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# CALIFORNIA REPORTER

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160 Cal.App.2d 364

**PEOPLE**

**v.**

**SCHIERS.**

**Cr. 6063.**

**Supreme Court of California.**

July 11, 1958.

Dissenting Opinion Aug. 7, 1958.

On petition for hearing.

Prior opinion, 324 P.2d 981.

PER CURIAM.

Hearing denied.

CARTER, TRAYNOR and SCHAUER,  
JJ., dissenting.

CARTER, Justice.

I dissent from the order denying a hearing in this case.

Rule on appeal 29(a) declares: "A hearing in the Supreme Court after decision by a District Court of Appeal *will* be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law \* \*." (Emphasis added.) A hearing of the case should have been granted for both reasons because the prosecution introduced evidence of a lie detector test before the jury.

Officer Belle was the last witness in the prosecution's case in chief. He was asked: "Did you at any time ask him [defendant] about the benzedrine showing up blood on his skin?" Belle related an interview with defendant. During this he said: "On the night of February 12th, we had taken him to the Police Administration Building and

gave him a lie detector test and told him that the test indicated that he was lying and asked him if he could explain that, and he said, 'No, there was something wrong with the machine.'

"When we first asked him to take the test, he was agreeable to take it. So Lieutenant [sic] Putty explained the test to him and asked him to pick out a card with a number on it, and when he was asked what the number was, he was to lie about it and the machine indicated he was lying.

"*So Mr. Schiers felt that the test was a fair one* and agreed to take it. We told him that the test indicated that he was lying, and he said that he couldn't understand it, even though *he believed it was accurate* when they showed him the experiment. He couldn't understand why it indicated that he was lying when they asked the questions about the murder of his wife." (Emphasis added.)

The trial judge ordered the noon recess at this point. Upon resumption of the trial the judge admonished the jury "not to consider or even recall" Belle's testimony regarding the lie detector. The District Court of Appeal held that the admonition obliterated the error. An admonition may cure minor errors. But to hold that an egregious and shocking attack upon the integrity of an accused is blotted out of a juror's mind by a mere incantation is as fictional as John Doe. *People v. Lyons*, 47 Cal.2d 311, 303 P.2d 329; *People v. Aragon*, 154 Cal.App.2d 646, 316 P.2d 370; *People v. Wochnick*, 98 Cal.App.2d 124, 219 P.2d 70. This error surpasses that in *Lyons*.

This "error" was deliberately committed at the end of the prosecution's case. Behind it were the prestige of science, the glamour of a modern scientific testing device, with the immense publicity given the "lie detector" in mass communication media. See, *People v. Aragon*, supra, 154 Cal. App.2d at page 658, 316 P.2d at page 378. No expert testified to the accuracy of the instrument, nor was the jury permitted to draw its own inferences from the questions asked during the test and the reactions of the instrument. The interpreter of the test may have been anybody, although this requires extensive training.<sup>1</sup> In fact, Belle did not testify to the *test results*; he merely testified that defendant was told it was unfavorable to him, leaving an obvious inference to the jury. A poll of jurors who sat in a case in which lie detector evidence was received (*People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348) shows they were greatly influenced by the evidence.<sup>2</sup> I, therefore, conclude that the admonition was impotent before such powerful testimony. *People v. Aragon*, supra, 154 Cal.App.2d 646, 316 P.2d 370; *People v. Wochnick*, supra, 98 Cal. App.2d 124, 219 P.2d 70.

One would be credulous indeed to believe the prosecutor was surprised by Belle's revelation (see, *People v. Aragon*, supra, 154 Cal.App.2d 659, 316 P.2d 379). Both knew that such evidence is inadmissible. The theory of separation of powers enjoins the judiciary to restrain the excesses of the executive (Montesquieu, *Spirit of Laws*, Book 5, ch. 10; Book 6, ch. 6; *The Federalist* No. 48; see, Griswold, *The Fifth Amendment Today*, p. 76, which indicates these fears are justified. Contra: Vyshinsky, *The Law of the Soviet State*, p. 498: "The bonds joining court and prosecutor's office are of the closest possible character and they act united by an indissoluble and

organic bond."). By this decision the California judiciary invites repetition of such open debauchery of basic fairness to the discredit of bench and bar. In my opinion it amounts to a denial of due process of law.

This case breaks the uniformity of California decisions holding that an admonition to ignore the prosecution's evidence of lie detector tests is powerless. *People v. Aragon*, supra; *People v. Wochnick*, supra. The facts in the Wochnick case are identical with the instant one. These cases appear irreconcilable. *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665, held that the results of lie detector tests are not judicially recognized as accurate and therefore are not probative. After reversal, Carter was retried and acquitted. *People v. Porter*, 136 Cal.App.2d 461, 288 P.2d 561, affirmed the refusal of the trial court to permit defendant to take a lie detector test because such evidence had been held inadmissible in California criminal prosecutions. *People v. Houser*, 85 Cal.App.2d 686, 193 P.2d 937, affirmed a conviction based on such testimony because defendant stipulated to it in writing and expressly waived his privilege against self-incrimination. Twenty-one reported cases from other states have passed upon the admissibility of evidence of various "lie detector" devices to gauge the veracity of an accused. Not one appellate court has approved admission of such evidence. It was admitted as evidence on behalf of a defendant (*People v. Kenny*, supra, 167 Misc. 51, 3 N.Y.S.2d 348), and was admitted for the sole purpose of proving a confession voluntary in *Tyler v. United States*, 90 U.S.App.D.C. 2, 193 F.2d 24. In only five of the twenty-one cases was it offered by the prosecution. In the others it was offered by the defense. California now becomes the first jurisdiction to

1. Lack of training increases the incidence of error precipitously. McCormick, *Evidence* 373 (1954).

2. This is the only such poll found. Defendant was found innocent. To the question: "Was the 'lie detector' testi-

mony, in your opinion, *conclusive* proof of the innocence or guilt of Kenny?" six answered "yes," four "no." Two jurors did not respond to the poll. Forkosch, "The Lie Detector and the Courts," 16 N.Y.U.L.Q.Rev. 202, 228-229 (1938-1939).

affirm a successful prosecution employing lie detector evidence.

Since the error was prejudicial because of its impact on the jury, the judgment of conviction should be reversed even though other evidence clearly established defendant's guilt. The testimony in issue violated defendant's privilege against self-incrimination (Cal.Const. art. I, § 13) and his right to a fair trial (U.S.Const. Fourteenth Amendment; Cal.Const. art. I, § 13). When constitutional liberties are impaired, article VI, section 4½, is powerless to cure the error. *People v. Sarazzawski*, 27 Cal. 2d 7, 161 P.2d 934, citing opinion of Sloss, J., in *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042.

The privilege against self-incrimination extends to informal proceedings. *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18; *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568. Whether forcing a suspect to submit to a lie detector test violates this privilege has not received judicial scrutiny. In *People v. Trujillo*, 32 Cal.2d 105, 194 P.2d 681, this court held that only *testimonial* evidence was privileged, relying upon Wigmore, Evidence, section 2263, for this interpretation. Is evidence of a lie detector test *testimonial*? In *Trujillo*, the court said *testimonial* means evidence from one's own lips (32 Cal.2d at page 112, 194 P.2d at page 685). Wigmore, however, contended the privilege existed only in formal proceedings where this form of expression is alone practical. In an out of court situation, other forms of communication must be included, for example, written rec-

ords. *United States v. Wheeler*, D.C., 149 F.Supp. 445. Holmes used the term *communication*, which is broader. *Holt v. United States*, 218 U.S. 245, 252-253, 31 S.Ct. 2, 54 L.Ed. 1021. Wigmore defined testimonial evidence as " \* \* \* the assertions of human beings regarded as the basis of inference to the propositions asserted by them. \* \* \*" All other evidence is circumstantial. Wigmore, *The Science of Judicial Proof* (3d ed. 1937), p. 12. This would seem to mean that a fact observable to anyone, such as a person's footprint, his appearance, his handwriting, or his blood type, is circumstantial. But if one must rely on another's assertions to establish a fact it is testimonial. For example, did X shoot Y outside the interrogator's presence? The memory and perception of X are relied upon for a response. This is true when a lie detector is used, although it is not necessary for the accused to make a verbal reply to a question to produce a reaction in the machine. Inbau, *Self-Incrimination* (1st ed.), pp. 67-68. In essence, although the device records only objective physiological data, the ultimate source of that data is the nervous system of the accused.<sup>3</sup> This was the rationale of the holding in *People v. Harper*, 115 Cal. App.2d 776, 779, 252 P.2d 950. The machine is a new and artificial method of communicating thought.

But the true question is: *Should* this evidence be within the scope of the privilege? Certainly it must be excluded until it is generally regarded as accurate. It is not now so regarded. *People v. Davis*, 343

3. Accord: Wigmore, "Professor Muensterberg and the Psychology of Testimony," 3 Ill.L.Rev. 399, 420; Sell, "Deception Detection and the Law," 11 U. Pitt.L.Rev. 210, citing for same point 28 Ill.B.J. 308. Cases in accord: *Henderson v. State*, 94 Okl.Cr. 45, 230 P.2d 495, 502, 23 A.L.R.2d 1292; *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593, 597. Some writers disagree: McCormick, "Deception Tests and the Law of Evidence," 15 Cal.L.Rev. 484, 520. He analogizes a polygraph, which measures physiological factors, to footprints and other objective evidence. But truth

serum tests are inadmissible since the accused's very words are to be used against him. Inbau, "Scientific Evidence in Criminal Cases," 24 J.Crim.L. & Cr., 1140, 1151. But he says diagnoses must be accepted with utmost caution and reservation. "The Lie Detector," 26 B.U.L.Rev. 264. He says the courts are justified in excluding such evidence, op. cit. 271. He agrees with McCormick on truth serum tests. Inbau doubts that the courts will accept the analogy to "physical" evidence and rule lie detector tests are not privileged. *Self-Incrimination*, p. 67.



Mich. 348, 72 N.W.2d 269, 281; *Henderson v. State*, 94 Okl.Cr. 45, 230 P.2d 495, 501; Sell, "Deception Detection and the Law," 11 U.Pitt.L.Rev. 210; 39 Cal.L.Rev. 439, 440 (citing Kiracofe, JAG J. 56 (June, 1948)). Contra: Inbau, "The Lie Detector," 26 B.U.L.Rev. 264. But assuming it is 100% accurate evidence of these tests should be held within the privilege because its use violates the policy foundations of the privilege. Inbau, *Self-Incrimination*, pp. 67-68; Green, "Can Science Legally Get the Confession," 21 A.B.A.J. 808; Silving, "Testing of the Unconscious," 69 Harv.L.Rev. 683; 37 Harv.L.Rev. 1138. These are expounded in Wigmore, *Evidence*, §§ 2250-51; Griswold, *The Fifth Amendment Today*; and Chafee, *The Blessings of Liberty*, pp. 184-209. Briefly they include these policies:

1. To stimulate law enforcement agencies to discover independent evidence to uncover offenders rather than resort to the inquisitorial examination of many persons.

2. To keep individuals free from police investigation and meddling unless there is probable cause to believe one has broken the law. See *Butler, J., Sinclair v. United States*, 279 U.S. 263, 292, 49 S.Ct. 268, 73 L.Ed. 692.

3. To preclude inquisitions into a person's private life by local "tyrants" for the purpose of "ensnarement." See, also, Despres, "Legal Aspects of Drug-Induced Statements," 14 U.Chi.L.Rev. 600, 607.<sup>4</sup>

4. Dependence upon confession at trials.

5. Assuming the detector becomes 100% accurate and its results are admissible, the jury will become vestigial and the defendant will no longer be a "party" since he cannot make a realistic defense. The real case will be decided not in open court but in the laboratory. See: Silving, "Testing the Unconscious," 69 Harv.L.Rev. 683, 701;

Kaganiec, "Lie-Detector Tests and 'Freedom of the Will' in Germany," 51 Nw. U.L. Rev. 446.

The lie detector is offensive to the traditions of our law. Germany's highest court reversed a conviction obtained with the aid of lie detector evidence. It held that it violated the principal of the Constitution that "Man's dignity is inviolate." Reported by Silving, *op. cit.* supra, 688. The historical antecedent of this Constitution is remarkably like that which produced the privilege in our own tradition. On April 10, 1958, Pope Pius XII condemned the use of narcoanalysis and lie detectors by police to extract confessions from suspects as illicit. Address to 13th International Congress of Applied Psychology reported by Professor G. Zilboorg, M.D., in *America*, June 7, 1958, p. 308.

Although Schiers consented to the test in the instant case, he cannot be held to have waived his immunity. Belle testified that the police convinced Schiers of the machine's accuracy. Assuming he was guilty, he did waive the privilege. Assuming he is innocent, he did not. It was observed that the machines are not fully accurate, particularly without expert operation. McCormick, *Evidence*, p. 373. An innocent man, convinced of the device's accuracy, would anticipate a favorable result, not an involuntary admission of guilt. He cannot be held to have waived his privilege against an untruth. Incriminating evidence obtained by deceit is within the privilege (*United States v. Wheeler*, D.C., 149 F. Supp. 445; *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553). Of course, no one but Schiers knows if he killed his wife.

The "confession" via the lie detector was so unfairly obtained and presented as to taint the entire proceeding within the test prescribed in *Rochin v. People of California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

4. Inbau, "Scientific Evidence in Criminal Cases," 24 J.Crim.L. & Cr., 1140, reports certain banks give periodic lie detector tests to employees and a background detector test for prospective employees (1144). He also reports a successful in-

quisition in a dormitory theft case (1146). See, also, *McCain v. Sheridan*, 160 Cal. App.2d 174, 324 P.2d 923. Loyalty tests and general "criminal examinations" are conceivable in the near future. For a critique, see Orwell, 1984.

Although it was not the usual confession expressed vocally or in writing, it was tantamount to one. Belle in effect told the jury that Schiers' perception and memory caused a physical reaction recorded by the lie detector, and that it indicated Schiers' verbal denial of guilt was a lie. If the jury believed the instrument to be accurate as Belle tacitly implied it was, they must have interpreted it as an acknowledgment of guilt.<sup>5</sup> It made precisely the same impression on the jury as a confession. Defendant, without counsel, was convinced that the detector was an accurate device. There is no evidence that an expert administered the test. There is no statement that the machine indicated Schiers was lying, although Belle's chronicle conveyed to the jury this impression. Belle only said Schiers *was told* the machine showed he was lying. This is often done to "break down" a suspect to confession. The impact on the jury was that the questions asked during the test, the verbal replies, and the infallible lie detector bared Schiers' consciousness and revealed guilt. An innocent defendant relying on the device would expect it to exculpate him, not condemn him. If Belle was deceitful, the officers did not tell Schiers the true results,<sup>6</sup> or the test was inconclusive, as about 20% of them are. See, Inbau, "The Lie Detector," 26 B.U.L.Rev. 264, 268. "Voluntary" confessions obtained after such tests are admissible. *State v. DeHart*, 242 Wis. 562, 8 N.W.2d 360; *Webb v. State*, Tex.Cr.App., 291 S.W.2d 331; *Henson v. State*, 159 Tex. Cr.R. 647, 266 S.W.2d 864; *Commonwealth v. Hipple*, 333 Pa. 33, 3 A.2d 353; *Tyler v. U. S.*, 90 U.S.App.D.C. 2, 193 F.2d 24. *Contra*: *People v. Sims*, 395 Ill. 69, 69 N.E.2d 336. However, Schiers has always maintained his innocence. Evidence obtained by misrepresentation is constitutionally excludable (*United States v. Wheeler*, supra, 149 F.Supp. 445. The sum total of fairness

and trustworthiness in this sort of evidence, when impressed upon a jury, is on a par with the old shell game.

Further, no expert appeared to testify to the precautions taken to insure the accuracy of the test or to interpret the machine's reactions. The jury did not hear the questions asked Schiers, his answers, or the degree to which the test was conclusive or what inferences could be drawn from the test. The jury was only told that the lie detector found Schiers guilty. Defense counsel, properly fearing the effect on the jury of the reiteration of this evidence, did not cross-examine on this point.

For these reasons a hearing should have been granted and the judgment of the trial court reversed.

SCHAUER, J., concurs.



50 Cal.2d 693

Louise M. JOHNSON and Carl Johnson,  
Petitioners,

v.

SUPERIOR COURT OF The State of CALIFORNIA, IN AND FOR the COUNTY OF LOS ANGELES et al., Respondents; Harold R. Sherwood, Real Party in Interest.

L. A. 24942.

Supreme Court of California,  
In Bank.

Aug. 19, 1958.

Mandamus proceeding brought to compel assignment of malpractice action to different judge. The Supreme Court, Gibson, C. J., held that where co-plaintiffs or co-

dence of the tests. "The Progress of the Law, 1919-21," 35 Harv.L.Rev. 302, 309.

6. The instrument is not in the examinee's view during the test.

5. Chafee says the lie detector is so complex and the testing and interpretational methods so specialized, that a jury may have to undergo an I.Q. test before it is permitted to draw inferences from evi-



defendants have substantially adverse interests, there may be more than two "sides" in case, and that statute providing for disqualification of judge but permitting only one motion for each "side" does not necessarily confine several parties joined as plaintiffs or defendants to one motion regardless of how conflicting their interests may be; and held that, so construed, statute does not arbitrarily discriminate against multiple parties.

Order accordingly.

McComb, J., dissented.

#### 1. Constitutional Law ⇨48

There is a presumption in favor of constitutionality and invalidity of legislative act must be clear before it can be declared unconstitutional.

#### 2. Judges ⇨49(1)

Legislature may adopt reasonable rules and regulations regarding disqualification of judges, and prejudice upon part of judge may properly be made ground for disqualification. West's Ann.Code Civ. Proc. § 170.6.

#### 3. Constitutional Law ⇨61

##### Judges ⇨40

In statute permitting challenge of judge for prejudice, declaration that prejudice against party or his attorney was basis of disqualification constituted sufficient legislative designation of standard to be applied, and it was unnecessary for Legislature to attempt to list the many conceivable factors which might cause a judge to be prejudiced. West's Ann.Code Civ. Proc. §§ 170, subd. 5, 170.6.

#### 4. Judges ⇨40

It is important not only that integrity and fairness of judiciary be maintained but also that business of courts be conducted in such manner as will avoid suspicion of unfairness; and it was reasonable for Legislature to provide for disqualification upon sworn statement, without necessity for establishing prejudice of judge as a fact to satisfaction of judicial body. West's Ann. Code Civ.Proc. § 170.6.

#### 5. Constitutional Law ⇨48, 70(1)

Wide discretion is vested in Legislature as to making of classification, and every presumption is in favor of validity; and decision of the Legislature as to what constitutes a sufficient distinction to warrant classification will not be overthrown by courts unless it is palpably arbitrary and beyond rational doubt erroneous.

#### 6. Constitutional Law ⇨208(16)

##### Judges ⇨40

Statute providing for disqualification of judges did not violate constitutional provisions against unreasonable classification, even though it applied only to civil actions or special proceedings and was not applicable to criminal cases. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 11, 21; art. 4, § 25.

#### 7. Judges ⇨40, 51(1)

Where coplaintiffs or codefendants have substantially adverse interests, there may be more than two "sides" in case, and statute providing for disqualification of judge but permitting only one motion for each "side" does not necessarily confine several parties joined as plaintiffs or defendants to one motion regardless of how conflicting their interests may be; and, so construed, statute does not arbitrarily discriminate against multiple parties. West's Ann.Code Civ.Proc. § 170.6.

See publication Words and Phrases, for other judicial constructions and definitions of "Sides".

---

Lowerre & Hollingsworth, George H. Lowerre, III, El Segundo, and Ben C. Duniway, San Francisco, for petitioners.

Garrett H. Elmore, San Francisco, as amicus curiae on behalf of petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondents.

DeForrest Home and Henry E. Kappler, Los Angeles, for real party in interest.

GIBSON, Chief Justice.

The sole question to be decided in this proceeding is the constitutionality of section 170.6 of the Code of Civil Procedure, which is set forth in full as an appendix to this opinion. This section, enacted in 1957, provides in substance that no judge of a superior, municipal or justice court shall try any civil action or special proceeding when it is established, in the manner set forth in the section, that he is prejudiced against a party or attorney appearing in the action. It further provides that prejudice may be established by an affidavit that the judge is prejudiced against the party or attorney so that the party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge. A party or attorney is not permitted to make more than one such challenge in any one action or special proceeding.

Petitioners are plaintiffs in a malpractice action pending in the Superior Court of Los Angeles County. Upon assignment of the case to Judge A. A. Scott for trial, petitioners moved to disqualify him and filed an affidavit of prejudice pursuant to section 170.6. The motion was heard and denied by Presiding Judge Roy L. Herndon. In this proceeding petitioners seek a writ of mandate to compel the assignment of the case to some judge other than Judge Scott.

In attacking the statute respondents argue that, because it does not require the litigant or his attorney to set forth the reasons or grounds which constitute the basis for the statement in the affidavit that the judge is prejudiced and because there is no provision for a judicial determination of whether the judge is in fact prejudiced, the statute makes an unconstitutional delegation of legislative and judicial powers to litigants and their attorneys and is an unwarranted interference with the powers of the courts.

[1] There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. *Lundberg v. County of Alameda*, 46 Cal.2d 644, 652, 298 P.2d 1. Section 170.6 was passed by an overwhelming vote of both houses of the Legislature and approved by the Governor in 1957. The enactment of the statute represented the culmination of many years' effort by the organized bar of this state to obtain legislation which would permit the challenge of a judge for prejudice without an adjudication of disqualification. A statute enacted in 1937, which, as we shall see, differed materially from section 170.6, was held unconstitutional in *Austin v. Lambert*, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849. Thereafter four measures similar to section 170.6, except that two of them were applicable to criminal as well as civil cases, were passed by the Legislature but failed to receive executive approval.<sup>1</sup> The history of the section thus shows that the State Bar and the Legislature have long felt that there is a need for such a measure.

[2,3] The Legislature may adopt reasonable rules and regulations regarding the disqualification of judges (*Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 386, 390, 139 P.2d 930), and it is obvious that prejudice upon the part of a judge may properly be made a ground for disqualification. The declaration in section 170.6 that prejudice against a party or his attorney is the basis of the disqualification constitutes a sufficient legislative designation of the standard to be applied, and, contrary to respondents' contention, it is wholly unnecessary for the Legislature to attempt to list the many conceivable factors which might cause a judge to be prejudiced. It should be noted in this connection that since 1897, section 170 of the Code of Civil Procedure has contained a general

1. The measures referred to were passed in 1941 (A.B. 442 [pocket vetoed by Governor Olson]), in 1951 (A.B. 479 [vetoed by Governor Warren and veto sustained]), in 1953 (S.B. 392 [pocket

vetoed by Governor Warren]), and in 1955 (S.B. 89 [pocket vetoed by Governor Knight]). The second and third of these were applicable to both civil and criminal cases.

provision for disqualification when it appears that a party cannot have a fair trial by reason of the "prejudice" or "bias" of the judge. Code Civ.Proc. § 170, subd. 4, as added in 1897, now contained in § 170, subd. 5; see *People v. Compton*, 123 Cal. 403, 412-413, 56 P. 44.

[4] The Legislature, in our opinion, also acted within its power to adopt reasonable regulations when it provided that, for the limited purposes of section 170.6, prejudice may be established by the filing of an affidavit sworn to by a party or his attorney, without judicial determination of the existence of the fact. It is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion of unfairness. See *Berger v. United States*, 255 U.S. 22, 35-36, 41 S.Ct. 230, 65 L.Ed. 481; *Haslam v. Morrison*, Utah, 190 P.2d 520, 523. Prejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced. In order to insure confidence in the judiciary and avoid the suspicion which might arise from the belief of a litigant that the judge is biased in a case where it may be difficult or impossible for the litigant to persuade a court that his belief is justified, the Legislature could reasonably conclude that a party should have an opportunity to obtain the disqualification of a judge for prejudice, upon a sworn statement, without being required to establish it as a fact to the satisfaction of a judicial body. Cf. *People v. Compton*, 123 Cal. 403, 413, 56 P. 44.

The possibility that the section may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute. Moreover, section 170.6 contains safeguards designed to minimize such abuses. It permits only one challenge to each side, requires that the party or his attorney show good faith by declaring under oath

that the judge is prejudiced, and provides for timely making of the challenge before trial, for strictly limited granting of continuances, and for reassignment as promptly as possible. We cannot properly assume that there will be a wholesale making of false statements under oath, and the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional.

Statutes similar to section 170.6 have been sustained in every state where they were considered by the courts, with the exception of Oklahoma. See *State ex rel. Anaconda Copper Min. Co. v. Clancy*, 30 Mont. 529, 77 P. 312, 315 et seq.; *State ex rel. Beach v. Fifth Judicial District Court*, 53 Nev. 444, 5 P.2d 535, 537 et seq.; *State ex rel. Clover Valley Lumber Co. v. Sixth Judicial District Court*, 58 Nev. 456, 83 P.2d 1031, 1034; *State ex rel. Hannah v. Armijo*, 38 N.M. 73, 28 P.2d 511, 512 et seq.; *Moruzzi v. Federal Life & Cas. Co.*, 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407; *U'Ren v. Bagley*, 118 Or. 77, 245 P. 1074, 1075 et seq., 46 A.L.R. 1173; *State ex rel. Bushman v. Vandenberg*, 203 Or. 326, 280 P.2d 344, 346 et seq.; *Murray v. Thomas*, 80 Ariz. 378, 298 P.2d 795, 797; *Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721, 724; *Howell v. State*, 77 Fla. 119, 81 So. 287, 288 et seq.; *State v. Hoist*, 11 Minn. 325, 126 N.W. 1090, 1091; *State v. Thompson*, 43 S.D. 425, 180 N.W. 73, 74; *State ex rel. Nissen v. Superior Court*, 122 Wash. 407, 210 P. 674, 675; *State ex rel. Dunham v. Superior Court*, 106 Wash. 507, 180 P. 481, 482; *Murdica v. State*, 22 Wyo. 196, 137 P. 574, 575-576.

The Oklahoma case of *Diehl v. Crump*, 72 Okl. 108, 5 A.L.R. 1272, 179 P. 4, 6, contains a statement, apparently as an alternative ground for invalidating the statute there involved, that it has been held that a law providing for the disqualification of a judge upon the mere filing of an affidavit of prejudice, without a hearing, is unconstitutional as depriving the court of judicial power. The only case cited in support of the statement, however, is *Ex parte N.*



K. Fairbank Co., D.C.Ala., 194 F. 978, and the Fairbank case was impliedly overruled, without discussion of the question of constitutionality, in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481. See discussion of the *Berger* and *Fairbank* cases in *Austin v. Lambert*, 11 Cal.2d 73, 77-78, 77 P.2d 849, 115 A.L.R. 849.

Our conclusion that section 170.6 is not subject to the objections discussed above does not conflict with *Austin v. Lambert*, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849, which, as we have seen held unconstitutional a disqualification statute enacted in 1937. That statute differed materially from section 170.6 in that it provided for a "peremptory challenge" of the judge assigned to hear the case without requiring the person making the challenge to state the ground for his objection or to make a declaration under oath that the ground in fact existed. It was condemned because it placed in the hands of a litigant the power to dislodge "without reason or for an undisclosed reason" an admittedly qualified judge, the opinion stating that this was an unwarranted and unlawful interference with the constitutional and orderly processes of the courts. 11 Cal.2d at page 79, 77 P.2d at page 853. The opinion distinguished statutes from other jurisdictions which contained an affidavit procedure similar to that prescribed by section 170.6; pointing out that they specified prejudice as a ground for disqualification and required a showing in the form of a statement under oath. 11 Cal.2d at pages 76-78, 77 P.2d at pages 851-852.

The prior case of *Daigh v. Shaffer*, 23 Cal.App.2d 449, 73 P.2d 927, in which no hearing by the Supreme Court was sought, also held the 1937 statute unconstitutional, using some of the reasoning later employed in *Austin v. Lambert*, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849, and recognizing that statutes like section 170.6 are distinguish-

able. While the opinion contained additional language which was not used in the *Austin* case, the matters referred to in these statements presented questions of policy for the Legislature and should not have been considered in determining the validity of the statute.

[5, 6] It is urged that section 170.6, because it applies only to a "civil" action or special proceeding, discriminates against parties in criminal cases in violation of federal and state constitutional provisions prohibiting unreasonable classifications. U.S.Const., Fourteenth Amendment; Cal. Const. art. I, §§ 11, 21; art. IV, § 25. The rights of parties in civil and criminal trials are, of course, different in many respects, and it should be noted in this connection that an affidavit procedure to establish prejudice has previously been made available in civil actions on more favorable terms than in criminal cases. *Lowrey v. Hogue*, 85 Cal. 600, 24 P. 995; *Miles v. Justice's Court of Pasadena*, 13 Cal.App. 454, 110 P. 349.<sup>2</sup> Wide discretion is vested in the Legislature as to the making of a classification, and every presumption is in favor of validity; the decision of the Legislature as to what constitutes a sufficient distinction to warrant the classification "will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous." *State of California, etc. v. Ind. Acc. Comm.*, 48 Cal.2d 365, 371, 310 P.2d 7, 11; *Dribin v. Superior Court*, 37 Cal.2d 345, 351, 231 P.2d 809, 24 A.L.R.2d 864. In enacting section 170.6, the Legislature could have concluded that, in criminal cases, there would be a greater possibility that the right conferred by the statute would be abused, and it cannot be said that this distinction was insufficient to justify withholding the right as to such cases.

[7] Another claim of discrimination is based upon that portion of section 170.6 which relates to multiple parties. The sec-

2. The statute involved in the cited decisions applied to criminal cases in justice courts and set forth an affidavit procedure for a change of venue on the

ground that a fair and impartial trial could not be had due to the prejudice of the justice or of the citizens of the township.

tion, after providing that no party or attorney may make more than one motion thereunder in any one action, declares, "\* \* \* where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding." We do not understand the quoted provision to mean that, where several parties are joined, they are necessarily confined to one motion regardless of how conflicting their interests may be. One motion for "each side" is permitted, and, where co-plaintiffs or co-defendants have substantially adverse interests, it is proper to conclude that there are more than two sides in the case. Such might be the situation, for example, where two drivers whose automobiles collide and injure the plaintiff are joined as defendants.

It is argued that, while a party who is the sole plaintiff or defendant may always disqualify one judge by complying with the statute, a party who is one of several plaintiffs or defendants is placed in a less favorable position. However, this is true only to a limited extent. Initially, a party who is joined with others cannot be in a worse position than a single party, since he has an equal opportunity to disqualify the judge assigned to hear the case. Such a party cannot possibly be placed at a disadvantage unless one of his co-parties has already disqualified a judge in the same action, and then only if his interests are substantially the same as the interests of the one who exercised the challenge. The Legislature could reasonably determine that this limited restriction was justified in order to prevent the undue delays which could otherwise occur, and we hold that section 170.6 does not arbitrarily discriminate against multiple parties.

Let a writ of mandate issue directing respondents to assign the case for trial to a judge other than Judge A. A. Scott.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, J., dissents.

#### Appendix

Section 170.6 of the Code of Civil Procedure provides:

"(1) No judge of any superior, municipal or justice court of the State of California shall try any civil action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge is prejudiced against any party or attorney or the interests of any party or attorney appearing in such action or proceeding.

"(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit that the judge before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge. Where the judge assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. In no event shall any judge entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing



(other than the trial of a cause), the motion must be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be.

"(3) If such motion is duly presented and such affidavit is duly filed, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge of the court in which the trial or matter is pending or, if there is no other judge of the court in which the trial or matter is pending, the chairman of the judicial council shall assign some other judge to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one

such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

"(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

"(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State Of California }  
County Of } ss.

....., being first duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That ..... the judge before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot or believes that he cannot have a fair and impartial trial or hearing before such judge.

Subscribed and sworn to before me  
this ..... day of ....., 19 ....

(Clerk or Notary Public or other officer administering oath)

"(6) Nothing in this section shall affect or limit the provisions of Section 170 and Title 4, Part 2, of this code and this section shall be construed as cumulative thereto.

"(7) If any provision of this section or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can

be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable."



162 Cal.App.2d 751

**Joe Henry McPHERSON and Clois Joe  
Hawkins, Petitioners and  
Respondents,**

**v.**

**The REAL ESTATE COMMISSIONER of  
the State of California, Respondent  
and Appellant.**

**Civ. 18145.**

District Court of Appeal, First District,  
Division 2, California.

Aug. 13, 1958.

Mandate proceeding to compel real estate commissioner to set aside order suspending a real estate broker's and a real estate salesman's licenses. The Superior Court, County of Monterey, Stanley Lawson, J., rendered judgment for the petitioners, and respondent appealed. The District Court of Appeal, Dooling, J., held that where real estate broker and salesman procured binding contract for sale of property, to satisfaction of vendor, but thereafter purchaser, who nevertheless stood ready, willing and able to perform, stated he did not wish property and he did not care what broker and salesman did with it so long as he could recoup his downpayment, subsequent sale was made on behalf of purchaser and not on behalf of original vendor, and real estate broker and salesman were under no duty to account to original vendor for the proceeds of the second sale which exceeded the original purchase price.

Judgment affirmed.

# 1. Mandamus ☞173

In mandate proceeding to compel real estate commissioner to set aside order suspending a real estate broker's and a real estate salesman's licenses, under statute, trial was to be de novo and trial court was entitled to exercise its independent judgment on the evidence. West's Ann.Code Civ.Proc. § 1094.5(c).

## 2. Mandamus ☞168(4)

In mandate proceeding to compel real estate commissioner to set aside order suspending a broker's and a salesman's licenses, suspended because, after they procured a contract for purchase of such property, purchaser stated that he did not want it and they then sold it to another, for a higher price, paying vendor what he was entitled under the original contract, evidence sustained trial court's finding that commissioner's finding that original purchaser had been unable to complete the purchase of the property was untrue but that he was ready, willing, and able to perform if required to do so.

## 3. Brokers ☞9, 37

Where real estate broker and salesman procured binding contract for sale of property, to satisfaction of vendor, but thereafter purchaser, who nevertheless stood ready, willing and able to perform, stated he did not wish property and he did not care what broker and salesman did with it so long as he could recoup his down payment, subsequent sale was made on behalf of purchaser and not on behalf of original vendor, and real estate broker and salesman were under no duty to account to original vendor for the proceeds of the second sale which exceeded the original purchase price.

## 4. Brokers ☞9, 19

Real estate salesman owes client highest degree of good faith, but once he has secured a binding and enforceable contract with purchaser, his services to his client have been performed.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., San Francisco, for appellant.

J. T. Harrington, Salinas, for respondents.

DOOLING, Justice.

[1] This is an appeal by the Real Estate Commissioner from a judgment in mandate compelling him to set aside his orders suspending the broker's license of respondent McPherson for 30 days and the salesman's license of respondent Hawkins for 90 days. Since the Real Estate Commissioner is a State officer exercising statutory powers his determination in a disciplinary proceeding is subject to a trial *de novo* before the superior court, in which the court is entitled to exercise its independent judgment on the evidence. Code Civ.Proc. § 1094.5 (c); *Moran v. State Board of Medical Examiners*, 32 Cal.2d 301, 308, 196 P.2d 20. The trial court found that in the real estate transactions in question respondents were guilty of no conduct justifying the disciplinary action taken against them and the only question presented before us is whether there is sufficient evidence in the record to support the trial court's findings.

Respondent Hawkins was a licensed real estate salesman working for respondent McPherson, a licensed real estate broker. Acting for one Brewer, respondent Hawkins procured from Gee a written contract to purchase real property owned by Brewer for \$17,700. Gee made a deposit of \$300. Gee's contract of purchase was made conditional upon his selling a home that Gee owned in Los Altos. Hawkins testified that before the sale had been consummated Gee telephoned to Hawkins' wife and told her that he didn't like the house and wanted to get rid of it. He wanted to get his money back out of it. Hawkins talked to Gee the next day and told Gee that he would try to resell the property for him but that he would have to make a commission. Gee replied: "I don't care what you do as long as I get my \$300 back." Hawkins then told Brewer that he was going to

try to sell the property again for Gee. Brewer told Hawkins that he didn't care, he had a deal with Gee and didn't care what they did with the property. Hawkins procured purchasers from Gee who paid \$18,500. The transaction was handled through a title company with a deed delivered by Brewer to Gee and a deed from Gee to the second purchasers. Gee put no further money into the transaction and received back his \$300 deposit. Brewer received the amount to which he was entitled under his contract with Gee and Hawkins and McPherson received their commission on the sale from Brewer to Gee and the net difference in the two selling prices, less taxes and other expenses. Brewer testified that Hawkins had told him that he was reselling the property again. "I told him I didn't care how many times he sold it, as far as I was concerned I had sold it to Mr. Gee." Brewer further testified that he was not interested in the resale price or what commission was received on the second sale, that he had no complaint against anyone and was well satisfied.

[2] The critical finding of the Real Estate Commissioner reads: "By reason of their failure to inform said seller [Brewer] that the purchaser, Fred B. Gee, was unable to complete the purchase of said property, and by reason of their failure to inform said seller \* \* \* that they had received another offer in the amount of \$18,500, respondents, and each of them, fraudulently and unlawfully obtained, in addition to their commission of \$885.00 paid to them by said seller, a secret and undisclosed profit of \$639.98, to the loss and detriment of said seller."

The trial court found that this finding of the Commissioner and the supporting findings on which it was based are not true.

There is ample evidence to support the trial court's findings in these particulars. Hawkins testified that Gee never told him that he would not go through with the purchase and that Gee stated that if Hawkins did not succeed in reselling



the property for him he would go ahead and buy it. There is the further testimony that Hawkins told Brewer that Gee wanted him to resell the property and that Brewer replied that he did not care. Brewer told Hawkins that he was satisfied to have this done at the time and he testified at the hearing that he was still satisfied.

[3] If, as the trial court found, it was not true that Gee was unable to complete the purchase the first finding of fraudulent conduct above quoted falls. The second finding of the Commissioner is necessarily dependent on the first one for the following reasons: Having negotiated a binding contract of sale to Gee for his client Brewer with which Brewer was satisfied and which he had accepted respondent Hawkins had completed the services to Brewer which he had undertaken to perform. So long as Gee was able to fulfill his contract Gee in turn was legally entitled to resell the property for his own account and to employ respondent Hawkins to make such a sale for him. This according to the findings of the trial court is what was in fact done.

[4] While a real estate salesman owes to his client the highest degree of good faith once he has secured a binding and enforceable contract with a purchaser his services to his client have been performed. No case has been cited to us holding that under such circumstances the broker breaches any duty to the first client by then undertaking in good faith to make a second sale of the same property for the purchaser.

While the evidence may have been sufficient to support the Commissioner's finding that Gee was unable to complete the purchase it equally supports the finding of the trial court that Gee was ready, able and willing to perform. The trial court was entitled to exercise its independent judgment on the effect and weight of the evidence since this was a trial *de novo*. Appellant cites Greif v. Dullea, 66 Cal. App.2d 986, 153 P.2d 581; Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649; and Marcucci v. Board of Equalization, 138 Cal.App.2d 605, 292 P.2d

264, to the effect that the trial court is not authorized to determine the truth or veracity of the witnesses. The first two cases dealt with local agencies and the third with a State board exercising constitutional power. Such agencies exercise judicial power which, under the decisions, is denied to a State-wide agency exercising only statutory power as here. The distinction is clearly pointed out with a citation of supporting cases in 3 Witkin, California Procedure, page 2489.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J.,  
concur.



162 Cal.App.2d 491

**Margery Lee WHITE, Plaintiff and  
Respondent,**

**v.**

**COX BROTHERS CONSTRUCTION  
COMPANY et al., Defendants,**

**County of Los Angeles, Defendant and  
Appellant.**

**Civ. 22935.**

**District Court of Appeal, Second District,  
Division 1, California.**

**Aug. 1, 1958.**

**Hearing Denied Sept. 24, 1958.**

Action for injuries sustained when automobile in which plaintiff was riding overturned on highway under construction. Judgment for plaintiff against the county in the Superior Court of Los Angeles County, Fletcher Bowron, J., and the county appealed. The District Court of Appeal, Fournier, J., held that case was properly submitted to the jury; that release of the construction company was not a release of the county; and that the instructions were proper.

Judgment affirmed.

Opinion, 325 P.2d 125, vacated.

**1. Automobiles** Ⓒ308(7)

In action for injuries sustained by passenger in automobile when the automobile struck a chuckhole and overturned, where highway was being reconstructed by construction company under a contract let by the county, whether the county inspector had notice of the condition at the place of accident and if he did have knowledge whether such knowledge was chargeable to the county was a question of fact. West's Ann.Gov.Code, § 53051; West's Ann.Vehicle Code, § 465.7.

**2. Automobiles** Ⓒ308(10)

In action for injuries sustained by passenger in automobile which struck a chuckhole in a road under construction by construction company under a contract let by the county, whether driver of plaintiff's automobile was negligent as a matter of law because of failure to see warning signs and whether such was the proximate cause of damages were questions of fact for the jury.

**3. Automobiles** Ⓒ309(1)

In action against county for injuries sustained by passenger when her automobile skidded and overturned after striking chuckhole in road being reconstructed by construction company under contract let by county, it was proper to instruct: (1) that jury was to consider a violation of all or any of statutory provisions in determining if driver was negligent and, if so, if his negligence was proximate cause of accident; (2) that jury was to consider whether, under all of the facts and circumstances of the case, the passenger's driver acted as a reasonable and prudent driver in doing what he did; and (3) that if he did not the jury would be justified in finding he was negligent. West's Ann.Vehicle Code, §§ 465(b), 465.7.

**4. Release** Ⓒ29(1)

In action by passenger in automobile which overturned after striking chuckhole in street under construction under contract between construction company and county, dismissal for consideration of the construction company did not constitute a release of

the county where there was no thought of abandoning the action against the county.

**5. Automobiles** Ⓒ309(4)

In action for injuries sustained by passenger in automobile which overturned after striking chuckhole in road under construction under a contract between construction company and county, where claimed negligence of the driver was before the jury, instructions as to principal and agent were proper under the circumstances. West's Ann.Gov.Code, § 53051.

**6. Negligence** Ⓒ6, 136(14)

Each violation of a statutory requirement must be considered in connection with the surrounding circumstances, and ordinarily the excuse relied upon by the violator presents a question of fact for the jury.

**7. Automobiles** Ⓒ308(10)

In action for injuries sustained by passenger in automobile which overturned due to a chuckhole in a road being constructed, whether violation by the driver of the Vehicle Code contributed to the accident and was excusable or justifiable was a question of fact. West's Ann.Vehicle Code, § 465.7.

**8. Appeal and Error** Ⓒ216(2)

In action for injuries, where court instructed as to the life expectancy of plaintiff but omitted the qualifying conditions about normal health, defendant was not entitled to complain where it did not request an explanatory instruction.

**9. Automobiles** Ⓒ309(1)

In action for injuries against a county when automobile in which plaintiff was riding overturned due to a chuckhole in a road under construction, instruction that it is presumed that the official duty has been regularly performed was properly omitted under the evidence. West's Ann.Code Civ. Proc. § 1963, subd. 15.

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Harold W. Kennedy, County Counsel,  
Los Angeles County, Lloyd S. Davis, Deputy  
County Counsel, Los Angeles, for ap-  
pellant.



G. Keith Sprague, of Chapman & Sprague, San Bernardino, for respondent.

FOURT, Justice.

This is an appeal from a judgment on the verdict of a jury in favor of the plaintiff for damages and injuries suffered in an accident allegedly resulting from a defective street.

On June 24, 1955, Harold Atenese was driving the plaintiff's automobile westerly on Imperial Highway near the intersection of Imperial Highway and Luitweiler Avenue in the unincorporated territory of the County of Los Angeles. The plaintiff was riding in her automobile at the time. Imperial Highway, where the accident occurred, was being reconstructed by a construction company under a contract let by the County of Los Angeles. The work consisted, in part, of the removal of the pavement from the surface of Imperial Highway, commencing about fifty feet east of Luitweiler Avenue. During the late afternoon of the day of the accident, when it was still daylight, the plaintiff's car was traveling westerly, and the front wheels thereof struck the first drop-off between the old pavement and the gravel surface where the pavement had been removed, and then struck a "chuck hole," and the car skidded and overturned. The drop-off was at the crest of a hill such that westbound drivers could not see the drop-off or the excavated roadway until they were almost upon it.

There was evidence that a water line under Imperial Highway, at the place of the accident, had been leaking for months, and that before the contractors had started excavating and repaving, there was a hole caused by the leaking water which extended from the edge of the asphalt into the paved portion of the roadway. The hole began two feet north of the asphalt and extended from one foot to one and one-half feet into the asphalt and was six to eighteen inches in depth and up to two to two and one-half feet wide. It was wet and stayed that way until June 27, 1955. After the paving was removed the hole remained but got larger. The county inspector saw the

"damp spot." There was also testimony that the condition was reported to the Los Angeles County Health Department and to "someone in a County Road Department car" long before the construction work started.

The excavated roadway consisted of "washboards" and loose gravel. The roadway was heavily traveled and the traffic tended to loosen the rock and create holes and ruts which required the contractor's smoothing and grading the surface every few days to prevent it from being hazardous. Two days before the accident the contractor's employees went out on strike and no work was being performed at the time of the accident. There was testimony of a long-existing six-inch hole three yards west of the drop-off. There was also evidence that during the twelve days prior to the accident, cars on the roadway struck something on the road so hard that "it \* \* \* jarred the house" and "occurred pretty near 24 hours a day," and of the hubcaps being forced off of the cars by reason of these impacts.

During the period of time between the commencement of the construction work and the accident there had been placed and maintained two advance warning signs and a barricade to warn drivers of the construction work. The first sign was of a type designated by the State Department of Public Works as a "W35R" wherein the word "Slow" is written in reflectorized letters on a yellow background, and was mounted on a post to the side of the highway about 300 feet from the termination of the pavement, and is in the category of the ordinary "warning signs" commonly placed on highways. The planning manual of instructions issued by the Department of Public Works, Division of Highways, states with reference to this particular type of sign, "This sign must be sparingly used to prevent ineffectiveness."

A second sign of a type designated as "P. R.," consisting of the words, "Construction Zone—Drive Carefully," in six inch high black letters on a yellow background about 84 inches by 60 inches, was

mounted between two posts about 100 feet from the termination of the pavement. The manual heretofore referred to, states in part with reference to this sign, "Use the P. R. sign in pairs to bracket the individual sections of a project where traffic is affected by construction work. Several pairs may be needed on one construction project \* \* \*," and are to be located "on the right 100 feet to 800 feet in advance of construction activities." This sign is in the category of "Construction Type Signs" and, as the manual indicates, "on major highways, particularly where speeds are high, larger signs may be required," and "[d]ue to unusual conditions encountered on construction projects, the position may be varied to obtain maximum effectiveness."

A third sign, apparently not of the type described or set forth in the "Uniform Sign Chart" of the Department of Public Works, had, most of the time prior to the accident, been located in the center of the highway about 50 feet from the end of the pavement. This sign consisted of the word "Slow" in block letters a foot high, mounted on a barricade and equipped with an orange flasher. On one occasion the sign was placed on the shoulder of the highway, but appellant states in its brief that, " \* \* \* at the time of the accident, this sign was apparently lying in the grass at the side of the road."

The job site was inspected regularly by a county inspector, and although the appellant states in its brief that the inspector " \* \* \* testified that all warning signs were in place on the morning of the day of the accident," we find that the following is the testimony of the inspector:

"Q. Did you see it there on the 23rd? A. I visited the project on the 23rd, Mr. Sprague, to examine the signs, and I do not recall that it had been moved.

\* \* \* \* \*

"Q. Do you have a recollection of visiting there and seeing the signs on the 24th, or would it help your recollection if you were allowed to read your deposition on

that subject? A. I have a record here of the time of day of my visit on the 24th at 10:15, and the purpose of my visit to Imperial and Luitweiler on June 24th was to examine the condition of the roadway, the signs, barricades, lights in place.

"Q. Is it your recollection that you saw the signs there, based upon the notation in your record? A. Well, as I say, I visited the project for that purpose. I have no record in here that anything was amiss.

"Q. Is the absence of any such record upon which you base your statement that the signs, and particularly the flasher light sign was in the center of Imperial Highway on the 24th of June? A. I think I would have noted anything amiss if I had noticed it."

Before the trial the plaintiff received \$3,500 from the co-defendants (among them the construction company), and gave them a covenant not to sue and filed a dismissal as to said defendants.

The trial resulted in a verdict in favor of the plaintiff in the sum of \$15,000, from which the \$3,500 above referred to was deducted. This appeal followed.

Appellant contends that there was no evidence to support a finding that there was notice to the Board of Supervisors, or other person employed by the county authorized to remedy the dangerous or defective condition; that the driver of the car was guilty of negligence as a matter of law, and his negligence was imputed to the plaintiff; that the dismissal as to the co-defendants of appellant constituted a release as to the appellant; that the jury was erroneously instructed, and that the court erred in refusing to give certain instructions.

[1] It is conceded that the Public Liability Act, section 53051 of the Government Code, is the sole basis for imposing liability in this case.

In our opinion it was a question of fact whether the county inspector had notice of the condition at the place of the accident and if he did have knowledge, such knowl-

edge is chargeable to the county. See, *Murphy v. County of Lake*, 106 Cal.App. 2d 61, 234 P.2d 712; *Balkwill v. City of Stockton*, 50 Cal.App.2d 661, 123 P.2d 596; *Newman v. County of San Mateo*, 121 Cal. App.2d 825, 264 P.2d 594; *Allen v. City of Los Angeles*, 43 Cal.App.2d 65, 110 P.2d 75; *Ackers v. City of Los Angeles*, 40 Cal. App.2d 50, 104 P.2d 399; *Bridges v. County of Los Angeles*, 131 Cal.App.2d 151, 280 P.2d 76.

While we are cognizant of the ruling in *Electrical Products Corp. v. County of Tulare*, 116 Cal.App.2d 147, 253 P.2d 111, we do not consider it to be determinative of the present controversy, in which a different factual situation is before the court.

Appellant insists that the legislature has placed the responsibility for establishing uniform types of warning signs in the State Department of Public Works, and cites section 465.7, Vehicle Code, which in part reads:

"The State Department of Public Works shall determine and publicize the specifications for uniform types of warning signs, lights and devices to be placed upon a highway by any person, firm or corporation engaged in performing work which interferes or endangers the safe movement of traffic upon such highway."

Further, appellant states that the State having occupied the field, so to speak, the county would not be authorized to vary the requirements. Section 465(b) of the Vehicle Code provides, in part, as follows: "Local authorities \* \* \* may place and maintain or cause to be placed and maintained, such appropriate signs, signals or other traffic control devices as \* \* \* may be necessary properly to \* \* \* warn or guide traffic."

It apparently is admitted in this case that the number three sign which was "lying in the grass at the side of the road," was not of the type specified by the State Department of Public Works.

[2] Appellant next asserts that the driver of the plaintiff's car was negligent as a matter of law. The basis of the as-

sertion is that the driver failed to obey the signs erected and therefore he did not exercise ordinary care. The County inspector testified, "I guess for the most part the traveling public observed the signs, slowed down to 40 to 50." The traffic was heavy over the particular road; it was a 55 mile per hour zone, and prior to seeing the third sign the driver was traveling at about 50 to 55 miles per hour. He decreased his speed to 40 to 45 miles per hour. Whether his failure to see the signs, if he did not see them, was negligence under the circumstances and whether such was the proximate cause of the damages, were issues of fact for the jury to determine. *Rath v. Bankston*, 101 Cal.App. 274, 281, 281 P. 1081; *Pittam v. City of Riverside*, 128 Cal.App. 57, 16 P.2d 768; *Owen v. City of Los Angeles*, 82 Cal.App. 2d 933, 187 P.2d 860.

[3] The court upon its own motion gave the following instruction:

"I have read to you certain provisions of the Vehicle Code of this State. You are instructed that you are to consider a violation of all or any of these statutory provisions in relation to the conduct of the driver of the automobile owned by the plaintiff and in which she was riding at the time of the accident in question in determining whether or not said driver was negligent and if such negligence, if you find he was negligent, was a proximate cause of the accident and resulting injuries suffered by plaintiff. These instructions are to be construed in the light of all other instructions in this case.

"Therefore you may consider whether the warning signals were so placed and of such size and nature that a reasonably prudent and observant driver would have seen them, or should have seen them in the exercise of due care at the particular place and time of the accident in question, and whether, taking into consideration all of the facts and circumstances the said driver was driving at a speed greater than was reasonable and prudent, and if you find that in the exercise of due care a



reasonably prudent and cautious driver would have looked and seen said warning signals and would have reduced the speed of the car he was driving and brought it under such control that the accident would have not happened, regardless of the condition in, on or about the roadway at the time, then you would be justified in finding the said driver was negligent. The determination of the weight or effect of the evidence is the exclusive province of the jury, and if you determine from all the facts and circumstances that the weight of evidence does not preponderate or have more convincing force to establish the affirmative defense of contributory negligence, then you would be justified in finding that the driver of plaintiff's car was not guilty of contributory negligence.

"But such finding last referred to, standing alone, would not support a verdict for plaintiff, unless you also find that the defendant County of Los Angeles is liable under the provisions of the Public Liability Act as covered in other instructions."

In effect, the court's instruction stated to the jury: (1) that the jury was to consider a violation of all or any of the statutory provisions in determining if the driver was negligent and, if so, if his negligence was a proximate cause of the accident; (2) that the jury was to consider whether, under all of the facts and circumstances of the case, the plaintiff's driver acted as a reasonable and prudent driver in doing what he did; and (3) that if he did not, the jury would be justified in finding he was negligent.

Appellant insists that the instruction was erroneous as given by the court, and that it should have given an instruction based upon B.A.J.I. 149.1. We believe that the instruction as given by the court was proper, and that the instruction requested by the appellant based on B.A.J.I. 149.1 would have been confusing to the jury in that it contains language in effect stating that "the evidence must support a finding that the violation resulted from causes or things

beyond the control of the person charged with the violation."

[4] We think that there is no merit to the claim of the appellant that the dismissal for a consideration of certain co-defendants constitutes a release of the appellant. See, *Kincheloe v. Retail Credit Co., Inc.*, 4 Cal.2d 21, 46 P.2d 971; *Holtz v. United Plumbing & Heating Co.*, 49 Cal. 2d 501, 319 P.2d 617; *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99; *Gerald v. San Francisco Unified School District*, 121 Cal. App.2d 761, 264 P.2d 90.

It is uncontradicted that the plaintiff gave certain of the defendants a covenant not to sue at a time when the statute of limitations had run on plaintiff's cause of action, for which she received \$3,500, and directed the dismissal of the action as to those particular defendants. There was no thought of abandoning the action against the county. The parties who engaged in and made such an agreement were entitled to do so, but any dismissal as to the defendants paying the \$3,500, operating as a bar to proceeding against the county was completely contrary to the intent of the parties.

[5] A complete reading of all of the instructions given by the court considered with the evidence convinces us that the jury was properly instructed. Appellant insists that the basis of liability must exist because of section 53051 of the Government Code, and therefore the giving of instructions respecting general negligence was clearly erroneous. Suffice it to say that the claimed negligence of the driver was before the jury because of the contentions of the appellant, and instructions on the subject were necessary for the jury properly to evaluate the conduct of the driver. Under the circumstances, the instructions as to principal and agent were proper. And as the respondent has set forth in her brief:

"The instruction regarding the inability of the County to abdicate its duty to exercise proper supervision over the work of third persons improving its streets was



necessary to advise the jury that, where the requirements of the Public Liability Act were otherwise met, the County could not escape liability for a dangerous or defective condition simply because someone else created it or, in violation of its contract with the County, allowed it to remain or failed to warn thereof. *Waldorf v. [City of] Alhambra*, 6 Cal.App.2d 522 [45 P.2d 207]. *Mulder v. City of Los Angeles*, 110 Cal.App. 663 [294 P. 485].

"Since full instructions were given on the requirements for plaintiff to prove a case under the Public Liability Act, and thus no prejudicial error could result, any error which existed would not constitute ground for reversal. *Silva v. Fresno County*, 63 Cal.App.2d 253 [146 P.2d 520]."

[6, 7] As to the assertion that a violation of the penal provisions of the Vehicle Code is negligence per se, the correct rule is stated in *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, at page 590, 177 P.2d 279, at page 284:

"In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in *Scalf v. Eicher*, supra, 11 Cal.App.2d [44] at page 54, 53 P.2d [368] at page 373: 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where \* \* \* the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'" (Citing cases.)"

[8] The court also instructed as to the life expectancy of the plaintiff, but omitted the qualifying conditions about normal health. As said in *Newman v. Campbell*, 23 Cal.App.2d 639, at page 641, 73 P.2d 1265, at page 1266:

"If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy \* \* \* such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint."

[9] Appellant's last contention is that the jury should have been instructed that it is presumed that official duty has been regularly performed. Code Civ.Proc. § 1963, subd. 15. Under the circumstances of this case we are of the opinion that it was not error to omit such an instruction.

We have considered the remaining assertions and contentions of appellant not herein particularly pointed out, but we deem it unnecessary to comment further thereupon.

We find no prejudicial error in the record.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



163 Cal.App.2d 154

**Louis PETE, Jr., Plaintiff and Appellant,**

**v.**

**J. R. NORBERG, an individual, doing business as Norberg Adjustment Bureau, Defendant and Respondent.**

**Civ. 17963.**

**District Court of Appeal, First District, Division 2, California.**

**Aug. 26, 1958.**

Action for abuse of process in garnishment of wages based on allegation that defendant garnisheed wages with full knowledge that plaintiff was entitled to have wages exempted from attachment and with knowledge that further attachment of

wages would result in discharge by employer. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that defendant did not know attachment of wages would result in plaintiff's discharge and that at time of levy defendant did not know that plaintiff's claim of full exemption was valid.

Affirmed.

### 1. Process ☞171

In action for damages for abuse of process in garnishment of accrued wages, evidence sustained finding that defendant did not know attachment of wages would result in plaintiff's discharge, and that while plaintiff's employment was terminated, it was because of lack of work and not because of attachment of wages.

### 2. Process ☞171

In action for damages for abuse of process in garnishment of accrued wages, evidence sustained finding at time of issuance of third in a series of writs of attachment on plaintiff's wages, defendant was not aware that plaintiff's claim of total exemption of wages, advanced for first time upon second levy of attachment for wages, was valid. West's Ann.Code Civ.Proc. § 690.11.

### 3. Process ☞171

Where process is regularly issued and employed, it is essential to maintenance of action for abuse of process that there be finding of bad motive or ulterior purpose.

Louis Pete, Jr., Phoenix, Ariz., in pro. per.

Hancock, Elkington & Rothert, Wayne D. Hudson, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendant in an action based on allegations charging abuse of process in the garnishment of his accrued wages owed to him by

his employer. The action in which the attachments issued resulted in a judgment against appellant.

The gist of the present action is stated in paragraph VII of the Complaint: "That defendant, with full knowledge that plaintiff was entitled to have his wages exempted from attachment under Section 690.11 of the Code of Civil Procedure \* \* \* and with knowledge that further attachments of his wages would result in his discharge by his employer, did \* \* \* maliciously and wilfully and with the intent to vex, harass and injure plaintiff and to deprive him of his said wages and \* \* \* to cause said Bethlehem Steel Corporation to discharge plaintiff \* \* \* and to cause and compel plaintiff in order to prevent his discharge to use said wages \* \* \*" to the satisfaction of his indebtedness to defendant cause and direct the garnishments to be levied upon his claims for wages.

The claim of abuse of process is twofold: 1. that defendant caused the attachments to be levied knowing that plaintiff was entitled to an exemption under Code of Civil Procedure section 690.11; and 2. that defendant knowing that further attachments would cause his discharge levied such attachments wilfully and maliciously to compel plaintiff to apply the exempt wages to the payment of his debt to avoid being discharged.

[1] On the second ground the trial court found that defendant did not know that the attachment of plaintiff's wages would result in his discharge and did not intend to cause him to be discharged. The court further found that while plaintiff's employment was terminated on March 12, 1954, this was because of lack of work and not because of the attachment of his wages. While there was a conflict in the evidence these findings are all supported by substantial direct evidence.

[2] Section 690.11, Code of Civil Procedure, exempts absolutely one-half of a defendant's wages earned within 30 days. As to the other one-half it provides an exemption "if necessary for the use of the debtor's

family." The evidence shows and the court found that three levies under writ of attachment were made by defendant: on February 18, February 24, and March 4, 1954. On the levy of February 18 plaintiff claimed only the one-half exemption and the sheriff immediately released such one-half. On the February 24 levy plaintiff claimed a total exemption which claim was contested by defendant, the court granting the total exemption after a hearing on March 12, 1954. Following this order the claim of total exemption on the March 4 levy was not contested by defendant.

The recital of these facts demonstrates the futility of appellant's position on appeal. The action was on a promissory note and it is not questioned that resort to the remedy of attachment was proper. The absolute exemption of one-half plaintiff's wages on the first levy was automatically granted and that part of his wages immediately released. As to the other one-half he had asserted no claim of exemption when the second levy was made and before defendant received notice of such claim the third levy had already been directed and the trial court found that the notice of such claim was received by defendant "after the issuance of instructions" for the third levy "and too late for said instructions to be recalled." There is no showing in the evidence that defendant knew before the court's order of March 12 that plaintiff's claim of total exemption was valid. No further levies were made after that date.

[3] There is no showing that defendant acted other than in good faith in pursuing his admitted right of attachment or took any further steps after appellant's right to exemption was established. The findings negative the bad motive or ulterior purpose which is essential to the action where the process is regularly issued and employed. *Crews v. Mayo*, 165 Cal. 493, 495, 132 P. 1032; *Pimentel v. Houk*, 101 Cal.App.2d 884, 226 P.2d 739.

Appellant, appearing in pro. per., attempts to reargue conflicts in the evidence which

have been resolved against him by the trial court. He also complains that the trial court refused to permit him to introduce some evidence on damages. He suffered no prejudice in this since the judgment went against him on the merits. Nor did he suffer prejudice by the court's refusal to permit him to "read some law" since under the facts found the law could not have helped him.

Judgment affirmed.

DRAPER, J., concurs.



162 Cal.App.2d 607

**Samuel W. GARDINER, as Assignee, etc.,**  
Plaintiff and Respondent,

v.

**Floyd GAITHER et al., Defendants,**

**Gran-Wood Company, Julius H. Selinger, H. B. Granlee, John F. Woodson, Defendants and Appellants.**

Civ. 17754.

District Court of Appeal, First District,  
Division 1, California.

Aug. 6, 1958.

Action for declaratory relief and a money judgment. The Superior Court, Marin County, Jordan L. Martinelli, J., entered judgment adverse to defendants and they appealed. The District Court of Appeal, Peters, P. J., held that evidence, including testimony that defendants, as real estate developers, entered into an agreement with certain contractors, whereby houses were to be built by contractors on land secured by developers, and net profits were to be shared, sustained conclusion that a partnership existed between developers and contractors.

Judgment affirmed.



**1. Contracts** Ⓒ176(1, 2)

Whether a contract is ambiguous or uncertain is a question of law, and if it is held not to be ambiguous or uncertain, interpretation of the contract becomes a question of law.

**2. Trial** Ⓒ9(1)

Where contending parties in a declaratory judgment action, prior to the main trial, submitted issue to the court as to whether a partnership existed between defendants and certain contractors, if defendants desired to submit any extrinsic evidence on partnership issue, other than submitting documents involved, they should have done so at such pretrial hearing.

**3. Appeal and Error** Ⓒ205**Trial** Ⓒ45(1)

In a declaratory judgment action, wherein issue was raised as to whether a partnership existed between defendants and certain bankrupt contractors, if at the time of trial defendants desired to offer more evidence, in addition to documents submitted on such issue, they could and should have made an offer to produce such evidence, and where they failed to do so, they could not object on appeal to refusal of judge to consider such oral evidence.

**4. Evidence** Ⓒ450(5)

Where in declaratory judgment action wherein issue of whether a partnership existed between defendants and bankrupt contractors was involved, a written contract submitted in evidence, without ambiguity showed the creation of a partnership, extrinsic evidence on partnership issue was not admissible to interpret such contract.

**5. Partnership** Ⓒ165

Where a contract created a partnership between certain parties, provision in such contract that neither contracting party was to be liable for the debt, default, undertaking, contract or tort of the other, although it might have had some effect as between the partners themselves, had no effect on the partners' liability to third persons.

**6. Partnership** Ⓒ39

Mere fact that creditors of certain bankrupt contractors did not know of such contractors' partnership contracts with certain realtors when they furnished labor and materials to contractor did not preclude them from holding realtors for such partnership debts.

**7. Partnership** Ⓒ55

In action for declaratory relief and a money judgment, evidence, including testimony that defendants, as real estate developers, entered into an agreement with certain contractors, whereby houses were to be built by contractors on land secured by developers, and net profits were to be shared, sustained conclusion that a partnership existed between defendants and contractors.

**8. Appeal and Error** Ⓒ1122(2)

If a finding is necessary to support a judgment deemed correct by District Court of Appeal, the District Court of Appeal can and will make such a finding under power conferred by the Code of Civil Procedure. West's Ann.Code Civ. Proc. § 956a.

**9. Accord and Satisfaction** Ⓒ1**Novation** Ⓒ1

A novation extinguishes one obligation by accepting for it another, that is, the creditor agrees to accept the second promise for his existing claim, but where there is an accord, the new promise is not accepted in lieu of the existing claim, but the performance of that new promise is accepted in lieu of the existing claim.

**10. Accord and Satisfaction** Ⓒ26(3)**Novation** Ⓒ12

In action for declaratory judgment, evidence sustained implied finding that defendants' creditors did not accept promise of completion of certain buildings by defendants for their existing claims, but that they agreed to accept performance of promise to complete certain buildings and divide profits in lieu of their existing claims.



**11. Declaratory Judgment**  $\S$ 292

Where creditors of a building contractor were also creditors of a realtor, if a contract between such parties created a partnership, creditors had sufficient interest in contract question to bring an action to have it declared that the contract created a partnership. West's Ann.Code Civ.Proc.  $\S$  1061.

**12. Declaratory Judgment**  $\S$ 292

A person who has rights flowing from a contract has an "interest" in that contract, and should, in the discretion of the trial court, be able to maintain an action to secure a declaration of the character and extent of those rights when an actual controversy exists. West's Ann.Code Civ. Proc.  $\S$  1061.

**13. Declaratory Judgment**  $\S$ 5, 394

Entertainment of an action for declaratory relief is within the discretionary power of the trial court and its decision will not be disturbed unless a clear abuse of discretion is shown. West's Ann.Code Civ.Proc.  $\S$  1061.

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Julius H. Selinger, San Rafael, for appellants.

Gardiner, Riede & Elliott, San Rafael, for respondent.

PETERS, Presiding Justice.

In an action for declaratory relief and for a money judgment brought by the assignee of several creditors against numerous defendants, the trial court determined that the three partners of Gran-Wood Company were personally liable for certain goods and services furnished by plaintiff's assignors. From the judgment so holding the three partners appeal.

The record discloses that in November of 1951 there existed a partnership known as the Gran-Wood Company, engaged in the purchase, development and sale of vacant and improved real estate. This company had three partners, H. B. Granlee, John F. Woodson and Julius H. Selin-

ger. At that time there also existed another partnership known as Gaither & Boe, engaged in the contracting business. This partnership had two partners—Floyd Gaither and Carl S. Boe—both licensed contractors.

On November 12, 1951, Gran-Wood entered into a contract with Gaither & Boe. One of the basic questions involved on this appeal is whether such contract created a partnership, or whether Gaither & Boe simply became independent contractors under it. The trial court came to the conclusion that it created a partnership.

Under the terms of this contract Gran-Wood employed Gaither & Boe for the construction of all homes and other structures to be erected upon lands to be acquired by Gran-Wood. Gaither & Boe agreed not to engage in any other contracting work for any other person. In the event that other construction jobs were offered to Gaither & Boe they had to be first submitted to Gran-Wood for approval as to price, time and location, and, if approved, were then to be subject to all the terms of this contract. Gaither & Boe agreed that they would make a firm bid on all construction jobs, and that such bid would be actual cost plus 5%. If the job was completed at a cost less than the firm bid, the cost to Gran-Wood was to be reduced accordingly, and, if the cost exceeded the firm bid, Gran-Wood was to pay Gaither & Boe the amount of such excess up to 5% of the firm bid. The prevailing customs and usages of the contracting business and related trades as to modes of financing and payments on the installment plan were to be applicable to all transactions under the contract. Title to all lands involved, before, during, and after construction, and until the property was sold, was to remain in Gran-Wood or its nominees. Gran-Wood undertook to use its best efforts, skill and judgment in the selection of land to be developed, and agreed that land acquired by it under the agreement should be carried on its books at its actual cost of acquisition and

development. Profits of the venture were to be divided as follows:

"(a) Of the first \$40,000.00 of net profits made per annum by Gran-Wood Company, Gaither & Boe shall be credited with 50% thereof.

"(b) If and when net profits of Gran-Wood Company shall exceed \$40,000.00 and shall be between \$40,000.00 and \$50,000.-00 Gaither & Boe shall be credited on the books of Gran-Wood Company with \$20,000.00 per annum plus 10% of any excess over \$40,000.00.

"(c) If and when the aggregate net profits of Gran-Wood Company shall amount to \$50,000.00 or more per annum, Gaither & Boe shall, in lieu of formulas (a) and (b) of this paragraph, be credited on the books of Gran-Wood Company with 40% of such net profits."

It was also provided that in addition to sharing in the profits arising out of the construction of dwellings, Gaither & Boe were to share, according to a fixed formula, in the net profits derived from the resale of any land acquired by Gran-Wood and sold by it as undeveloped property.

Granlee and Woodson, two of the partners in Gran-Wood, who were realtors, were to have the exclusive rights to sell for a 3% commission the various properties involved at prices fixed by Gran-Wood and approved by Gaither & Boe.

It was expressly provided that resale prices and selection of vacant or improved property, the terms of sale and financing of such property, and the determination as to the type, cost and suitability of each structure were to be determined by mutual consent. This was to be equally true of all other matters of policy directly affecting the character of the development involved. The contract also provided for a settlement of accounts between the parties as each unit was sold and when the profits therefor became ascertainable with due regard being given to the expiration of lien periods on each project.

The contract contained this provision: "Neither of the contracting parties herein shall be liable to any third person, firm, or corporation for the debt, default or undertaking, contract or tort of the other contracting party, but shall be answerable only for its own acts or omissions."

The contract was to remain in effect for three years, unless either party gave written notice of termination to the other, which each was empowered to do.

In January of 1952, under this contract, Gaither & Boe commenced construction of five houses, on which the firm bid was \$13,000 each. About March of 1952 the partners in Gran-Wood learned that the construction was defective in that the foundations and retaining walls were not adequate. Construction was stopped until remedial measures could be taken. The city of San Rafael condemned the structures as unsafe. Following this, and within the time provided by law, a number of subcontractors and materialmen filed mechanics' liens against the property, claiming that both Gaither & Boe and Gran-Wood were personally liable for the amounts involved. Gran-Wood denied any such liability.

Several of the lien claimants assigned their claims to Samuel W. Gardiner, an attorney, and the plaintiff in this action. There then ensued some correspondence between Gardiner and Selinger, also an attorney, and a partner in Gran-Wood. This correspondence ultimately resulted in what the participants called a "deal." The second major disagreement of the parties is whether this "deal" constituted a novation or was a mere executory accord. The trial court held that it was not a novation.

Under the terms of this "deal," as disclosed by the correspondence, Gran-Wood, while disclaiming any personal liability for the debts here involved, offered, and Gardiner on behalf of his clients accepted, a proposition under which Gran-Wood agreed to proceed with salvage operations and completion of three of the five build-

ings involved, and to demolish the two that could not be salvaged. The mechanics' lien claimants agreed to waive their claim of personal liability against Gran-Wood and its partners and to withdraw or release their liens on the five structures. When the three buildings were completed and sold, there was to be a *pro rata* distribution among the creditors involved.

Pursuant to this agreement, Gran-Wood resumed operations with a new contractor. One of the three buildings was partially completed and sold in an unfinished state. The foundation work was never completed on any of the other buildings because Gran-Wood discovered that the cost would be in an amount that Gran-Wood was unwilling to pay.

Subsequently, Floyd Gaither and Carl Boe were adjudicated to be bankrupts. These two persons, while defendants in the present action in the court below, are not parties to this appeal, since they have not appealed from the judgment.

The trial court found that the lien claims of plaintiff's assignors had become valueless prior to the filing of the present action because the property was of less value than the deeds of trust of Hunter Investment Company, which deeds of trust were prior in right to the lien claims.

The trial court also found that the appellants did not perform the proposals agreed upon in the second contract, and further found that this second agreement was intended as a means of paying the existing claims, and that the proposals contained therein were intended to be prospective in nature and operative at a future time because the parties did not intend that appellants were to be instantly discharged from liability. All the waivers, releases and discharges contained in the agreement were found to have been intended by the parties to be contingent upon actual performance by the appellants of their obligations under the agreement. The court thereupon concluded that the first contract was a partnership contract between Gai-

ther, Boe, Granlee, Woodson and Selinger; that respondent's assignors supplied goods and services under that contract to the partnership, and that the acts of Gaither & Boe were performed as partners and under the partnership agreement. The correspondence between Gardiner and Selinger and the resulting agreement did not constitute a novation. Gardiner was held entitled to a judgment on behalf of his clients and against Granlee, Woodson and Selinger upon a *quantum meruit* in the sum of \$5,205.70. Those three persons appeal.

Appellants challenge the conclusion of law that the first contract created a partnership, claiming that there is no evidence and no findings to the effect that this contract created a partnership. The record shows that the parties submitted to the trial court certain issues prior to the main trial. This was a pre-trial proceeding before the pre-trial procedure as we now know it was authorized by the rules. But even before pre-trial counsel could, of course, stipulate to the trial of certain issues to be tried separately from the other issues. That was the legal effect of what was here done.

After these separate issues had been submitted to the trial court, and before the main trial, the court entered a minute order which stated that "two questions were submitted to the Court for its pre-trial decision," and then stated the first question and its answer as follows:

"1. Whether the agreement attached as Exhibit A to the complaint in the above entitled cause constituted a partnership agreement under which H. B. Granlee, John F. Woodson and Julius H. Selinger became co-partners with Floyd Gaither and Carl S. Boe or whether said Gaither and Boe became independent contractors under said agreement and whether the members of Gran-Wood Company under said agreement became liable to the creditors of Gaither and Boe.

"This Court has for all practical purposes settled said question in the matter of Hunter Investment Company v. Gran-



Wood, tried in the above entitled Court commencing on January 24, 1956, in which action the identical agreement was before this Court.

"In lieu of a written opinion herein the Court makes reference to the comments of the Court upon the decision in said action contained in the notes of the shorthand reporter."

The minute order then recites that the second question submitted to it was whether the second contract was a novation or executory accord, and answered that question as follows:

"The Court is of the opinion that said correspondence termed by counsel herein as a 'deal' amounts to no more than an accord without satisfaction and without extinction of the obligations theretofore existing and did not approximate the dignity of a Novation.

"The Court inclines to the view that the original obligations remain in force."

[1] No extrinsic evidence was offered at the pre-trial hearing on these issues, the two contracts being submitted to the court for its interpretation as a matter of law. The court's pre-trial determination amounted to a holding that the contracts were not ambiguous or uncertain, and that their interpretation was a matter of law. Whether a contract is ambiguous or uncertain is a question of law, and if it is held not to be ambiguous or uncertain the interpretation of the contract becomes a question of law. This is elementary. (See discussion and collection of cases, 12 Cal. Jur.2d p. 324, § 119.)

So far as the first contract is concerned, the court determined that it created a partnership between the contracting parties. Certainly the agreement is not ambiguous or uncertain on this point. The terms of the agreement demonstrate without ambiguity that this is what the parties intended. The provisions for sharing profits, and giving each party an equal voice on all major policy matters can have no other meaning.

The case of *Constans v. Ross*, 106 Cal. App.2d 381, 235 P.2d 113, is directly in point, and very similar as to its facts to the instant one. There, two realtors and a contractor entered into a contract whereby the realtors were to secure suitable building locations and the contractor was to erect residences thereon. The realtors were to make arrangements for financing, and provide the plans and specifications. A formula for the division of profits was set forth in the agreement. Materialmen sued both the realtors and the contractor, and secured a judgment against them. This was affirmed. The court held that under the terms of the agreement the realtors were partners of the contractor, and, as such, liable for the debts contracted by the partnership, and stated (106 Cal.App. 2d at page 386, 235 P.2d at page 116): "The question of the existence of a partnership depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. [Citations.] Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business. [Citations.] In ascertaining the intention of the parties, where they have entered into a written agreement, such intention should be determined chiefly from the terms of the writing. [Citation.] While the question of whether a partnership exists is to be determined from the nature of the relation agreed upon rather than the name which the parties have given to it, some weight must be given to the language of the parties themselves. [Citations.] It is the intention as evidenced by the terms of the agreement, and not the subjective or undisclosed intention of the parties, that controls."

The court then referred to the pertinent provisions of the contract, and summarized the evidence as to the conduct of the parties in carrying out its terms, and then pointed out that the apportionment of duties between the partners was not indicative of a non-partnership intent and that



the fact profits and losses were not equally shared did not compel a conclusion that no partnership existed, and then concluded (106 Cal.App.2d at page 389, 235 P.2d at page 118): "Considering the terms of the agreement here involved and the conduct and activities of the parties thereto in carrying on the business, the conclusion is impelled that a partnership existed. The agreement discloses an association for the purpose of carrying on a business and dividing the profits. And the agreement for division of profits implies an agreement also to bear the losses."

Appellants correctly point out that in the *Constans* case the contract was not interpreted solely from its terms but oral evidence of the surrounding circumstances were presented to and considered by the trial court, and then urge that in the instant case "our complaint is that no evidence was permitted to be offered." (App.Rep. Br. p. 8.)

The record does not show that appellants, either at the pre-trial hearing or at the main trial made any offer of any such evidence. But at the oral argument, and in a brief filed after oral argument, appellants, while conceding that no such offer at any time was made, argue that at the pre-trial hearing the court ruled without such evidence that the contract created a partnership, that this was in effect a summary judgment on the issues decided, and made the offer of any such evidence at the trial futile.

[2] These arguments are fallacious. The contending parties, prior to the main trial, submitted two issues to the court. These issues were presented by simply submitting the documents involved. If appellants desired to submit any extrinsic evidence that was the time to have done so. This they did not do. This so-called pre-trial hearing, was nothing more than the submission, by agreement, to the trial court of certain issues to be separately decided. Assuming that appellants have extrinsic evidence relevant to the issue, and the nature of such evidence has not been divulged, the time to have offered it was

when the issue of interpretation was before the court.

[3] In the second place, the minute order made after the pre-trial hearing was only interlocutory and was not a final order. If at the time of the main trial appellants desired to offer extrinsic evidence on the issue, they could have asked the judge to change his ruling that such question was one of law, and could and should have made an offer to produce such evidence. This, appellants did not do. It is too late to object now.

[4] A third reason why no error could possibly have occurred in reference to this matter, is that the trial court properly held that the first contract, without ambiguity and as a matter of law, created a partnership. Extrinsic evidence was not admissible, therefore, to interpret it. The terms of the contract in this respect are clear and unequivocal.

[5] Appellants place some reliance on the provision that neither contracting party was to be liable for the debt, default, undertaking, contract or tort of the other. Whatever effect such provision may have had as between the partners themselves, it can have no effect on the partner's liability to third persons. As stated in *San Joaquin Light & Power Corp. v. Costaloupes*, 96 Cal.App. 322, 334, 274 P. 84, 89: "The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership, without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership."

[6] The next argument of appellants is that all of respondent's assignors extended credit exclusively to the contractors, Gaither & Boe, at a time when they did not know of Gran-Wood's relationship to the transaction, and therefore even if Gaither & Boe, as partners, were agents of Gran-Wood, the agents alone are liable. An at-

tempt is made to bring this case within the rule of *Rigney v. De La Salle Institute*, 10 Cal.App.2d 492, 52 P.2d 579. There the plaintiffs, as here, were materialmen and subcontractors who had furnished the contractor with labor and material used in the construction of certain buildings for the defendant. The appellate court reversed a judgment for the plaintiffs, pointing out that the evidence demonstrated that the plaintiffs had extended the credits solely and exclusively to the contractor, who was defendant's agent. After completion of the building the plaintiffs executed and delivered final lien waivers to the contractor, thus accepting his exclusive credit for the payment of the debts, and releasing the property from all liability. The court quite properly held that under such a state of facts it would be improper to hold the owner personally responsible, stating (10 Cal. App.2d at page 499, 52 P.2d at page 582): "The authorities amply bear out the conclusion that where exclusive credit is extended to the agent, regardless of any agreement by the parties, the rule of liability of an undisclosed principal is inapplicable, and the parties stand in the same relation as if the principal had at all times been disclosed. [Citations.]" (See also *Hayward's v. Nelson*, 143 Cal.App.2d 807, 299 P.2d 1013.)

The rule of these cases is not here applicable for the simple reason that there is no showing in the record to show that respondent's assignors extended the credits exclusively to Gaither & Boe. If appellants desired to raise that defense to escape the normal rules of agency, they should have produced, or offered to produce, evidence on the issue. This they did not do.

Certainly, in the absence of any such evidence, the mere fact that respondent's assignors did not know of the Gran-Wood, Gaither & Boe, contract when they furnished labor and materials does not preclude them from now holding the partners of Gran-Wood. If this were the law then all the rules relating to the liability of an undisclosed principal would be meaningless. As this court stated in *Luce v. Sutton*, 115

Cal.App.2d 428, 433, 252 P.2d 352, 355: "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." *Geary St. Park & Ocean R. Co. v. Rolph*, 189 Cal. 59, 64, 207 P. 539, 541. "A creditor may sue an undisclosed principal when found although he may not have known of the existence of such principal at the time the debt was incurred." *Hulsmann v. Ireland*, 205 Cal. 345, 352, 270 P. 948, 951."

In *Wahyou v. Kiernan*, 145 Cal.App.2d 443, 445, 302 P.2d 638, 639, the court announced the same elementary rule, and then stated: "Again, here \* \* \* there was no intervening circumstance such as was present in *Rigney v. De La Salle Institute*, 10 Cal.App.2d 492, 52 P.2d 579, which would warrant a conclusion by this court that credit had been extended exclusively to Hemley, and it is only by such a circumstance that the defendant can escape liability under the general rule previously set forth."

If this is the rule as to undisclosed principals, and it clearly is, it certainly applies to an undisclosed partner. If a case is necessary to support such an obvious rule it is to be found in *Schwaegler Co. v. Marchesotti*, 88 Cal.App.2d 738, 199 P.2d 331, where the court laid down the rule by quoting from *Bissell v. King*, 91 Cal.App. 420, 267 P. 356, as follows (at page 743 of 88 Cal.App.2d, at page 334 of 199 P.2d):

"\* \* \* Thus, in cases of secret partnership and dormant partners, a creditor is entitled to recover from all the partners when discovered, though the debt was not originally charged to all [citation], and even though one partner holds himself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by his representations."

"And in Section 500 of the text of Rowley on Partnership, last cited, it is said:

"\* \* \* As a rule, he [the dormant or undisclosed partner] is liable to the firm creditors to the same extent as if he were known to the creditor at the time the credit was obtained, under the doctrine that an undisclosed principal is liable for the acts of his agent. \* \* \* If the dormant partner be completely so, and not known as such to the firm creditor, he will be liable to the firm creditor for indebtedness incurred by the firm to the creditor during the dormant partner's connection with the firm, \* \* \*." (See, generally, *Lindner v. Friednash*, Cal.App., 325 P.2d 612.)

[7, 8] Thus, the trial court was correct in concluding that the contract created a partnership between Gran-Wood and Gaither & Boe, and in holding that this rendered appellants liable for the goods and services furnished to Gaither & Boe and used in the construction of the partnership buildings. We do not find it necessary to determine whether the trial court was correct in simply concluding that a partnership existed, and in not making a finding to that effect, because this court, if such finding were necessary, could and would make it under the power conferred by section 956a of the Code of Civil Procedure. If we were to exercise such power such finding would, for reasons already stated, be in precise accord with the conclusion of law of the trial court.

The second main attack of appellants is on the findings to the effect that the second agreement did not constitute a novation. Appellants urge that appellants' assignors, at best, had a doubtful right to enforce personal liability against Gran-Wood, and that the substitute agreement constituted a compromise of that right. They urge, therefore, that the second agreement was a novation under the rule announced in *Bennett v. Bennett*, 219 Cal. 153, 25 P.2d 426. That case held that a compromise of a disputed and doubtful claim is enforceable as a novation. Appellants rely on language of *Gardiner* contained in one of the letters constituting the contract to the effect that

"We now understand that we have a definite deal as between ourselves, and that it is only contingent upon obtaining that approval from Hunter," which was admittedly later obtained, and claim such language demonstrates that the second agreement replaced the first.

In the instant case, the second agreement was not performed. Had it been, it would have constituted an accord and satisfaction, and respondent could claim no rights under the first contract. In such event it would have become a substitute for that contract. Appellants would have us believe that the respondent's assignors intended to give up all existing rights against Gran-Wood in return for the mere promise of Gran-Wood to perform the second contract. The right against Gran-Wood being asserted by respondent's assignors was not a highly doubtful right, as appellants assert, but was a clear and obvious right. The mere fact that appellants refused to recognize it did not make it a doubtful right. To contend that respondent's assignors intended to surrender, completely, that right in return for the mere promise of Gran-Wood to perform the second agreement is contrary to ordinary business practice.

Interestingly enough, such contention is also contrary to the position taken by appellants in their answer to the complaint in which they denied that the second agreement "was or is a substituted agreement or a compromise agreement," alleging that there was no previous agreement at all for which the second could be a substitute or compromise.

Under the law the second agreement was clearly an executory accord and not a novation. A novation is defined in section 1530 of the Civil Code as the "substitution of a new obligation for an existing one." Section 1531 provides how it is made. It requires that the substitution be with the intent to extinguish the old obligation. An accord, on the other hand, is "an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." Civ.Code, § 1521. The next sections provide that an accord does not extin-



guish the obligation until it is executed. Acceptance of such performance by the creditor is the satisfaction of the accord.

[9] Under these sections, which codify general law on the subject, a novation extinguishes one obligation by accepting for it another, that is, the creditor agrees to accept the second promise for his existing claim. But this is not true of an accord. Here it is not the new promise that is accepted in lieu of the existing claim, but the performance of that new promise. In 1 Cal. Jur.2d p. 276, § 34, the applicable principles supported by many authorities are stated as follows:

"Acceptance by the creditor of the consideration of an accord extinguishes the obligation, and constitutes the satisfaction. However, the obligation is not extinguished until the accord is fully executed, even though the parties to the accord are bound to execute it. In other words, an accord may be binding on the parties, but it does not discharge the obligation it is made to satisfy until it is executed. \* \* \*

"It is an elementary principle that an accord without satisfaction is not a bar, nor does it constitute a defense. In other words, if a second contract is but an accord, then the original obligation remains in force until the new one is performed." (See also discussion and cases cited 1 Am.Jur. p. 216, § 3.)

[10] In the instant case there is no evidence that respondent, on behalf of his clients, agreed to accept Gran-Wood's promise to complete three of the five structures as satisfaction of the pre-existing debts. Certainly, the presumption is against any such conclusion. The most reasonable and sensible interpretation of the correspondence is that the creditors were willing to accept performance of the agreement to finish three of the five houses in satisfaction of their existing claims, but extinguish-

ment of those claims was conditional upon performance of the second promise. The correspondence in question between Gardiner and Selinger was a practical attempt at a practical solution by which creditors would get back some or all of their money, and Gran-Wood would be relieved of personal liability by salvaging the three buildings, which Gran-Wood obviously thought could be profitably done. But Gran-Wood found it to be unprofitable, and did not perform. Obviously, the whole agreement was prospective. What respondent's assignors wanted was performance of the second agreement. This they did not get. Thus, the original obligation was not extinguished and may be enforced. (See *United States Gypsum Co. v. Snyder-Ashe Co.*, 139 Cal. App. 731, 34 P.2d 767.)

[11-13] It is next urged that because respondent and his assignors were not parties to the contract between Gran-Wood and Gaither & Boe they cannot secure a construction of that contract in a declaratory relief action, because not persons "interested" in such contract. The point is without merit. The respondent's assignors were creditors of Gaither & Boe, and also creditors of Gran-Wood, if the contract between these two created a partnership. Certainly respondent's assignors had an interest, an important interest, in having it declared that the contract in question created a partnership. It seems clear that a person who has rights flowing from a contract has an "interest" in that contract, and should, in the discretion of the trial court,<sup>1</sup> be able to maintain an action to secure a declaration of the character and extent of those rights when an actual controversy exists. *Wollenberg v. Tonningsen*, 8 Cal.App.2d 722, 48 P.2d 738.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

1. The entertainment of an action for declaratory relief is within the discretionary power of the trial court. Its decision will not be disturbed unless a clear abuse of discretion is shown. § 1061, Code Civ.Proc.; *Schessler v. Keck*, 125

Cal.App.2d 827, 271 P.2d 588; *Wieber v. Worton*, 105 Cal.App.2d 626, 234 P.2d 114; *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306.



162 Cal.App.2d 701

Merritt Hardman FOSTER, Petitioner  
and Appellant,  
v.

F. Britton McCONNELL, as Insurance Commissioner of the State of California,  
et al., Respondents.

No. 18041.

District Court of Appeal, First District,  
Division 1, California.

Aug. 12, 1958.

Rehearing Denied Sept. 11, 1958.

Hearing Denied Oct. 10, 1958.

Proceeding on petition for writ of mandate to compel Insurance Commissioner to restore restricted license. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered order denying writ and petitioner appealed. The District Court of Appeal, Bray, J., held that petitioner was not entitled to a trial de novo, and there was substantial evidence to support findings of Commissioner that petitioner knew, that even with appointment of petitioner as agent for specific company after license had been suspended, he could not solicit new business and that petitioner misrepresented policies.

Affirmed.

### 1. Licenses ⇨38

Rule that, in proceeding to revoke or suspend licenses, licensee is entitled to a trial de novo in Superior Court does not apply where application for license is denied or where licensee is seeking restoration of a revoked license, and in those cases scope of review is to determine whether administrative agency abused its discretion which means that court's power is limited to determining sufficiency of evidence to support administrative findings. West's Ann. Insurance Code, §§ 1690, 1690.3.

### 2. Insurance ⇨12

Petitioner seeking to compel Insurance Commissioner to restore restricted insurance license was not entitled to a trial de novo in the Superior Court. West's Ann. Insurance Code, §§ 1690, 1690.3.

### 3. Mandamus ⇨168(4)

In proceeding on petition for writ of mandate to compel Insurance Commissioner to restore restricted license, evidence sustained finding that petitioner knew, after his license had been revoked, that even with his appointment as agent for specific insurance company, he could not negotiate new business.

### 4. Mandamus ⇨168(4)

In proceeding on petition for writ of mandate to compel Insurance Commissioner to restore petitioner's restricted license, evidence supported finding that petitioner had misrepresented policies which he had sold.

### 5. Insurance ⇨12

Where Insurance Commissioner brought proceeding to revoke restricted insurance license of petitioner on grounds, among others, that petitioner had misrepresented policies which he had sold, and petitioner denied making statements which other persons claimed he made, there was merely a conflict in evidence which hearing officer and Commissioner had duty to resolve.

### 6. Insurance ⇨12

In proceedings to revoke insurance license on ground of misrepresentation of policies by holder, fact of misrepresentation is important and not whether applicant for insurance relied on such misrepresentation.

### 7. Licenses ⇨38

Administrative proceedings for revocation of license are not quasi-criminal and are not governed by rules of criminal evidence or procedure so it is not necessary that accusations and representations be proved beyond a reasonable doubt.

### 8. Insurance ⇨12

Insurance Commissioner had authority to revoke insurance license on ground of misrepresentation, notwithstanding fact that misrepresentations were made on U. S. Army installation. West's Ann. Insurance Code, § 1639.

9. Constitutional Law ⚡240(2)  
Statutes ⚡72

Mere fact that California might require higher standards of its insurance licensees in soliciting business on U. S. Army installation in California than another state requires of its licensees operating at same installation does not violate the Fourteenth Amendment to the Federal Constitution or the uniform operation clause of the California Constitution. U.S.C.A. Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 11.

Allan L. Sapiro, Arthur N. Ziegler, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Appellant's petition to the superior court for a writ of mandate to compel respondent Insurance Commissioner to restore his restricted insurance licenses was denied. He appeals.

Questions Presented.

1. Was appellant entitled to a trial de novo in the trial court?

2. Is there substantial evidence to support the findings of the commissioner?

3. Did the commissioner have jurisdiction to discipline appellant for misrepresentations made at Fort Ord, a government reservation?

4. Was there a violation of the United States Constitution or the California Constitution?

Record.

Appellant had been licensed as a fire and casualty agent, life and disability agent, and fire and casualty broker. For violations of the Insurance Code all licenses were suspended for two months (from December 14, 1951, to February 13, 1952). At the end of the suspension period and pursuant to section 1690, Insurance Code, the Department of Insurance issued appellant restricted agent's licenses only. On

April 24, 1952, an accusation was filed against appellant charging (1) that during the suspensory period appellant transacted more than 100 policies of insurance with Western Pioneer Insurance Company without a license so to do, and (2) that on certain dates at Fort Ord military reservation appellant knowingly made untrue representations specifically set out in the accusation to three named soldiers respectively to induce each to purchase a life insurance policy from appellant. The hearing officer found all charges to be true and recommended the revoking of appellant's licenses. The commissioner thereafter adopted the findings and decision of the hearing officer and revoked the licenses. The trial court, upon the hearing of the petition for writ of mandate, found "That substantial evidence in the light of the full record supports the findings of respondent complained of \* \* \*; that said findings afforded ample support to the order of the said respondent, and said order was properly issued \* \* \*" and denied the petition for writ of mandate.

1. Trial De Novo.

[1,2] Appellant contends that Nardoni v. McConnell, 1957, 48 Cal.2d 500, 310 P.2d 644, required the court to reweigh the evidence and exercise its independent judgment in the proceedings on the writ rather than do, as the court did, merely determine if the commissioner's findings were supported by the evidence. (See also 2 Cal. Jur.2d 384-385.) In the Nardoni case and in the ones referred to in the above reference to 2 Cal. Jur.2d, the courts were dealing only with proceedings brought to suspend or revoke licenses. It has been held such rule applies *only* to such proceedings. McDonough v. Goodcell, 1939, 13 Cal.2d 741, 753, 91 P.2d 1035, 123 A.L.R. 1205; McDonough v. Garrison, 1945, 68 Cal.App.2d 318, 336, 156 P.2d 983. It does not apply where an application for a license is denied by the commissioner (McDonough v. Garrison, *supra*, 68 Cal.App.2d 318, 156 P.2d 983), nor where the licensee is seeking the restoration of a revoked license.

Housman v. Board of Medical Examiners, 1948, 84 Cal.App.2d 308, 312, 190 P.2d 653, 192 P.2d 45. In those cases the scope of review is to determine whether the administrative agency abused its discretion which means that the court's power is limited to determining the sufficiency of the evidence to support the administrative findings. *McDonough v. Garrison*, supra, 68 Cal.App. 2d at page 337, 156 P.2d at page 993. There are two provisions in the Insurance Code which seem to indicate that the Legislature intended such discretion as alluded to above to repose in the commissioner in dealing with restricted licenses. Section 1690, Insurance Code, provides that the commissioner *may* issue a restricted license where, as here, he finds that a licensee has been found to have violated any provision of the code which would justify the suspension or revocation of his license. Section 1690.3 provides that a restricted license "does not confer any property right in the privileges to be exercised thereunder, and the holder of a restricted license does not have the right to renewal of such license. \* \* \* The commissioner may, with or without hearing, revoke a restricted license whether the holder has violated any provision of this code or restriction or condition of the license or not." Thus, the granting of a restricted license and its revocation is entirely within the discretion of the commissioner. Hence, when he has revoked such a license the only inquiry the court may make is whether he has abused his discretion and such an inquiry does not require a trial de novo. It calls only for a determination of whether there is substantial evidence to support the commissioner's determination.

## 2. The Evidence.

[3] The evidence as to the transaction with the Western Pioneer Insurance Company follows: Upon his suspension appellant was informed that he could exercise no rights or privileges under his licenses. He was also instructed in writing that he was permitted to handle only renewals and reinstatements of policies which were entire-

ly issued prior to his suspension and of which he was the producer of record; also there could be no gap in coverage. During the period of his suspension appellant was informed by the general manager of Pioneer Underwriters that they were cancelling as of now all of his substandard automobile insurance risks. Appellant went to the Western Pioneer Insurance Company, bringing with him all of his records and correspondence, dealing with over 100 policies. He told Voss, the manager, of his suspension and asked him to find out from the Department of Insurance whether the company could accept the cancelled business. Voss called the commissioner's office. He assumed that the person whom he was calling was familiar with appellant's case and would know that appellant was not licensed as an agent for Western. Voss was told that the company could accept the business but could not pay appellant a commission. Voss then sent a regular form of appointment of appellant as an agent for Western to the department. It was approved and returned. Appellant admitted that during the suspension period he wrote two new Western policies, also some 15 or 20 of the policies he turned over to Western were policies which had expired on other companies during the suspension period; also there was a group of 28 policies which were new policies for which applications had been sent to other companies prior to his suspension, rejected by them, returned to appellant, and accepted by Western during the suspension. Appellant had no contact with the department during this period. He thought that the appointment obtained for him by Western was all he needed. He had Western communicate with the department because he felt that the company had "cleaner hands" than he. The letter of instructions given him by the department at the time of suspension recommended that he get another broker. He approached two or three but they did not want to become involved with a man under suspension. He does not claim that his acts were not in violation but that the appointment sent him by the commissioner on Western's application



amounts in effect to an estoppel. He relies on *Snyder v. Redding Motors*, 1955, 131 Cal.App.2d 416, 280 P.2d 811, which, however, is not in point. There an insurance company was held liable for a judgment and costs of defense suffered by an automobile owner who had applied to the company for automobile insurance and the company neither rejected the application nor issued the insurance. Obviously there is no resemblance between the facts of that case and ours. Voss in communicating with the department did not make a full disclosure of the situation, as he was only interested in determining whether appellant would be entitled to commissions. He did not state that appellant was turning over new business although he knew that "renewal" (which was all appellant was entitled to turn over) did not apply to new policies. Appellant read all of the documents pertaining to his suspension. The evidence supports the conclusion that he knew that even with the appointment he could not negotiate new business. The finding against him on this branch of the case is well supported.

[4-6] As to the alleged misrepresentations we see no reason to completely detail the evidence for the reason that the testimony of the soldiers amply supports a finding that appellant misrepresented the policies that he sold them, that he did so knowing the representations to be untrue and that he made them for the purpose of selling the policies. Appellant denied making the statements which the soldiers claimed he made. This, of course, merely constituted a conflict which the hearing officer and the commissioner had the duty to resolve and which they resolved against appellant. Additionally, appellant contends that he cannot be held liable for any misrepresentations because he relied upon and used a demonstrator sheet and material supplied by the insurance company, citing *Graham v. Ellmore*, 1933, 135 Cal.App. 129, 26 P.2d 696, to support his contention. He also contends that certain statements on the company's literature to the effect that the figures showing returns on the policies, etc.,

are merely illustrative and not guarantees, coupled with the ruling in *Podlasky v. Price*, 1948, 87 Cal.App.2d 151, 160, 196 P.2d 608, 614, to the effect that a disclaimer of responsibility for errors and omissions contained at the bottom of a prospectus would "excuse an innocent misrepresentation or misstatement of fact" precluded any finding of misrepresentation by him. However, the evidence shows that appellant represented the policies (1) to be a savings plan, (2) that the insured could withdraw sums from the policy at any time after the payments were received by the company, and (3) that on cancellation the insured could recover all sums paid, and as to one of the insured accumulated interest would be paid. Thus appellant was doing more than presenting the insurance company's representations. As to the statement at the bottom of the demonstrator sheet, the case cited by appellant, *Podlasky v. Price*, supra, 87 Cal.App.2d 151, 160, 196 P.2d 608, 614, states that such a statement "would not justify a false representation knowingly made." Moreover, it is the fact of misrepresentation that is important here, and not whether the applicant for insurance relied upon such representation. *Collins v. Caminetti*, 1944, 24 Cal. 2d 766, 772, 151 P.2d 105, 154 A.L.R. 1141.

[7] Appellant's contention that the accusations and misrepresentations must be proved beyond a reasonable doubt is unfounded. Administrative proceedings for the revocation of a license are not quasi-criminal and are not governed by rules of criminal evidence or procedure. *Webster v. Board of Dental Examiners*, 1941, 17 Cal.2d 534, 537-539, 110 P.2d 992; *Marlo v. State Board of Medical Examiners*, 1952, 112 Cal.App.2d 276, 282, 246 P.2d 69.

### 3. Fort Ord.

Appellant's misrepresentations were all made at Fort Ord. He had a permit from the post commander to sell insurance there. It had not been revoked. The Army has regulations as to the procedure and policy to be followed in soliciting commercial life insurance on any installations. Appellant



contends that in the cession to the United States of Fort Ord, California did not reserve the power to regulate insurance agents and that the United States has exclusive jurisdiction there and that the commissioner has no jurisdiction to regulate the conduct of an insurance agent there.

[8] We deem it unnecessary to discuss respondent's contention that, for various reasons, the United States had not assumed jurisdiction of the regulation of California insurance agents at Fort Ord in matters of this kind for, assuming that its jurisdiction at Fort Ord is exclusive, nevertheless the commissioner had the power to revoke appellant's licenses for acts at Fort Ord violative of the California Insurance Code. The purpose of the provisions of the Insurance Code is as stated in section 1639, "to protect the public by requiring and maintaining professional standards of conduct on the part of all insurance agents and insurance brokers acting as such within this State." We are not concerned here with the question of the state making regulations concerning the selling of insurance on government reservations. We are concerned with the protection of the public from one holding a state insurance agent's license and who, regardless of whether his acts occur within or without the state, demonstrates that he does not maintain professional standards in his conduct of the insurance business. The situation is very similar to that concerning attorneys.

In *Geibel v. State Bar*, 1938, 11 Cal.2d 412, 79 P.2d 1073, it was held that an attorney could be disciplined for conduct in the federal courts. It was stated there: "If an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court." 11 Cal.2d at page 415, 79 P.2d at page 1074. A similar case is *State ex rel. Hardin v. Grover*, 1907, 47 Wash. 39, 91 P. 564, where it is stated that "any court, the bar of which the de-

linquent is a member, has jurisdiction to disbar for unprofessional conduct, when and whenever committed \* \* \*". In *re Lamb*, 1905, 105 App.Div. 462, 94 N.Y.S. 331, also held that the state court could disbar an attorney for unprofessional conduct in judicial proceedings in the federal courts.

In *re Porep*, 1941, 60 Nev. 393, 111 P.2d 533, and *People ex rel. Colorado Bar Ass'n v. Lindsey*, 1929, 86 Colo. 458, 283 P. 539, the attorneys were disciplined for acts outside the jurisdictions even where the acts seemingly were lawful where done. In the *Porep* case, Nevada disciplined one of its attorneys for advertising in a San Francisco newspaper even though a California Bar committee had previously determined that the conduct did not justify disciplinary action. And in the *Lindsey* case it was held that a juvenile court judge could be disbarred there for violation of Colorado statutes making it unlawful for a judge to act as an attorney or counsel where the judge acted as counsel in a probate proceeding in New York.

*Matter of Application of Shepard*, 1917, 35 Cal.App. 492, 170 P. 442, and *Selling v. Radford*, 1916, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585, are not applicable because the jurisdiction where the conduct took place had already adjudged the conduct to be unlawful before the disciplinary proceedings in the other jurisdiction took place.

In his argument on this subject appellant states: "A state may not punish one for doing in exclusively federal territory what by the law of the United States was lawful \* \* \*" He thereby implies that it is lawful for an agent selling insurance on government property to misrepresent the terms of a policy to a prospective buyer—a proposition that is absurd on its face.

#### 4. The Constitutions.

[9] Appellant contends that the action of the commissioner constituted a violation of the equal protection clause of the United States Constitution (Fourteenth Amendment, § 1) and of the uniform operation clause of the California Constitution (art. I, § 11). Thus he contends that a Califor-

nia licensee might have his license revoked for misrepresentations at Fort Ord where a licensee of another state doing business there and making the same misrepresentations might not have his license revoked. The mere fact that California requires higher standards of its licensees wherever they act than another state does of its licensees does not violate either of the constitutional provisions. See *In re Porep*, supra, 111 P.2d 533, and *People ex rel. Colorado Bar Ass'n v. Lindsey*, supra, 283 P. 539, disbarring attorneys for acts in states other than the licensing state which in those states would not be grounds for disbarring attorneys licensed there.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



163 Cal.App.2d 118

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Albert Delmer JONES, Defendant and**  
Appellant.

Cr. 1188.

District Court of Appeal, Fourth District,  
California.

Aug. 22, 1958.

Rehearing Denied Sept. 8, 1958.

Hearing Denied Oct. 15, 1958.

Defendant was convicted of offense of having escaped from state prison in violation of West's Ann.Pen.Code, § 4530. The Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., rendered judgment and sentence, and defendant appealed. The District Court of Appeal, Mussell, J., held that one incarcerated in state prison by virtue of a commitment valid on its face was lawfully in custody and that his departure from prison to another state without permission from prison

officials constituted an escape within meaning of statute.

Judgment affirmed.

#### 1. Escape ⇐6

Where plea of not guilty by reason of insanity was entered to charge of armed robbery and jury found that defendant was sane at time robbery occurred and defendant was thereupon sentenced to imprisonment in state prison, he was lawfully confined in prison and contention that he had entered plea of not guilty by reason of insanity in belief that he was to receive an additional trial on plea of not guilty, which was not, in fact, entered, constituted no defense to charge of having escaped from prison. West's Ann.Pen.Code, § 4530.

#### 2. Criminal Law ⇐1166(1)

Where only invalidity of conviction and sentence to state prison for armed robbery, asserted as a defense to charge of having escaped from prison, was based on defendant's statement that he had entered plea of not guilty by reason of insanity to robbery charge in belief that he would have an additional trial on plea of not guilty and that he had not been tried on issue of guilt, refusal to order that defendant be furnished with complete transcript of proceedings at robbery trial was not reversible error, since defense counsel at escape trial could readily ascertain truth or falsity of defendant's statement with respect to robbery trial without such transcript. West's Ann.Pen.Code, § 4530.

#### 3. Escape ⇐4

Unlawful departure of a prisoner from limits of his custody constitutes "escape" within meaning of statute prescribing punishment for an escape or attempt to escape from state prison. West's Ann.Pen.Code, § 4530.

See publication Words and Phrases, for other judicial constructions and definitions of "Escape".

#### 4. Escape ⇐4

One incarcerated in state prison by virtue of a commitment valid on its face was

lawfully in custody and his departure from prison to another state without permission from prison officials constituted "escape" within meaning of statute prescribing punishment therefor. West's Ann.Pen.Code, § 4530.

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Thorne & Bailin and Harold A. Bailin, Upland, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with having escaped from the State Prison at Chino in violation of the provisions of section 4530 of the Penal Code. He entered a plea of not guilty and waived his right to be tried before a jury. Trial was then held before the court and appellant was found guilty of the offense charged in the information. He was sentenced to the State's prison for the term prescribed by law and appeals from the judgment.

On June 21, 1957, appellant, who was a prisoner confined in the California Institution for Men at Chino, failed to report to the prison dormitory for the prisoner count made at 7:20 a. m. The prison authorities then conducted a search throughout the institution and surrounding grounds but were unable to locate the appellant. He had left the institution without obtaining permission from the prison officials and was later apprehended in Oregon and returned to San Bernardino county.

In a statement made to the county agent who went to Oregon to return him to San Bernardino, he, the appellant, admitted that on June 21, 1957, he left the mess hall and went into a field, where he lay until darkness fell; that he then walked to Los Angeles, where he obtained food and clothing and a temporary job, later going to Oregon. Appellant made no effort at the trial to refute these facts but contended that his incarceration at the state prison at the time of his escape was not based upon a legal, valid conviction. However, the certified

commitment papers covering appellant's incarceration at the prison were admitted into evidence without objection and show that an information filed in Glenn county charged appellant with having committed the crime of robbery with a deadly weapon and that appellant pleaded not guilty by reason of insanity; that a trial before a jury was held and appellant was represented by counsel; that the jury found that appellant was sane on the day and at the time the robbery occurred and he was sentenced to imprisonment in the State's prison. The commitment papers also contained the statement prepared for the Department of Corrections by the trial judge and district attorney, which statement recites the following history of the crime:

"\* \* \* On January 21, 1957, defendant was without funds and was on his way from Ashland, Oregon, to Hayward, California. He had thirty cents in his pocket and stopped at a cafe and bought a cup of coffee and a couple of doughnuts. He then went across the street to a service station and had his car filled with gasoline. He then took a gun which he had in his possession and told the service station attendant to open the cash register and give him the money. The service station attendant did so, giving the defendant around \$35.00. After the defendant left in his car, the service station attendant called the Sheriff's Office and reported the crime. The defendant was apprehended by the Sheriff of Glenn County, who gave pursuit to the defendant's car, at Maxwell which is located approximately twenty miles south of Willows.

"Defendant pleaded not guilty by reason of insanity. He was examined by R. B. Teller, M. D. and Daniel Lieberman, M. D., Court appointed psychiatrists. Upon a jury trial on February 20, 1957, of the defendant's sanity, he was found by the Jury to be sane. Because of the nature of the offense, armed robbery, defendant was



not eligible for probation and on March 1, 1957, defendant was sentenced by the Court to the State Prison at San Quentin for the term prescribed by law."

The record shows that appellant did not move for a new trial or appeal from the judgment of conviction in Glenn county or maintain any proceedings to establish that his trial there was improper or invalid. The judgment in that county became final and resulted in appellant's being confined in lawful custody of the Department of Corrections at one of its institutions.

In *People v. Ganger*, 97 Cal.App.2d 11, 13, 217 P.2d 41, 42, it is said that if a defendant has reason to believe that his imprisonment is illegal he must apply for his release and not take it upon himself to terminate his incarceration by escaping. Citing *Whitaker v. Commonwealth*, 188 Ky. 95, 221 S.W. 215, 216, 10 A.L.R. 145, 146, as stating that " \* \* \* whatever his legal rights, defendant had his legal remedy; that he was not justified in leaving the jail of his own volition, and his departure from lawful custody before his discharge by process of law was an escape."

In *People v. Scherbing*, 93 Cal.App.2d 736, 743, 209 P.2d 796, 800, the court said:

"There are cases holding that one unlawfully confined who escapes from such confinement, where the confinement is without color of authority, does not violate a statute making it unlawful to 'escape' from prison. *People v. Clark*, 69 Cal.App. 520, 231 P. 590; *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190. These cases, however, deal with situations where a person has been confined either without any authority at all or where the judgment was void on its face. But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful. *People v. Ah Teung*, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190; *People v. Howard*,

120 Cal.App. 45, 8 P.2d 176; *People v. Belknap*, 137 Cal.App. 366, 30 P.2d 576; *People v. Crider*, 76 Cal.App. 101, 244 P. 113; *People v. McPheeley*, 92 Cal.App.2d [589], 207 P.2d 651. This is likewise the general rule in other states. *Kelley v. Meyers*, 124 Or. 322, 263 P. 903, 56 A.L.R. 661; *People ex rel. Haines v. Hunt*, 229 App.Div. 419, 242 N.Y.S. 105; *People ex rel. Scrum v. Hunt* [Sup.], 230 App.Div. 801, 244 N.Y.S. 790. It is also the view adopted by the federal courts. *Aderhold v. Soileau*, 5 Cir., 67 F.2d 259; *Giese v. United States*, 79 U.S. App.D.C. 126, 143 F.2d 633; *United States v. Jerome*, 2 Cir., 130 F.2d 514, reversed on other grounds 318 U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640; *Bayless v. United States*, 9 Cir., 141 F. 2d 578, certiorari denied 322 U.S. 748, 64 S.Ct. 1157, 88 L.Ed. 1580. Many cases are collected and commented upon in annotations in 56 A.L.R. 666 and 163 A.L.R. 1137. These cases make sense. To allow prisoners to use force to escape and then to permit the defense that they were unlawfully confined, would create chaos in a prison. In a democracy the right of self-help is seldom permitted. Resort to the courts is the normal and traditional method of correcting an unlawful confinement. While some argument can be made that an inmate has a lawful right to escape where his confinement is completely unlawful, because the constitutional right of freedom has been infringed, no one has a lawful right to possess a knife or other dangerous weapon while confined in a prison."

[1] We conclude that appellant was lawfully confined in the State's prison at Chino and that he cannot now maintain as a defense to the escape charge that the trial court erred in striking his testimony to the effect that in the superior court of Glenn county he had pleaded not guilty by reason of insanity to the charge of rob-



bery in the belief that he was to receive an additional trial on a plea of not guilty, a plea which was not entered in the said court.

[2] Appellant argues that he was denied the right to present important evidence in support of his claim of innocence in that the trial judge did not instruct or order the Glenn county officials to furnish him with a transcript of the proceedings in the robbery case. There is no merit to this contention. The only claimed invalidity of the judgment in that case was based on the statement of defendant that he thought he would have an additional trial on a plea of not guilty. Appellant's motion to obtain an order for a transcript was supported by the affidavit of his counsel, in which counsel stated that appellant had advised him that he had not entered a plea of guilty and that he was not tried on the issue of guilt. It is apparent that the truth or falsity of appellant's statement could have been readily ascertained by defendant's counsel without the preparation of the complete transcript. Under these circumstances there was no reversible error in refusing to order a complete transcript of the proceedings at the robbery trial.

Section 4530 of the Penal Code provides that "Every prisoner confined in a state prison who escapes or attempts to escape therefrom, is punishable by imprisonment in a state prison for a term of not less than one year; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. No additional probational report shall be required with respect to such offense."

[3] In *People v. Quijada*, 53 Cal.App. 39, 41, 199 P. 854, it is said that "The term 'escape' is not defined in the Code, but a definition as clear and concise as any found in the authorities is, 'the unlawful departure of a prisoner from the limits of his custody.'"

[4] In the instant case appellant was incarcerated in prison by virtue of a commitment valid on its face. He was there-

fore lawfully in custody and his departure therefrom to the state of Oregon constituted escape within the meaning of section 4530 of the Penal Code.

Judgment affirmed.

GRIFFIN, P. J., concurs.



163 Cal.App.2d 151

**The PEOPLE of the State of California,  
Plaintiff and Respondent,**

**v.**

**Frank NAVARETTE and Felix Reyes,  
Defendants and Appellants.**

**Cr. 1241.**

**District Court of Appeal, Fourth District,  
California.**

**Aug. 25, 1958.**

Defendants were convicted of burglary in the second degree and from judgments of conviction in the Superior Court of Tulare County, Robert K. Meyers, J., the defendants appealed. The District Court of Appeal, Mussell, J., held that where judgments of conviction were rendered on February 28, 1958 and notice of appeal was filed with clerk of the superior court on March 11 and there was no showing of any excuse for delay in filing the necessary notices of appeal, the appeals must be dismissed.

Appeals dismissed.

#### **1. Burglary ☞2**

The crime of burglary is committed when any person enters any shop, warehouse or store with intent to commit grand or petit larceny. West's Ann.Pen.Code, § 459.

#### **2. Criminal Law ☞552(1)**

A finding of guilty may be based on circumstantial evidence.

**3. Burglary**  $\S$  41(1)

Evidence supported conviction of burglary in the second degree. West's Ann. Pen.Code,  $\S$  459.

**4. Criminal Law**  $\S$  1081

Where judgments of conviction were rendered on February 28, 1958 and notice of appeal was filed with clerk of the superior court on March 11 and there was no showing of excuse for delay in filing the necessary notices of appeal, the appeals must be dismissed. West's Ann. Rules on Appeal, rule 31.

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William A. Hill, Porterville, for appellants.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants were charged with violation of section 459 of the Penal Code (burglary in the second degree) in that on or about January 3, 1958, they entered the building of Chuck's Used Furniture Store, located at 404 East Main Street in the city of Visalia, with intent to commit theft. Trial was had before a jury which found each appellant guilty as charged in the information. Probation was denied as to each appellant and they were sentenced to imprisonment in the State's prison for the term prescribed by law. They appeal from the judgments of conviction, claiming that the evidence is insufficient to support the verdict and judgments.

At about 11:00 p. m. on January 3, 1958, Oliver Hinkle, proprietor of the Santa Fe Liquor Store, 406 East Main Street in Visalia, while in his store heard "a loud noise, a crash of breaking glass." He stepped out of the door of his store and saw two men turning away from a broken window in Chuck's Used Furniture Store next door. The men were at a distance of not more than 15 feet from Mr. Hinkle and he called "hold it" to them. They

stopped and looked around and he recognized the appellants, who had been patrons of his store. Each had a rifle in his hands and after looking at Hinkle, they ran from the scene.

Charles Larsen, proprietor of Chuck's Used Furniture Store, was called to the store and found that a plate glass window had been broken and that two rifles which had been on display in the window were gone. Larsen also observed a 12 inch crescent wrench wrapped in a handkerchief and lying partly in and partly out of the window. At about 11:00 p. m. on the same night appellants returned to the Hacienda Cafe in Visalia, where they had been earlier in the evening, and appellant Navarette asked Mr. Gutierrez, the proprietor of the cafe, if he was interested in buying a gun.

Prior to the trial it was stipulated that appellants and Mr. Hinkle should be given polygraph examinations by an expert supplied by the California State Bureau of Criminal Identification and that this expert might testify in court as to his findings and opinion. Mr. Joseph McVarish, the expert supplied in this connection, testified that in his opinion Mr. Hinkle was honest in his answers to the questions asked and that the responses of appellants were not truthful. Both defendants denied the burglary.

[1-3] The crime of burglary is committed when any person enters any shop, warehouse or store with intent to commit grand or petit larceny. Pen.Code, sec. 459; *People v. Morlock*, 46 Cal.2d 141, 146, 292 P.2d 897. The fact that burglary was committed is not controverted and the evidence is amply sufficient to show that fact. The commission of the burglary herein was not witnessed. However, it is well settled that a finding of guilty may be based on circumstantial evidence (*People v. Goodall*, 104 Cal.App.2d 242, 247, 231 P.2d 119; *People v. Dickerson*, 131 Cal. App.2d 49, 53, 279 P.2d 991), and the evidence herein amply supports the verdict of the jury finding appellants guilty as charged in the information.

[4] The record shows that the judgments herein were rendered on Friday, February 28, 1958, and that the notice of appeal of each appellant was filed with the clerk of the superior court in Tulare county on Tuesday, March 11, 1958. Rule 31 of the Rules on appeal provides in part that "In the cases provided by law, an appeal may be taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order, \* \* \*" This time limitation has been held to be jurisdictional and in the event of a failure to file a timely notice of appeal, the appeal must be dismissed. *People v. Behrmann*, 34 Cal.2d 459, 461, 211 P.2d 575; *In re Horowitz*, 33 Cal.2d 534, 537, 203 P.2d 513. There is no showing in the instant case of a convincing or of any excuse for the delay in filing the necessary notices of appeal and the appeals must, therefore, be dismissed. *People v. Riser*, 47 Cal.2d 594, 596, 305 P.2d 18.

Appeals dismissed.

GRIFFIN, P. J., concurs.



163 Cal.App.2d 175

**Jeannette HOLBERT, Plaintiff and Respondent,**

**v.**

**Coe WILSON, Defendant and Appellant.**  
**Clv. 22824.**

District Court of Appeal, Second District,  
Division 3, California.

Aug. 26, 1958.

Suit to establish and enforce constructive trust. The Superior Court of Los Angeles County, Robert E. Roberts, J., entered a decree requiring defendant to convey property to plaintiff, and defendant ap-

pealed. The District Court of Appeal, Nourse, J. pro tem., held that if, as alleged, plaintiff had conveyed property to decedent without consideration and with understanding that the property should in fact remain that of plaintiff and if, as alleged, defendant had taken record title to property from decedent with knowledge of agreement between plaintiff and decedent, defendant had become constructive trustee, and held that it would be immaterial whether he had induced decedent to breach trust through undue influence or whether she had breached it of her own volition.

Affirmed.

#### 1. Appeal and Error ☞854(2)

Where complaint alleged cause of action and findings supported cause, trial court's judgment, being in fact correct, would have to be affirmed, even if trial court had reached its decision on erroneous theory.

#### 2. Trusts ☞95

If, as alleged, plaintiff had conveyed property to decedent without consideration and with understanding that the property should in fact remain that of plaintiff and if, as alleged, defendant had taken record title to property from decedent with knowledge of agreement between plaintiff and decedent, defendant became a constructive trustee, and it would be immaterial whether he had induced decedent to breach trust through undue influence or whether she had breached it of her own volition.

#### 3. Specific Performance ☞106(1)

Decree requiring defendant to convey certain real property to plaintiff would affect only the parties, and personal representative of defendant's deceased grantor (who had allegedly held property in trust for plaintiff) was not an indispensable party.

#### 4. Action ☞37

That complaint was entitled, and that proceeding was referred to, as one to quiet title would not preclude granting relief to



plaintiff, even though she asserted no title in herself but only an equitable right, where constructive trust was alleged and proved.

#### 5. Trusts $\Rightarrow$ 374

Trustee's grantee was entitled to possession under his deed until trustee's death, and where there was no evidence of an agreement by beneficiary of trust to pay taxes upon property, trial court was justified in not requiring beneficiary to pay taxes as condition precedent to recovering title from trustee's grantee, who had had possession of property from time of trustee's death without paying rent.

Shepherd & Shepherd, Los Angeles, for appellant.

Brandon & Marnell, Huntington Park, for respondent.

NOURSE, Justice pro tem.

Defendant appeals from a decree by the terms of which he is ordered to convey certain real property to the plaintiff.

[1] The complaint and the findings of fact are, to say the least, inartificially drawn, but we have reached the conclusion that by the complaint, facts are alleged which spell out a cause of action and that by the findings, facts are found, which support that cause of action; and, that therefore, even though it may be that the trial court reached its decision on an erroneous theory, its judgment, being in fact correct, must be affirmed. *Sears v. Rule*, 27 Cal. 2d 131, 140, 163 P.2d 443; *Bank of America National Trust & Savings Ass'n v. Vanini*, 140 Cal.App.2d 120, 127, 295 P.2d 102.

The following facts may be gleaned from the complaint, although not clearly alleged therein: Plaintiff was a sister of one Anna Hilburn, hereinafter called "Anna," and a relationship of trust and confidence existed between them; in 1933 Anna deeded the real property in question to plaintiff and plaintiff in consideration of the deed undertook to provide care, comfort and sustenance for Anna during her life; in 1952

plaintiff conveyed the property to Anna without consideration; Anna agreed that the property would be kept by her and the title would be vested in plaintiff at Anna's death and that Anna would hold the record title to the property during her lifetime in order that she might have a feeling of security but that the property should in fact remain that of the plaintiff; defendant had actual knowledge of this agreement between the plaintiff and the decedent and, despite this knowledge, induced Anna to convey the property to him without consideration. These facts spell out a constructive trust under which defendant held title for the benefit of the plaintiff. *Sherman v. Sandell*, 106 Cal. 373, 374-375, 39 P. 797; *Taylor v. Morris*, 163 Cal. 717, 722-723, 127 P. 66; *Stobie v. Stobie*, 116 Cal.App.2d 360, 366-368, 253 P.2d 765; Civil Code, § 2243.

[2] Each of the facts which we have heretofore set forth as being alleged in the complaint was found by the trial court to be true and the evidence supports these findings. The trial court further found that Anna was induced to convey the property to the defendant through undue influence imposed upon her by him but we need not here determine whether or not such findings are supported by the evidence; for, as the evidence supports the court's finding of the trust upon which Anna held the property and its finding that defendant took record title to the property with knowledge of that trust he became a constructive trustee and it is immaterial whether he induced Anna to breach her trust through undue influence or she breached it of her own volition.

[3] Appellant contends that Anna's personal representative was an indispensable party and that the court erred in refusing defendant's request that a representative of her estate be made a party to the action. This contention cannot be sustained.

The decree here entered does not affect and could not bind Anna's heirs or her estate. It affects only the parties to this action. A personal representative of Anna



was not an indispensable party. *Bank of California, Nat. Ass'n v. Superior Court*, 16 Cal.2d 516, 520-526, 106 P.2d 879.

[4] Appellant further asserts that the action is one to quiet title and that plaintiff, by her complaint, has asserted no title in herself but only an equitable right and that therefore an action to quiet title did not lie. It is true that the complaint is entitled and throughout the proceedings was referred to as one to quiet title but that is not conclusive for plaintiff's action was, in fact, not one to quiet title but one to establish and enforce a constructive trust and that is the decree rendered.

[5] It was stipulated at the trial that defendant paid the taxes on the property in question for the years 1952 to 1956, both inclusive. Defendant complains that the decree did not compel the plaintiff to do equity by reimbursing him in the amount of these taxes. Defendant was entitled, under his deed from Anna, to possession of the property until Anna's death and it was only upon his then asserting title adverse to plaintiff that he breached the trust under which he held possession. There was no evidence that plaintiff had agreed to pay the taxes upon the property during the time the record title stood in the name of Anna and defendant was obligated to pay the taxes upon the property from the time he, under his deed, became entitled to possession, until the time of Anna's death. Defendant was in possession of the property in question from the time of Anna's death in August 1955 and did not offer to account for the rental value of the property. The total of the taxes that he paid during the period after plaintiff became entitled to possession amounted to less than \$100 and the court was justified in not requiring the plaintiff, as a condition of the decree, to pay the taxes but to assume that they were offset by the defendant's use of the property during that period. There were no equities in defendant's favor.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

163 Cal.App.2d 286

**Claude A. PIERCE, Plaintiff and Respondent,**

**v.**

**Tommy Ellsworth STANDOW et al., Defendants,**

**Lalla Standow, Defendant and Appellant,**

**Pacific Employers Insurance Company, a corporation, Plaintiff in Intervention, Respondent.**

**Civ. 18019.**

**District Court of Appeal, First District, Division 2, California.**

**Sept. 2, 1958.**

**Rehearing Denied Sept. 22, 1958.**

**Hearing Denied Oct. 28, 1958.**

Action against mother, who was co-owner of automobile, for damages resulting when her automobile, while being driven by her 17 year old son, collided with parked automobile. The Superior Court, County of Alameda, Folger Emerson, J., rendered judgment against mother, and she appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that mother knew that her son was an incompetent and unlicensed driver and that she impliedly consented to son's driving automobile when she entrusted keys to automobile to son.

**Affirmed.**

#### **1. Evidence ⇨587**

A trial judge or jury may disbelieve direct evidence and rely on circumstantial evidence to support a finding.

#### **2. Trial ⇨382**

Even where conflicting inferences may with equal reason be drawn from evidence, the choice of which inference to draw rests in judgment of trier of fact.

#### **3. Automobiles ⇨244(30)**

In action against mother who was co-owner of automobile for damages resulting when automobile was driven by her 17 year old son, admitted fact that mother, who with her son was attending a trade school, entrusted the keys to automobile to son for alleged purpose of permitting him to sit in

automobile while he was free from classes was sufficient to support inference that mother impliedly consented to son's driving automobile.

#### 4. Automobiles $\S$ 244(31)

In action against mother, who was co-owner of automobile, for damages resulting when her automobile, while being driven by her 17 year old son, collided with parked automobile, evidence sustained finding that mother knew that son was incompetent and unlicensed driver when she entrusted keys to automobile to son.

Berry, Davis & Channell, Oakland, for appellant.

Nichols, Williams, Morgan & Digardi, Jesse Nichols, Anthony R. Brookman, Oakland, Phillip M. Millsbaugh, Richmond, for respondent.

#### DOOLING, Justice.

Defendant Laila Standow appeals from the judgment against her based upon the collision of an automobile of which she was a co-owner with a parked automobile while her automobile was being driven by her 17-year old son Tommy. The case was tried without a jury and the judgment against appellant is based upon the findings of the court that at the time of the accident the automobile was being driven by her minor son with her implied consent and permission and that she had knowledge that he was an incompetent driver and had no license to drive.

The sole ground urged on appeal is that the evidence is insufficient to support these findings. The evidence shows that appellant and her son were both attending a trade school. The son finished his classes from one-half to one hour before the mother and each morning when they arrived at the school the mother gave the keys of the car to her son. Mother and son both testified that the mother had on several occasions forbidden the son to drive the automobile and that the only purpose of her giving him the keys was to permit him

to open the car door and sit in the car while he was free from classes.

Appellant concedes in her closing brief "that the trial court could and did disbelieve the testimony of appellant and her son," but she argues that "disbelief of such testimony would not furnish or supply affirmative evidence to the contrary."

[1,2] This argument assumes that from the mother's habitual practice of giving the car keys to her son the trial court could not reasonably infer her implied consent to his driving the automobile. It is well settled that a trial judge or jury may disbelieve direct evidence and rely on circumstantial evidence to support a finding. *Gray v. Southern Pacific Co.*, 23 Cal.2d 632, 641, 145 P.2d 561; *Scott v. Burke*, 39 Cal.2d 388, 398, 247 P.2d 313; *Bohn v. Watson*, 130 Cal.App.2d 24, 34, 278 P.2d 454; *Halstead v. Paul*, 129 Cal.App.2d 339, 341, 277 P.2d 43; *Alonso v. Hills*, 95 Cal.App.2d 778, 786, 214 P.2d 50; *State of California v. Day*, 76 Cal.App.2d 536, 548, 173 P.2d 399. It is also well established that even where conflicting inferences may with equal reason be drawn from the evidence the choice of which inference to draw rests in the judgment of the trier of the fact. *Hamilton v. Pacific Electric Co.*, 12 Cal.2d 598, 603, 86 P.2d 829; *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; *Fry v. Sheedy*, 143 Cal.App. 2d 615, 620, 300 P.2d 242; *Halstead v. Paul*, supra, 129 Cal.App.2d 339, 341, 277 P.2d 43; *Spolter v. Four-Wheel Brake Service Co.*, 99 Cal.App.2d 690, 693-694, 222 P.2d 307.

[3] The admitted fact that appellant daily entrusted to her son the keys to the automobile thus putting it in his power to drive the car at will is, in our judgment, sufficient to support the inference drawn by the trial court that she impliedly consented to his doing so. (Cf. *Casey v. Fortune*, 78 Cal.App.2d 922, 179 P.2d 99, where a similar inference was drawn from the fact that the appellant left the car keys where they were accessible to the minor, knowing that on one or two previous oc-

casions he had driven the automobile.) Here appellant gave the keys repeatedly to her son with knowledge, according to her own testimony, that he had repeatedly indicated to her that he was anxious to drive.

[4] Appellant also argues that there is no evidence to support the finding that she knew that her son was an incompetent and unlicensed driver. She herself testified that he had no driver's license and she further testified that she did not know that he had ever driven an automobile (he testified that he had driven a friend's car a couple of times in the State of Washington) and that he had requested her to permit him to learn to drive but that she had refused.

The evidence is sufficient to support the findings attacked and the findings support the judgment against appellant. 7 Cal.Jur. 2d, Automobiles, § 322, p. 195.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J.,  
concur.



162 Cal.App.2d 139

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**John R. RAY, Defendant and Appellant.**  
**Cr. 6307.**

District Court of Appeal, Second District,  
Division 1, California.

July 15, 1958.

Proceedings on appellant's motion for rehearing and augmentation of the record. The District Court of Appeal held that even though clerk's transcript did not set forth order of court verbatim as did reporter's transcript, there was no substantial conflict in the two transcripts where

clerk's transcript did present ultimate ruling of court and, in substance, the reasons therefor; and held that appellant's application to correct reporter's transcript to conform with order denying his application for writ of error coram nobis as reflected by and set forth in clerk's transcript would be denied.

Petition for rehearing denied.

#### **Criminal Law** §1110(1)

Even though clerk's transcript did not set forth order of court verbatim as did reporter's transcript, there was no substantial conflict in the two transcripts where clerk's transcript did present ultimate ruling of court and, in substance, the reasons therefor; and appellant's application, to correct reporter's transcript to conform with order denying his application for writ of error coram nobis as reflected by and set forth in clerk's transcript, was denied.

John R. Ray, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

#### **PER CURIAM.**

The order of June 23, 1958, in connection with which appellant files this motion for a rehearing, is modified to read as follows:

"Appellant asks this court to correct the reporter's transcript on appeal to conform with the order denying his application for a writ of error coram nobis as reflected by and set forth in the clerk's transcript.

"Both transcripts are now before this court duly certified as required by law, and copies thereof are in the possession of appellant.

"The clerk's transcript sets forth the order appealed from substantially as reflected by the reporter's transcript and the former may be utilized by appellant in the preparation of his briefs. While the clerk's transcript does not set forth the



order of the court verbatim as does the reporter's transcript it does present the ultimate ruling of the court and, in substance, the reasons therefor. We perceive no substantial conflict in the two transcripts.

"The application to correct the reporter's transcript is therefore denied."

The petition for rehearing is denied.



162 Cal.App.2d 793

**SEARS, ROEBUCK AND CO., a corporation, Plaintiff and Respondent,**

**v.**

**H. W. STEWART** in his capacity as Director of the Department of Employment of the State of California, Defendant and Appellant.

Civ. 22804.

District Court of Appeal, Second District,  
Division 3, California.

Aug. 15, 1958.

Hearing Denied Oct. 10, 1958.

Action by employer for refund of assessments made by Director of Department of Employment against employer for unemployment compensation benefits paid to former employees because of disability incurred after their discharge or resignation from employment, but during time for which they had received vacation pay or service pay, alone or in combination. From a judgment of the Superior Court of Los Angeles County, Walter R. Evans, J., in favor of the employer the defendant appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where employer's voluntary plan approved by the director provided that an employee's right to disability benefits would cease upon his resignation or discharge, the former employees were not covered by, and were not entitled to benefits under, the voluntary plan, but that the plan operated to cast upon the

state disability fund liability for benefits to which an employee might be entitled under the statute upon his ceasing to be covered by the voluntary plan.

Affirmed.

#### 1. Master and Servant ⇨78.1(6)

Where employer had, pursuant to Unemployment Insurance Code, adopted a voluntary plan for payment of disability benefits to its employees, which plan provided that an employee's right to disability benefits would cease upon his resignation or discharge, former employees incurring disability during periods for which they had received vacation pay or service pay were not entitled to benefits under employer's voluntary plan. West's Ann.Unempl.Ins.Code, § 3263.

#### 2. Social Security and Public Welfare ⇨242

Employees, in accepting employer's voluntary plan providing unemployment compensation benefits by reason of disability sustained by them, could, in order to obtain benefits conferred by plan which they considered of greater value and more advantageous than those available under statute, relinquish some statutory benefits. West's Ann.Unempl.Ins.Code, §§ 3251-3271.

#### 3. Master and Servant ⇨78.1(3)

Under Unemployment Insurance Code providing that an employer may establish a voluntary plan for the payment of disability benefits to its employees, the plan may, with approval of the Director of the Department of Employment, provide that an employee's right to disability benefits shall cease upon his resignation or discharge. West's Ann.Unempl.Ins.Code, § 3254.

#### 4. Social Security and Public Welfare ⇨242

Where an employer had, pursuant to the Unemployment Insurance Code, adopted a voluntary plan for the payment of disability benefits to its employees, such plan, when approved by the Director of Department of Employment, and accepted by employees, became binding on employer and its employees, and cast upon State Disabili-



ty Fund liability for benefits to which an employee might be entitled under the Code upon his ceasing to be covered by the voluntary plan. West's Ann.Unempl.Ins.Code, § 3263.

#### 5. Master and Servant ☞78.1(6)

Where voluntary plan for disability benefits provided that the right to such benefits terminated upon an employee's having been dismissed or resigned from employment, the fact that another provision of the plan provided that payments would be made for any day of disability for which an employee received "wages" did not entitle employee who had resigned or had been discharged to disability benefits by reason of disability sustained during period for which employee had received vacation pay or service pay. West's Ann.Unempl.Ins.Code, §§ 3251-3271.

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Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., Vincent P. Laffer-ty, Deputy Atty. Gen., for appellant.

John L. Wheeler, John J. McCue, Theodore G. Morris, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Defendant, the Director of the Department of Employment of the State of California, appeals from a judgment in favor of the plaintiff in an action for refund of assessments made by the defendant against the plaintiff for unemployment compensation benefits paid by the appellant to eleven former employees of the plaintiff.

The facts are undisputed and the question presented is purely one of law which may be thus stated: Were the former employees of the plaintiff in question covered by and entitled to benefits under the plaintiff's voluntary plan providing unemployment com-

pensation disability benefits for its employees by reason of disability sustained by them at a time following their discharge or resignation from plaintiff's employ?

At the time of their discharge or resignation each of these employees was entitled to and received from the plaintiff an amount representing accrued vacation pay and/or service pay.<sup>1</sup> Following such resignation or discharge but during a period of time commencing with the day after the day of such discharge or resignation and continuing for the number of days for which his vacation pay or service pay, alone or in combination, was paid, each of such former employees incurred disability within the meaning of the Unemployment Insurance Code.

Pursuant to the provisions of section 3251-3271 of the Unemployment Insurance Code, hereinafter referred to as the Code, the plaintiff, with the approval of the Director of the Department of Employment, adopted a voluntary plan for the payment of disability benefits to its employees. This plan as it existed during the period with which we are here concerned contained, among other things, the following provisions:

"D. Disability Benefits: Any employee while covered under this plan who becomes disabled by any physical or mental illness or injury, except as hereinafter excluded, so as to prevent him from performing his regular or customary work, shall be paid benefits for the period of such disability by this plan as set forth in the following schedule, subject to limitations and provisions hereinafter stated:"

"G. Individual Termination: The participation of any employee under this plan shall terminate: \* \* \* 2. Any employee who ceases to be employed because of a leave of absence or layoff, without pay

1. Under the personnel regulations of the plaintiff, upon termination of employment an employee with one or more years of service who has not taken the vacation due him on his last anniversary date is entitled to pay for his vacation. The employee is also entitled to vacation earned

from his last anniversary date to his last day worked at the rate of  $\frac{1}{6}$  of a week's pay for each calendar month of service. In addition he is entitled to a service allowance at the rate of  $\frac{1}{6}$ th of a week's pay for each four months of service.

which extends for a period of two weeks or more; of [sic] because of resignation, dismissal, being pensioned or retired, shall cease to be covered by this plan at the end of such two weeks or upon termination of the employer-employee relationship by reason of resignation, dismissal, being pensioned or retired.”<sup>2</sup>

[1] The provision last above quoted would seem to make unmistakably clear that an employee's right to disability benefits under the plaintiff's voluntary plan ceases upon his resignation or discharge. Indeed, it would be difficult to select language which would more clearly express this thought. Appellant, however, asserts that it does not mean what it plainly says. The argument in support of this contention is as follows: Vacation and service pay constitute “wages” (Jones v. California Employment Stabilization Commission, 1953, 120 Cal.App.2d 770, 262 P.2d 91); section 1252 of the Code provides that “An individual is ‘unemployed’ in any week during which he performs no services and with respect to which no wages are payable to him”; section 1251 provides that unemployment compensation benefits are payable to “unemployed individuals” and one receiving wages is not unemployed and hence not entitled to unemployment benefits. Bradshaw v. California Employment Stabilization Commission, 1956, 46 Cal.2d 608, 610-612, 297 P. 2d 970. Thus it necessarily follows, so says the appellant in effect, that one who is not “unemployed” because he is receiving “wages” must be employed by someone, namely: the one from whom he has received “wages” (vacation pay and service pay) during the period in question.

This argument is tersely but effectively answered by the brief memorandum opinion

of the trial judge in announcing his decision herein with which we are in full accord:

“In this case as was indicated in the conference between the court and the attorneys for the parties herein on June 3rd, the court finds no quarrel with the authorities cited by both counsel and the propositions for which those authorities stand. However, in spite of the fact that it is now definitely established that the ‘vacation pay’ and ‘service pay’ referred to in the stipulation of facts herein is wages insofar as unemployment benefits are concerned, such a fact is of no consequence and has no bearing on the question before the court at this time.

“The voluntary plan of the plaintiff which was approved by the defendant and accepted by the employees is clear and concise, and without ambiguity in that the right to disability benefits thereunder terminates with the termination of the employer-employee relationship, which termination was the date of dismissal or resignation of the said employees.

“Under the plaintiff's voluntary plan which terminates the right to disability benefits upon resignation or dismissal, the State, in paying such benefits, is merely paying something it is obligated for under the statute, and which has not been provided for by the employer and for which the employer is not liable by reason of the provisions of said voluntary plan.”

[2-4] The voluntary plan established by plaintiff and accepted by its employees was, as stated, approved by the director. Presumably it conformed to the conditions prescribed as prerequisite to the approval of such a plan by section 3254 of the Code, including among other things that “The rights afforded to the covered employees are

cause of a leave of absence or layoff, without pay which extends for a period of two weeks or more; or because of resignation, dismissal, being pensioned or retired, shall cease to be covered by this plan at the end of such two weeks or immediately upon his resignation, dismissal, being pensioned or retired.”

2. This was the language of this provision as it read during the period from and after January 1, 1954. From January 1, 1952, to December 31, 1953, it read as follows:

“G. Individual Termination: The participation of any employee under this plan shall terminate: \* \* \* 2. Any employee who ceases to be employed be-

greater than those provided for in Chapters 2 and 3 of this part." We must assume that the plaintiff's employees, in considering whether to accept the voluntary plan, weighed the relative benefits afforded thereby as against those available to them under the statute, and concluded that the plaintiff's plan was the most advantageous to them. There is no reason why the employees in accepting the plan could not relinquish some benefits under the statute in order to obtain benefits conferred by the plan which they considered of greater value and more advantageous than those available under the statute. We find nothing in the Code which suggests that, with the approval of the director, such a voluntary plan may not provide, as does the one here, that the employee's right to benefits thereunder shall cease upon resignation or discharge. Nor need we pause to consider whether the director could have refused to approve the plan because it contained this provision for, having received his approval, it became not only a binding contract between the plaintiff and its employees but it operated to cast upon the State Disability Fund liability for benefits to which an employee might be entitled under the statute upon his ceasing to be covered by the voluntary plan. Unempl. Ins.Code, § 3263.

[5] The only other provision contained in the plan to which appellant refers in support of its contention is that found in the paragraph entitled "Limitations" and which reads as follows:

"Benefits for any day of disability for which the employee receives wages shall be paid in an amount not to exceed the benefits provided in paragraph D1 which, together with any wages received by the employee, do not exceed  $\frac{1}{4}$  of 70% of his weekly wage immediately prior to the commencement of his disability."

Appellant asserts that this provision demonstrates that payment of disability insurance benefits under the plan was contemplated for any day of disability for which the employee receives "wages." This may readily be conceded but it does not operate

to establish, as appellants suggest, that one who has resigned or been discharged continues to be an "employee" entitled to benefits under the plan in view of the provision previously quoted which expressly provides that the right to benefits thereunder shall cease upon resignation or discharge. Moreover, the provision last above quoted does not undertake to define eligibility to benefits but rather to prescribe a limitation upon the amount of the benefits payable in accordance with section 2656 of the Code.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 89

**L. A. JONES, as Guardian of the Estate  
of Roderic Allan Stellar, an Incompetent  
person, Plaintiff and Respondent,**

**v.**

**Murray H. ROBERTS, as Executor of the  
Estate of Robert W. Stellar, Deceased,  
Defendant and Appellant.**

Civ. 22984.

District Court of Appeal, Second District,  
Division 1, California.

Aug. 21, 1958.

Action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care. The Superior Court of Los Angeles County, Fred Miller, J., granted the relief sought, and defendant appealed. The District Court of Appeal, White, P. J., held that it had not been inequitable to impound the sum of \$360 annually for expected increase in cost of hospitalizing the incompetent.

Judgment reversed and cause remanded with directions.



**1. Executors and Administrators** Ⓒ285

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, court had power, under Probate Code section, to make decree requiring sequestration of property as security for performance of decedent's obligations under agreement. West's Ann. Prob.Code, § 953.

**2. Executors and Administrators** Ⓒ221(9)

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, evidence would sustain finding that \$250 annually was a necessary additional clothing expense under property settlement agreement.

**3. Executors and Administrators** Ⓒ236, 239

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, trial court's discretion could not be arbitrarily exercised, but appellate tribunal could not substitute its judgment for that of trial court unless it clearly appeared that case had been made reasonably justifying conclusion that questioned finding of trial court indicated a lack of ordinary good judgment and that no reasonable inferences could be drawn from evidence to support finding and judgment predicated thereon.

**4. Executors and Administrators** Ⓒ202(1)

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, it was,

absent showing of necessity for outside and independent psychiatric examinations each year, error to allow \$250 annually for medical examinations to be made by psychiatric expert not affiliated with state hospital where incompetent was kept.

**5. Executors and Administrators** Ⓒ285

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, it was not error to sequester the sum of \$360 annually for expenses and fees of trustee to administer trust funds of incompetent, even though it was incompetent's guardian (the plaintiff) who was appointed trustee and even though property settlement agreement made no provisions for trustee's fees. West's Ann.Prob.Code, §§ 953, 953.1, 1122.

**6. Evidence** Ⓒ18

Court was entitled to take judicial notice of economic condition of country and that cost of living had been steadily increasing while purchasing power of dollar had been steadily decreasing.

**7. Executors and Administrators** Ⓒ285

In action against executor of decedent's estate for moneys allegedly due to decedent's son as third-party beneficiary under terms of property settlement agreement obligating decedent to support his incompetent son and furnish him with certain hospital and institutional care, it was not inequitable to impound the sum of \$360 annually for expected increase in cost of hospitalizing the incompetent.

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Robert Sikes, Los Angeles, for appellant.  
Mason, Kinley & Wallace, William Kinley, Long Beach, for respondent.

WHITE, Presiding Justice.

Plaintiff L. A. Jones, as guardian of the Estate of Roderic Allan Stellar, an incompetent, instituted this action against defendant Murray H. Roberts, as executor of the



Estate of Robert W. Stellar, deceased, for moneys allegedly due to the incompetent as a third party beneficiary under the terms of a property settlement agreement between the decedent Robert W. Stellar during his lifetime, and Marjorie Stellar, the parents of the incompetent.

The complaint contained two causes of action, the second of which was dismissed by stipulation at the pretrial hearing. The remaining first cause of action alleged that in connection with a property settlement agreement dated December 26, 1951, the aforesaid parents of the incompetent contracted that the father, Robert W. Stellar, would support the incompetent son and furnish him with certain hospital and institutional care. The answer denied generally the allegations of the complaint other than the execution and validity of the property settlement agreement.

The record reflects that the incompetent son is presently confined in the State Hospital at Camarillo, California, suffering from a mental disorder known as schizophrenia. That this affliction will make it impossible for the incompetent son to support and maintain himself and will require his hospitalization and medical care for the duration of his life; that his life expectancy is conceded to be forty-two years.

The terms of the aforesaid property settlement agreement insofar as here pertinent are as follows:

"\* \* \*; Husband further agrees to pay all nurses, doctors, institutional and hospital expenses reasonably necessary in the treatment and care of said minor child (Roderic Allan Stellar) (parenthesis added) until he attains the age of twenty-one years. After the said minor attains the age of twenty-one years, should it be necessary to incur doctor, nurse, hospital or institutional expenses in order to treat and care for said child, Husband shall pay the first \$300 per month on account of said expense and any overage shall be borne by the parties jointly."

Following execution of this agreement and subsequent divorce of the parents of the incompetent, his father remarried. The

latter died on April 15, 1954, leaving as his heirs and legatees his widow Shirley Stellar, a son Charles A. Stellar, his incompetent son Roderic Allan Stellar, his posthumous daughter Deborah Stellar, and his brother Arnold T. Stellar. The estate of the deceased father Robert W. Stellar is solvent and financially able to pay the claim which is the subject of this litigation, having gross assets of approximately \$350,000 and distributable assets of between Ninety and One Hundred Twenty Thousand Dollars.

Following trial before the court, sitting without a jury, findings were made, and insofar as necessary for the disposition of this appeal, are as follows:

"XIII. That the necessary expenses to provide the said Roderic Allan Stellar, the incompetent herein, with doctors, nursing care, institutional or hospital care, to treat and care for said incompetent, is the sum of Three Thousand Twenty Dollars (\$3,020) annually. *That said sum is made up of the following items of expense: \$1,800.00 annually for hospitalization in Camarillo State Hospital; \$250 annually for clothing; \$250 annually for medical examinations; \$360 annually for expenses and fees of a trustee to administer the trust funds of said incompetent; and the sum of \$360 annually for the increased costs of hospitalizing said incompetent during his forty-two year life expectancy.* (Emphasis added.)

"XIV. That the cost of hospitalizing said incompetent in the Camarillo State Hospital has increased by the sum of \$16 per month since January 1, 1955, and that further increases in the cost of hospitalizing said incompetent during his life expectancy of forty-two years are reasonably certain to occur.

\* \* \* \* \*

"XXI. That to provide Roderic Allan Stellar, the incompetent herein, with the funds necessary for his care in the sum of \$3,020 annually, as found in Finding No. XIII herein, for a period of forty-two years, the life expectancy of said incompetent, will require the sum of \$69,670.80

drawing interest at the rate of  $3\frac{1}{4}\%$  per annum."

Judgment was rendered in favor of plaintiff, directing that defendant Executor pay to plaintiff guardian the sum of \$69,670.80 to be held in trust by plaintiff guardian for the use of the incompetent.

The judgment further provided, "That in the event the said Roderic Allan Stellar shall, prior to the expiration of his estimated forty-two years of life expectancy, die or be restored to capacity, then the corpus of said trust funds remaining in the hands of the trustee shall at that time forthwith be distributed in the same manner and to the same persons and in the same respective proportions as shall be made in the decree of final distribution in the Estate of Robert W. Stellar, Deceased, \* \* \* now pending in this court." This appeal is prosecuted by defendant executor from the judgment.

As indicated by the findings, the court estimated that the amount necessary to provide the incompetent with medical and institutional care is the sum of \$3,020 annually. Using this figure as a basis, extended over a period of forty-two years, the agreed life expectancy of the incompetent, the court concluded that the sum of \$69,670.80 earning  $3\frac{1}{4}\%$  interest would be required. The annual figure of \$3,020 was calculated by the court as follows:

(1) The sum of \$1800 annually for hospitalization and care in the State Hospital at Camarillo;

(2) \$250 annually for clothing;

(3) \$250 annually for medical examinations;

(4) \$360 annually for expenses and fees of a trustee to administer the trust funds in the judgment;

(5) \$360 annually for increased costs of hospitalizing the incompetent in the future.

Appellant concedes the validity of the first item of \$1800 for hospitalization and care at the State Hospital, but challenges the remaining four annual figures, contending that the findings thereon are without evidentiary support.

[1] As a prelude to his argument, appellant asserts that, "\* \* \* this is a simple *legal* action to recover moneys due on a contract. Accordingly, the trial court may not, in this case, sit as an equity judge would in a domestic relations matter and set certain figures for support or care which in his opinion were equitable. The trial court here may only award the plaintiff such moneys as the plaintiff had, by a preponderance of the evidence, shown he was entitled to under the strict provisions of the contract."

With this contention we cannot agree. This case involves the power of the court under Section 953 of the Probate Code to make a decree requiring the sequestration of property as security for a claim not due or contingent. That such a proceeding is an action in equity and that the equity side of the court may be invoked to protect the owners of contingent claims which will mature after the period within which distribution in the estate may take place, was the holding in *Dabney v. Dabney*, 9 Cal. App.2d 665, 673, 51 P.2d 108; *Vallelunga v. Gomes*, 102 Cal.App.2d 374, 382, 227 P.2d 550.

[2] We are satisfied that appellant's attack upon the finding that \$250 annually was a necessary additional clothing expense under the property settlement agreement cannot be sustained. At the outset it should be noted that neither the incompetent or his guardian has a vested right in the total amount of the judgment entered herein. The respondent guardian has the right to expend from that fund the sums of money, not exceeding \$300 monthly in accordance with the property settlement agreement, that are necessary for the maintenance and support of the incompetent. It is also noteworthy that according to the judgment herein, should the incompetent recover to the extent that he could return to a normal life in society, thereby no longer requiring medical care or hospitalization, or should the incompetent die, the unexpended remainder of the fund set aside by the trial court and in the possession of the trustee would then be



distributed by the probate court in accordance with the decree of distribution made by that court.

[3] While the discretion of the trial court in a proceeding such as the one now engaging our attention must not be arbitrary or capricious and must be exercised within reason, it is equally true that an appellate tribunal may not substitute its judgment for that of the court below unless it clearly appears that a case has been made reasonably justifying the conclusion that the questioned finding indicates a lack of ordinary good judgment, and that no reasonable inferences can be drawn from the evidence to support the finding and the judgment predicated thereon. We are satisfied that the finding now under consideration cannot be thus strictured. There was evidence that the only clothing furnished to the incompetent by the state hospital was the "bare necessities", or "a ward uniform" consisting of "blue denims and an old shirt". In addition to the testimony of respondent guardian wherein he estimated that the cost of providing the incompetent with clothing would be approximately \$100 annually there is in the record testimony by Mrs. Marjorie H. Stellar, mother of the incompetent, that she visited the latter on numerous occasions. That the only clothing furnished the incompetent by the State Hospital was "bare necessities" as aforesaid. That suits, dress shirts, slacks, ties, shoes and slippers had to be furnished to the incompetent from sources other than the hospital. She further testified that the hospital's medical staff felt that having "dress-up" clothing was good for the incompetent's morale and was part of his therapy and that she, herself, had expended the sum of \$130 for clothing for the incompetent approximately two months prior to the time of the hearing of this matter in the trial court. Appellant does not contend that the allowance made by the trial court for clothing for the incompetent son was not within contemplation of the Property Settlement Agreement, but only that there is no evidence in the record to support the amount of

such allowance. When the estimate of respondent guardian is added to the money expended by the incompetent's mother, and the reasons given for such expenditures, we cannot say that the figure arrived at by the trial court exceeded the bounds of reason, and was devoid of any substantial evidence to support it (*In re Estate of Cornaz*, 8 Cal.2d 347, 355, 65 P.2d 784; *Robertson v. Nichols*, 92 Cal.App.2d 201, 207, 206 P.2d 898).

[4] The next item under attack by appellant is the allowance of \$250 annually for medical examinations to be made by a psychiatric expert not affiliated with the Camarillo State Hospital. We are persuaded that the contention of appellant must be sustained. We are not directed to any evidence in the record which supports a finding that an annual independent psychiatric examination of the incompetent is necessary or reasonably indicated. At the trial it was stipulated that Dr. John B. Doyle would testify to the facts and opinions contained in his letter to Robert Sikes, attorney for appellant under date of June 12, 1956, and which letter was admitted into evidence. This independent examination cost \$250. The addendum to Dr. Doyle's letter contains some six pages of the medical record of the incompetent at the State Hospital, and also states that the latter is receiving complete medical and psychiatric care at the hospital. That the incompetent has been under the care of Doctors Nash, Talbot and Jussman (the latter being Senior Clinical Psychologist). That the incompetent has been receiving electro-shock therapy, music therapy, and applications of thorazine, all approved methods for treating the ailment of the incompetent. There is no evidence that the facilities provided at the State Hospital are inadequate or that the incompetent, while at the State Hospital, is not at all times receiving the care and attention of able and competent physicians and psychiatrists. Respondent urges that the trial court was empowered to determine that it was for the best interests not only of the incompetent but also the heirs and legatees

to have an annual opinion and other advice of an independent medical expert to determine the exact mental condition of the incompetent, "in order that the funds set aside by the trial court in this proceeding for his medical care and support could, as soon as possible, be made available for distribution to the heirs and legatees of the decedent." We see no valid reason why this determination could not be made on the medical records kept of the periodical examinations made and the prognosis arrived at by the medical and psychiatric staff of the State Hospital. Respondent advances the further argument that "the trial court might also take judicial notice that at some time during the next forty-two years the incompetent might recover sufficiently to enable him to be discharged from Camarillo State Hospital or to be hospitalized in an independent institution but would still require medical attention and care which would not be furnished by some state agency." However, in that event it is manifest that respondent guardian could then resort to the \$1,800 allowed for maintenance of the incompetent at the State Hospital, which payment to the hospital would cease when and if the incompetent was discharged therefrom. There being a complete absence of any showing of the necessity for outside and independent psychiatric examinations each year, it necessarily follows that the allowance therefor was erroneous.

In considering the equities involved in this proceeding, regard must be had for the terms of the Property Settlement Agreement, the value of the estate and the interests of the widow, the infant daughter of decedent, the other son, as well as the incompetent. In the estate of the latter there is at present some \$7,200 to which will be added  $\frac{7}{8}$  of his deceased father's estate.

[5] A serious question is presented by appellant's contention that the court erred in sequestering the sum of \$360 annually for the expenses and fees of a trustee to administer the trust funds of the incom-

petent over a life expectancy period of forty-two years, totaling \$8,196.48. Appellant concedes that respondent guardian is entitled to his reasonable fees and expenses from the estate, under the provisions of Probate Code, Section 1556, but urges that such compensation must come from the funds of the incompetent's estate (consisting of \$7,200 and  $\frac{7}{8}$  of the estate of his deceased father), but not out of the assets of the decedent's estate being administered by appellant executor. The latter argues that in the present proceeding the court is not appointing a trustee to handle this particular claim of the incompetent under Section 953.1 of the Probate Code because the incompetent already had an estate and there was a guardian-trustee acting for the ward. That the court in the instant proceeding is merely determining the amount to be delivered to this guardian-trustee on the incompetent's claim against the estate of his father. That respondent guardian should look to his ward's estate generally and in its entirety and this would include the guardian's fees for handling the total trust estate inclusive of the judgment rendered in the case at bar.

Appellant earnestly contends that his argument finds support in the language of Probate Code, Section 953, upon which respondent bases this action and which he contends authorizes only the setting aside from the decedent's estate "\* \* \* such part of the same as the holder (of the contingent claim) would be entitled to if the claim were due". (Emphasis added.) That since if the incompetent's claim were due he would not be entitled to any additional allowance for the fees or expenses of his guardian to administer it, the same reasoning applies to a contingent claim, payable in installments or on the happening of a stated event.

From the judgment entered herein it is at once apparent that the court proceeded under the provisions of Section 953.1 of the Probate Code which authorizes the court to appoint a trustee to whom the funds sequestered from the estate shall be



paid, and who shall make the payments therefrom as authorized by the court. We are persuaded that the court having appointed a trustee was authorized, under Section 953.1 to set aside a sufficient sum of money from which the probate court could at a future time make its order to compensate the trustee upon a proper showing, for his services rendered to the trust estate (Probate Code, Section 1122). Had the court proceeded under Section 953 rather than 953.1 it would have been necessary to have set aside from the assets of the decedent father's estate a sum of money in cash to cover the medical care, hospitalization, etc., required by the incompetent for a period of forty-two years, which was the latter's life expectancy. This cash fund would have been delivered to the county treasurer subject to the continuing jurisdiction of the trial court sitting as a court in equity, to order the monthly payments as required (*Vallelunga v. Gomes*, supra, 102 Cal.App.2d at page 379, 227 P.2d at page 553). Had that procedure been followed in the trial court, the sum of \$75,000 in cash would have been deposited with the court designated depository to provide the bare essentials of hospitalization and medical care for the incompetent at the rate of \$1,800 annually for a period of forty-two years. The procedure adopted by the court under Section 953.1 of the Probate Code has saved to the estate and the heirs and legatees approximately \$6,000.

Appellant strongly urges that there is no provision whatsoever in the property settlement agreement for any obligation on the part of decedent father for trustee's fees nor is there a trust set up therein. That it is a mere contract partially for the benefit of a third party, the incompetent son. The answer to this contention is that insofar as the provisions of the property settlement agreement with which we are here confronted are concerned, the primary purpose thereof was to provide funds for the medical treatment and care of the incompetent son, and for which purposes the aforesaid agreement provided the decedent

father would pay the first \$300 per month required. Had the court followed appellant's contentions, a situation could well arise wherein funds allocated to pay for hospitalization and medical care would be depleted because of the allowance therefrom of compensation for the trustee and attorneys' fees, etc. It must be remembered that when decedent entered into the property settlement agreement he was, at the time, aware of the mental and physical condition of his incompetent son. He was aware of the cost of medically treating and hospitalizing him. With knowledge of these factors in mind, the decedent agreed to provide up to \$300 monthly for that purpose. It must also be assumed that, fortified with independent legal advice, he realized that in the event of his death, a fund must necessarily be established out of his estate to be administered by a trustee, to the end that such fund would be utilized to carry out the terms of his aforesaid agreement, and that the expenses of maintaining that fund and administering it would become a part of that cost and expense. Since the monthly sum awarded by the court for the support, care and maintenance of the incompetent does not exceed in totality the amount of \$300, we cannot say that the court, sitting in equity, was without authority, under the terms of the property settlement agreement, to set aside an amount out of which fees for the trustee could later be awarded by the Probate Court without diminishing the amount of money necessary for the maintenance and care of the incompetent son of decedent.

[6,7] Finally, appellant insists that the finding of the court, " \* \* \* that further increases in the cost of hospitalizing said incompetent during his life expectancy of forty-two years are reasonably certain to occur", and setting aside \$360 additional per year for such increased hospitalization costs, is not supported by any substantial evidence. Appellant contends that setting aside the aforesaid sum to cover the anticipated increased cost of hospitalization and care during the ensuing

forty-two years of life expectancy of the incompetent amounts to mere conjecture and speculation unsupported by substantial evidentiary facts. With this contention we cannot agree. There was evidence before the court that the cost of maintaining this incompetent in the State Hospital at Camarillo has increased at the rate of \$16 per month since January 1, 1955, and the court was entitled to take judicial notice of the economic condition of the country, that the cost of living is steadily increasing while the purchasing power of the dollar is steadily decreasing. In determining a matter such as this, no method could be devised that would be free of difficulties. The court was attempting to make the incompetent secure through a fund adequate for his maintenance, hospitalization and medical care, in accordance with the provisions of the property settlement agreement, and for a life expectancy of forty-two years. While of course, the future is hidden from judicial view, we cannot say that there is anything grossly inequitable, or at all inequitable about the order impounding the sum of \$360 annually for the increased cost of hospitalizing the incompetent, in the light of the foregoing increase of care and hospitalization of \$16 per month between January 1, 1955 and the date of trial; the existing economic conditions and the prognosis for the future based on the experience of the past.

Both appellant and respondent concede a mathematical error in the computation of the court which if the judgment as rendered were affirmed would reduce the amount thereof by the sum of \$910.72. However, since the cause must be remanded for further proceedings, the error in question can be corrected.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to enter a new and different judgment for plaintiff in accordance with the views herein expressed. The parties will bear their respective costs on appeal.

FOURTH and LILLIE, JJ., concur.

J. W. BERNARD, J. R. Cambiano, Warren Driver, L. B. Gibbs, H. J. Harkleroad, J. W. Howard, K. Kenneth, V. W. Munn, E. M. Sills, and Earl E. Thomas, as Trustees of the Carpenters Health and Welfare Trust for Southern California, Plaintiffs, Appellants and Cross-Respondents,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Hudson Construction Company, Defendants,

Indemnity Insurance Company of North America, Respondent and Cross-Appellant.

Civ. 22241.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1958.

Hearing Denied Sept. 24, 1958.

Action by trustees of union health and welfare fund against public works contractor and surety on its bond to recover health and welfare payments which public contractor was required to pay into trust fund under labor contract. The Superior Court, Los Angeles County, Leon T. David, J., entered judgment dismissing action as against surety and trustees appealed and surety cross-appealed from order denying attorneys' fees. The District Court of Appeal, Fourth, J., held that surety on bonds required to be furnished by contractor, under statute, and guaranteeing payment for any work or labor, was liable for payments required to be made by public contractor into union health and welfare fund under collective bargaining agreement.

Reversed and cause remanded with directions.

Opinion, 324 P.2d 628, vacated.

# I. Schools and School Districts 81(2)

Under statute requiring that public works contractor's bonds should provide, among other things, that if contractor fails to pay for any work or labor the surety would pay for the same, surety was liable to trustees of union health and welfare

fund for payments required to be made into fund by public contractor under collective bargaining agreement requiring employer to make payments of specified sums for each hour of work by each union employee. West's Ann.Gov.Code, §§ 4200-4208, 4204.

## 2. Labor Relations ⇨131

Trustees of union health and welfare fund into which public contractor, who gave required bond, had to make payments under collective bargaining contract were assignees under equitable assignment of rights and claims of union members, and had right to sue surety on bond to collect payments contractor had failed to make into such fund. West's Ann.Gov.Code, §§ 4204, 4205.

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George M. Cox, Los Angeles, Charles P. Scully, San Francisco, for appellants and cross-respondents.

### 1. The pertinent provisions of the Trust Fund are as follows:

#### Article II:

##### "Section 1.

"(a) There is hereby created the Carpenters Health and Welfare Trust for Southern California, which shall consist of all contributions made into the Fund and all interest, income, and other returns thereon of any kind whatsoever, together with the policies and all property and assets of the Fund.

"(b) Such amounts are held in trust for the purpose of paying, either from principal or income or both, for the benefit of the employees, their families and dependents, for medical or hospital care, or insurance to provide any of the foregoing, or life insurance, or non-occupational disability and sickness insurance, or accident insurance.

"Section 2. The Fund shall have its principal office in the County of Los Angeles, State of California.

"Section 3. Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan.

Johnson & Stanton, Gardiner Johnson, Thomas E. Stanton, Jr., San Francisco, amici curiæ (for Carpenters Health & Welfare Trust Fund for California et al.)

Anderson, McPharlin & Connors, Los Angeles, for respondent.

## FOURT, Justice.

This is an appeal from a judgment which ordered the dismissal of the action as against the respondent surety company after sustaining of a demurrer to the amended complaint without leave to amend.

There appears to be no serious dispute as to the facts of the case. Appellants constitute the board of trustees of the Carpenters Health and Welfare Trust for Southern California (sometimes hereinafter referred to as the "Trust Fund"), which Trust Fund was established pursuant to a collective bargaining agreement (sometimes hereinafter referred to as the "Master Labor Agreement").<sup>1</sup>

"Section 4. Neither the Employers, any signatory association, any employer, the Unions, any signatory union, any employee, any beneficiary of the Health and Welfare Plan nor any other person shall have any right, title or interest in the Fund other than as specifically provided in this agreement, and no part of the Fund shall revert to the Employers, any signatory association, or any employer. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of the Employers, any signatory association, any employer, the Unions, any signatory union, any employee, or any beneficiary. No part of the Fund, nor any benefits payable in accordance with the Health and Welfare Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any person; provided, however, that the Board of Trustees may establish a procedure whereby any employee may direct that benefits due him to be paid to an institution in which he is hospitalized in consideration for medical or hospital services rendered or to be rendered."

#### Section 1(a) of Article IV:

"The Fund shall be administered by a Board of Trustees which shall consist



The Master Labor Agreement was executed in 1954 by and between the Associated General Contractors of America, Southern California Chapter, the Building Contractors of California, Inc., the Excavating and Grading Contractors Association, Inc., and the Home Builders Institute, Inc., on behalf of their respective contractor-employer members engaged in construction work in eleven Southern California Counties, and the United Brotherhood of Carpenters and Joiners of America, on behalf of the carpenter-employees of said contractor-employer members. The Master Labor Agreement contains provisions relating to the wages, hours and working conditions of the carpenter-employees of said members in the Southern California area.

Article XXI of the Master Labor Agreement provides as follows:

"The parties agree to establish a joint Health and Welfare Trust Agreement between the Contractors and the Carpenters. Effective Sep-

tember 1, 1954, the Contractors shall make payments to the Health and Welfare Fund of 5¢ per hour worked per employee under this Agreement. Effective May 1, 1955, payments to the Health and Welfare Fund by the Contractor shall be increased 5¢ per hour. The establishment of the Joint Trust Fund and other terms and conditions of the Health and Welfare Plan shall be completed by a joint committee. Benefits to workmen shall commence not later than six months from September 1, 1954. This provision shall remain in full force and effect and not subject for re-opening through April 30, 1957."

The Trust Fund was established by the same parties as those who negotiated the Master Labor Agreement.

About August 27, 1954, Hudson Construction Company (sometimes herein referred to as the "Contractor") executed a collective bargaining agreement with the Building and Construction Trades Councils

of ten (10) trustees. Five (5) trustees shall be appointed by the Unions (known as Union Trustees) and five (5) trustees shall be appointed by the Employers (known as Employer Trustees)."

Article V:

"Section 1. The Board of Trustees shall have power to administer the Fund and to administer and maintain the Plan in effect.

"Section 2. The Board of Trustees shall collect and receive all contributions due to the Fund, and shall promptly deposit such contributions in a special trust fund account or accounts established in a reputable bank or banks located in such locality as determined by the Board of Trustees.

"Section 3. The Board of Trustees shall have power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 3 of Article III. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court

costs, and all other reasonable expenses incurred by the Board in connection with such suit or claim.

"Section 4. The Board of Trustees shall collect and receive any and all dividends, interest, returns of premiums or other credits or benefits due from any insurer or otherwise, which the Fund is entitled to receive and shall deposit the same in the Fund or credit the same to the Fund, and all such deposits and credits shall become part of the Fund and shall be used for the purposes stated in this agreement.

"Section 5. The Board of Trustees shall promptly use the monies available in the Fund first to provide the benefits specified in the Plan. The Board shall have power to enter into contracts and procure insurance policies necessary to place into effect and maintain the Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of this agreement and the collective bargaining agreements, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts or policies. Any such contract or policy may be executed in the name of the Fund, and any such policy may be produced in such name."

of the eleven Southern California counties (sometimes herein referred to as the "Agreement"), which provided, in effect, that the Contractor would be bound by the Master Labor Agreement.

During the effective period of the Agreement, the Contractor employed construction carpenters on four construction projects of various school districts in Los Angeles county. The Contractor, pursuant to the provisions of Government Code sections 4200-4208, provided the school districts with four separate bonds (though not identical), each applicable to one of the four construction contracts.<sup>2</sup>

[1] It was claimed that the Contractor failed to make certain of the payments to the Welfare Fund. An action was filed by the Trustees of the Trust Fund against the Contractor and the surety company to collect the amounts due. The amended complaint incorporated, as exhibits, the bonds in question, the Agreement between the Contractor and the Council, the Master Labor Agreement and the Agreement and Declaration of Trust.

The surety company filed a demurrer which was sustained without leave to amend, and this appeal followed from the judgment which was thereafter entered.

Indemnity Insurance Company of North America filed a cross-appeal because the court refused to grant it attorney's fees as costs. In view of our decision on the plaintiffs' appeal, little, if anything, need be said with reference to the cross-appeal.

The issue is whether, under the provisions of the Government Code, the surety is liable to the appellants for the unpaid Health and Welfare contributions which the Contractor agreed to make to the Fund.

2. Government Code, § 4204:

"To be approved, the contractor's bond shall provide that if the person or his subcontractors, fail to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, or for

Counsel in this matter have been of the utmost assistance to the Court through the filing of their complete and comprehensive briefs.

The payment of the contributions to the Health and Welfare Fund is obviously in payment for labor. It would seem to be apparent that if the agreement between the Contractor and the Union provided that the Contractor pay the carpenter five or ten cents per hour above the prevailing wage rate, and the carpenter had, by contract with the Union, agreed to contribute that sum to the Health and Welfare Fund, the surety would have been obligated to make good any default in Contractor's payments of the extra five or ten cents per hour. The surety asserts, in substance, that when the amounts are paid directly to the Fund, then a different rule must prevail. We are of the opinion that under the circumstances no such fine legal distinction can be drawn.

The theory or philosophy of health and welfare plans is commendable. As stated in a United States Senate Committee report, "The existence of welfare and pension programs is a tribute to the free enterprise system. They constitute an important underpinning of our economic security, broadening and supplementing the various governmental programs." Under the plan, the Contractor, by contributing a fixed amount per hour of work to a trust fund, administered by representatives of labor and industry, can provide benefits for employees greater than could be purchased by the individual for the same amount of money. Also, the worker who, by the nature of his craft, is required to shift from one employer to another can pool his credits with the Fund and thereby secure continued protection. It was appropriately

amounts due under the Unemployment Insurance Act with respect to such work or labor, that the surety or sureties will pay for the same, in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon the bond, a reasonable attorney's fee, to be fixed by the court."

said in *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America, (C.I.O.)*, 1955, 203 Or. 342, 279 P. 2d 508, at page 512, 280 P.2d 412:

" \* \* \* Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs. Both situations involve substantially the same thing: a wage increase which takes the form of group insurance. As compared with the situation where a collective bargaining agreement provides for a so-called employer-paid plan, a contract between an employer and a union, such as the one before us, only indicates more specifically what such a group insurance plan really is when it provides that it is to be financed by a wage increase. Therefore, the distinction between employer-paid and employee-paid plans is at best one of form, not of substance, and the rights of the parties are the same in the two situations. *International Woodworkers of America, Local 6-64, C.I.O. v. McCloud River Lumber Co., D.C.*, 119 F.Supp. 475, 486, in interpreting the provisions of a health and welfare insurance program substantially the same as the one before us, said:

" 'To this Court, the difference between "a wage increase intended as the method of financing the health and welfare plan" and "a wage increase to pay for a Health and Welfare Program for the employees' seems like the difference between tweedledum and tweedledee!'" "

In *United States, for Benefit and on Behalf of Sherman v. Carter*, 1957, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776, the Supreme Court had occasion to interpret the Miller Act, 40 U.S.C.A. § 270a et seq., a

federal law, designed to protect those supplying labor for the construction of federal buildings. The agreement involved in the Carter case was a collective bargaining agreement and provided for the payment of seven and one-half cents an hour to trustees of the Health and Welfare Fund, the trustees to use the money to purchase various types of life, accident, hospitalization and surgical benefit insurance for the laborer, as in the instant case. In the Carter case, as here, the laborer had no rights to the contribution except as provided in the trust agreement, and it was provided that the contributions should not constitute or be deemed to be wages. In the Carter case the contractor became insolvent after completing the construction work and paying the laborers their wages. The contractor was unable to make the contribution to the trustees, who then brought an action against the contractor's surety who had issued a bond similar to the bonds in question in this case. While we are mindful that the opinion of the Supreme Court in the Carter case is not necessarily binding upon us in this matter, nevertheless what was said by the Court in that instance is very cogent. After stating, in effect, that the surety's liability on the bond must at least be co-extensive with the obligations imposed by the Act, and that the trustees' rights against the surety depend upon and are measured by the statutory provisions, the court said (353 U.S. at page 216, 77 S.Ct. at page 796, 1 L.Ed.2d at pages 782-784):

" 'The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. [Citing cases.] But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.' *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107, 64 S.Ct. 890, 893, 88 L.Ed. 1163.



"The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material. Thus the Act provides a broad but not unlimited protection.

"\* \* \* The unpaid contributions were a part of the compensation for the work to be done by Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements.

"The surety suggests that Carter's obligation to contribute to the fund was not covered by the statutory bond because that obligation was not set forth in his construction contract with the United States, but appeared only in the master labor agreements. Those labor agreements were also the source of Carter's obligation to pay the 'wages' payable directly to his employees, an obligation concededly guaranteed by the bond. \* \* \*

"The surety also argues that the trustees are not entitled to recover the promised contributions under § 2(a) of the Miller Act, since they are neither persons who have furnished labor or material, nor are they seeking 'sums justly due' to persons who have furnished labor or material. An answer to this contention is found in cases arising under the Heard Act involving suits by assignees of the claims of

persons furnishing labor or material. Such assignees were not the persons who had furnished the labor or material for which the claims were made. They did not seek 'sums justly due' to persons who had themselves furnished labor or material, since the assignments had extinguished the right which those persons had to the performance of the contractors' obligation. Yet these cases established that assignees of the claims of persons furnishing labor or material came within the protection of the statutory bond. \* \* \*

"If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.

"Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, these contributions

are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash."

It will be noted that section 4204 of the Government Code does not limit the surety's liability to the payment of "wages," but refers to the contractor's failure to pay for "any work or labor."

[2] Our view is that the Trustees can properly bring an action such as the one under consideration. Section 4205 of the Government Code specifically provides that the bond shall, by its terms, inure to the persons therein named "or their assigns in any suit brought upon the bond." See *French v. Powell*, 135 Cal. 636, 68 P. 92; *Hub Hardware Co. v. Aetna Accident & Liability Co.*, 178 Cal. 264, 173 P. 81. The Trustees, in this instance, are the assignees under an equitable assignment of the rights and claims of the carpenters, and as such have the right to sue under the circumstances. See *Matter of Otto*, D.C., 146 F. Supp. 786; *McIntyre v. Hauser*, 131 Cal. 11, 14, 63 P. 69; *Goldman v. Murray*, 164 Cal. 419, 422, 129 P. 462; *Thorpe v. Story*, 10 Cal.2d 104, 114, 73 P.2d 1194; *City of Oakland v. California Construction Co.*, 15 Cal. 2d 573, 578, 104 P.2d 30; *City of Oakland v. De Guarda*, 95 Cal.App. 270, 285, 272 P. 779, 273 P. 819.

In a recent case, *In re Embassy Restaurant*, 3 Cir., 1958, 254 F.2d 475, the court had under consideration a situation wherein the contractor had gone bankrupt and had not paid specified amounts to the Welfare Fund. In the employer's bankruptcy proceeding the Trustees of the Welfare Fund filed proofs of claim, seeking priority over tax claims of the United States. The district court, 154 F.Supp. 141, granted the wage priority to the employer contributions and the government appealed. The appellate court said, in affirming the district court (254 F.2d at pages 477-478):

"Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an

essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L.J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages. For this reason we are constrained to disagree with the view of the Second Circuit in the Hack decision [*Local 140 Security Fund v. Hack*, 242 F.2d 375] and to affirm the decision of the district court here."

The respondent maintains that we are bound to a limited and strict interpretation of the statute in question; that health and welfare contributions were not even known when the statute in question was adopted in 1919, and that therefore the legislature never intended that a statutory bond should include such health and welfare payments. The respondent admits however, that "[t]he purpose for which such labor and material bonds are executed is for the benefit of laborers and materialmen. (Citing cases.) It has been held that such statutes and bonds should be liberally construed to effect the purpose of the Legislature. (Citing cases.)"

Respondent also asserts that the section in question, namely § 4204 of the Government Code, was amended in 1947 to make the bond expressly cover State Unemployment Insurance Act taxes, and that therefore, in effect, it was the intention of the legislature, by including one additional obligation, to exclude any other. A complete answer to any such contention is that Unemployment Insurance taxes are a government imposed obligation, whereas health and welfare payments are mutually agreed to obligations in return for work.

Our California courts, in many instances, have interpreted the bond statute in question, with reference to what constitutes "materials" or "supplies." In *Pacific Wood & Coal Co. v. Oswald*, 1919, 179 Cal. 712,

at pages 714-716, 178 P. 854, the court set forth:

"\* \* \* Since the filing of the briefs herein, this court has had occasion to consider the effect of statutes like the one here involved, and has, in at least two cases, declared that such statutes must be given a broader construction than had, perhaps, been thought to be proper theretofore. \* \* The federal decisions, cited in the Sherman Case [*Sherman v. American Surety Co. of New York*, 178 Cal. 286, 173 P. 161], unite in giving to the statute and the bond a liberal interpretation, and hold, accordingly, that the obligation of the sureties will cover such items as cartage and towage of materials, rental of cars and other equipment used by the contractor, freight charges in transporting materials, and even the cost of provisions used by a contractor in feeding his employé's where the location of the work rendered the furnishing of such board necessary. A similar result was reached by Department One in *Bricker v. Rollins [& Jarecki]*, 178 Cal. 347, 173 P. 592. The opinion in that case did, it is true, refer to the inclusion in the statute and the bond of the 'more comprehensive word "supplies."' It relied, however, on the authority of the Sherman Case and the cases there cited. In their reasoning, as well as in their citation of authority, the Sherman and the Bricker Cases must therefore be regarded as authority for the conclusion that items like the one here claimed are recoverable under a bond requiring payment for 'materials furnished for or in the doing of the work,' irrespective of the presence or absence of the word 'supplies.'"

Also, in the case of *Williamson v. Egan*, 209 Cal. 343, at page 349, 287 P. 503, at page 506, the court, in passing upon what the surety company was liable for, stated in effect that it was not disposed to give a narrow construction to the terms of the bond and said, "The bond sued upon here

is one required by statute and its provisions are to be liberally construed to effectuate its purpose. *Continental Nat. Bank v. Republic Casualty Co.*, 202 Cal. 586, 589, 262 P. 300. \* \* \*"

And, in *A. L. Young Machinery Co. v. Cupps*, 213 Cal. 210, at pages 213-214, 2 P.2d 321, at page 322, the court said: "It has repeatedly been held in reference to the 1919 act, and its predecessors, that such acts are to be more liberally construed than the mechanic's lien statutes, and that the reasons for giving a limited construction to the latter are not applicable to the former. (Citing cases.) It has been held under the 1919 act and similar public work statutes, that rental of machinery, money expended on the hiring of mule teams, money spent for provisions, harness, and other equipment, including scrapers, freight on mules and equipment etc., are all recoverable against the surety. (Citing cases.)" See also, *McCormick Saeltzer Co. v. Haidlen*, 119 Cal.App. 96, 6 P.2d 255, and *Christie v. Commercial Casualty Ins. Co.*, 6 Cal.App.2d 710, 715, 45 P.2d 263.

It would appear that if the words "materials" and "supplies" are to be given the broad interpretation and meaning indicated by the cited cases as proper, then surely the words "pay for \* \* \* any work or labor thereon of any kind," as used in the same bond mean more, and should be construed to include more than just basic hourly wage rates.

It is our conclusion that the contributions sought to be recovered are directly related to the work performed in the construction of the school projects by the Contractor. The amounts became due solely because the work was performed, and the sum is measured by the number of hours of work performed.

The legislature intended to protect the laborer as to every element of his compensation, whether that compensation be an hourly wage, or whether it be an hourly wage plus other benefits, and the novelty of the health and welfare provisions of the



contracts does not in any wise prevent the contributions therefor from being considered as payments for "any work or labor" on the bonded project.

The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer and allow defendants a reasonable time within which to answer the complaint herein if they be so advised.

WHITE, P. J., and LILLIE, J., concur.



**SELECT BASE MATERIALS, Inc., a corporation, Plaintiff and Appellant,**

**v.**

**BOARD OF EQUALIZATION of the State of CALIFORNIA, Defendant and Respondent.\***

**No. 22758.**

District Court of Appeal, Second District,  
Division 3, California.

Aug. 5, 1958.

Hearing Granted Oct. 1, 1958.

Action to recover sales taxes paid under protest. The Superior Court of Los Angeles County, John J. Ford, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem., held that Revenue and Taxation Code section (defining as a taxable sale the withdrawal of taxable personal property from place where it is located for delivery to a point in state for purpose of transfer of title of property for consideration) rather than Uniform Sales Act would have to be applied in determining sales tax liability; and held that under the applicable statute taxable sale had been accomplished at moment when decomposed granite had been removed from ground and placed aboard truck of independent highway carrier consigned to a customer and that transportation charges had not therefore become, for

\* Opinion vacated 335 P.2d 672.

Cal.Rep. 329-330 P.2d-5

sales tax purposes, part of gross receipts of seller, except in instances where they had not been separately stated.

Judgment reversed.

#### 1. Licenses ⇨15.1(5), 29

Revenue and Taxation Code section (defining as taxable sale the withdrawal of taxable personal property from place where it is located for delivery to a point in state for purpose of transfer of title of property for consideration) rather than Uniform Sales Act would have to be applied in determining sales tax liability; and under the applicable statute taxable sale was accomplished at moment when decomposed granite was removed from ground and placed aboard truck of independent highway carrier consigned to customer and transportation charges did not therefore become, for sales tax purposes, part of gross receipts of seller, except in instances where they were not separately stated. West's Ann. Rev. & Tax.Code, § 6006(b).

#### 2. Statutes ⇨190

Court cannot give unambiguous statute any different meaning than that which its language compels.

#### 3. Licenses ⇨15.1(6)

The Revenue and Taxation Code section, defining a taxable sale as any withdrawal of taxable personal property from place where it is located for delivery to a point in state for purpose of transfer of title of property for consideration, makes definition applicable where withdrawal is for delivery to any point in state, irrespective of whether sale at that point would be taxable. West's Ann.Rev. & Tax.Code, § 6006(b), 4 U.S.C.A. §§ 104-110.

#### 4. Statutes ⇨245

Where meaning of tax statute is doubtful, it must be construed most strongly against taxing power.

#### 5. Licenses ⇨15.1(5)

A "taxable sale", for sales tax purposes, having been completed by withdrawal of materials and placing them upon trucks for delivery, purposes of statute, requiring transportation charges incurred after sale

to be separately stated, were fully met by separate entry of price of materials and transportation charges and tax in seller's books and by invoice sufficient to advise customer as to breakdown in total amount for which he was billed. West's Ann.Rev. & Tax.Code, §§ 6006(b), 6011, 6012.

#### 6. Licenses ☞30

Where methods adopted were sufficient to prevent evasion of taxes, they were sufficient to satisfy Revenue and Taxation Code requirement that transportation charges incurred after sale be separately stated, in absence of specific regulations advising taxpayer as to procedure to be adopted. West's Ann.Rev. & Tax.Code, §§ 6006(b), 6011, 6012.

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Wm. J. Clark, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, Deputy Attys. Gen., for respondent.

Trippet, Yoakum, Stearns & Ballantyne, Oscar A. Trippet and David Freeman, Los Angeles, amicus curiae.

NOURSE, Justice pro tem.

By its amended and supplemental complaint in this action appellant sought to recover sales taxes in the sum of \$10,446.45 paid by it under protest. These sales taxes were based upon transportation charges made by appellant to its customers for the delivery or sending of the materials sold by it during the period from May 1, 1951, through September 30, 1953, and which were assessed upon the grounds that the cost of transportation was incurred prior to the sale of the materials and was taxable as a part of appellant's gross receipts.

The facts so far as relevant to the questions presented here are:

During the period in question appellant was engaged in the business of mining and selling decomposed granite from lands owned by it or held by it under mining leases. Appellant did not stockpile any materials but upon receiving an order for decomposed granite mined the material and placed it

directly on trucks to be hauled to the place designated by the purchaser. Appellant did not own any trucks but in all instances contracted for the transportation of the materials with independent licensed "highway carriers." The charges of these carriers are governed by tariffs promulgated by the Public Utilities Commission which fix the charge that may and must be made for delivery within certain zones. Practically all of appellant's orders with the exception of those hereinafter noted came in by telephone.

When a new customer called he would ask the price and would be quoted the price per ton at the appellant's place and after giving the address to which the materials were to be delivered or sent he would be quoted the transportation cost based upon the applicable tariff and the total of the two items. If the customer was an old one there would be no discussion as to price but an order would be given and taken for so many tons of gravel with the point to which the materials were to be transported given. Unless the customer indicated his desire to pick up the materials in his own trucks no statement was made to the customer as to who would be employed to transport the materials.

Upon receiving the order appellant would call upon an independent "highway carrier," would load the amount of the order onto his truck and give him a delivery ticket in duplicate. This ticket contained the name of the consignee, the address to which the materials were to be transported, the purchase order number, if any, and a statement of the weight of the materials delivered, and the name of the highway carrier and it also contained a notation, as follows: "Our drivers will make every effort to place materials where customer designates, but the shipper assumes no responsibility for damages inside the curb line."

Upon reaching the destination shown in the delivery slip the carrier would cause one copy thereof to be signed by the consignee and would return it to the appellant and thereafter appellant would pay the transportation charge as fixed by the applicable tariff. Transactions of this character con-

stituted the great bulk of the transactions involved.

In all instances on appellant's books the charges were broken down so as to separately state the price charged for the materials, the sales tax on those materials and the amount charged for transportation which in all cases was the exact amount paid to the highway carrier.

The form of invoice sent to purchasers of the class mentioned above varied. In some invoices the price of the materials was stated, the tax on the materials was stated and the transportation charge was separately stated followed by a total of all three items. On others there was a statement of the number of tons at a price per ton which equalled the pit price of the materials plus the transportation cost followed by a total of the two. There was then a notation such as "3½% tax on materials at \$.55" followed by the total of the tax. In others the number of tons was stated at a price per ton equal to the pit price plus transportation and the total amount followed by the notation "3½% on material"<sup>1</sup> followed by a notation of the total tax.

In the case of certain private corporations and municipal corporations the method of handling the transactions varied from what we have stated but, inasmuch as the amount of the tax on these transactions is but a fraction of a per cent of the tax paid and sought to be recovered, and as the facts varied in each case and as the trial court made no distinction between these transactions and the great bulk of the transactions, it would serve no useful purpose to here detail the methods used in the transactions we have just mentioned.

The statutory provisions involved in the determination of this case are the following designated sections of Revenue and Taxation Code: sections 6051, 6006, 6011 and 6012.

Section 6051, Revenue and Taxation Code, in substance provides that for the privilege of selling tangible personal property at retail a tax of 3 per cent of the gross receipts of any retailer is imposed. By section 6011 "Sales price" is defined as the total amount for which tangible personal property is sold including the cost of transportation of property prior to its purchase but excluding transportation charges for transportation occurring after the purchase of the property if that charge is separately stated. By section 6012 "Gross receipts" is defined as the total amount received on the sale without any deduction of the cost of transportation of the property prior to its sale to the purchaser but excluding from the amount received "[t]ransportation charges separately stated" if the transportation occurs after the sale of the property is made to the purchaser. Section 6006 in defining "sale" provides in part as follows: "(a) Any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or any means whatsoever, of tangible personal property for a consideration. 'Transfer of possession,' 'lease,' or 'rental' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter. (b) Any withdrawal, except a withdrawal pursuant to a transaction in foreign or interstate commerce, of tangible personal property *from the place where it is located for delivery to a point in this State for the purpose of the transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of the property for a consideration.*"<sup>2</sup> (Emphasis added.)

The trial court found that all the transportation charges made by appellant to its customers during the period in question were for transportation of the materials which occurred prior to this sale;

1. This included the city sales tax.
2. Effective September 15, 1953, this section was amended so as to delete subdivision (b) as above quoted. But the sec-

tion as quoted was in effect during the entire period for which the taxes were assessed excepting the last 15 days thereof.



that no sale by appellant to its customers took place until delivery to the customer at the respective places designated by them; and that the appellant's bills to its customers included a charge for both the materials and transportation. The court made no finding as to whether the charges for materials and the charge for transportation were separately stated. By its conclusions of law the court concluded that all transportation charges made by appellant to its customers were for transportation of materials occurring prior to the sale thereof and were a part of the sales price of the property sold by appellant and were properly includable within the gross receipts of appellant and taxable as such. The court further concluded that section 6006(b) of the Revenue and Taxation Code heretofore quoted "is inapplicable to the facts presented at the trial."

It was the position of the respondent at the trial of the action and it is its position here that the question as to whether the sales took place before or after the transportation charges were incurred was to be resolved under the provisions of the Uniform Sales Act as adopted in this State (Part 4, title I, et seq., §§ 1721-3268 inc., Civ.Code) and that the definition of "sale" contained in subdivision (b) of section 6006, Revenue and Taxation Code, had no application and this position is the one adopted by the trial court in determining this case. It is further respondent's contention that the transportation charges made by appellant to its customers were not separately stated within the meaning of section 6012 and that therefore the tax was properly assessed irrespective of whether the charges were incurred before or after the sales took place.

Appellant contends that if the applicable law is the law of sales as set forth in the Uniform Sales Act the evidence establishes without substantial conflict that it was the intention of the parties that title should pass when its materials were placed upon the trucks of the independent con-

tractor (highway carrier) for transportation to its customers. They assert, however, that the question as to what constitutes a sale is to be determined not by the Uniform Sales Act but by the provisions of section 6006 of the Revenue and Taxation Code and that all of the transactions here fell within the definition of sale set forth in subdivision (b) of that section.

[1] While a large part of the briefs of each of the parties is given over to the question of whether a sale took place before or after the transportation charges in question were incurred if the provisions of the Uniform Sales Act are applicable, that question need not be decided here for we are convinced that it is the definition of a sale set forth in section 6006(b) of the Revenue and Taxation Code which must be applied.

Under this section a taxable sale takes place when there is "[a]ny withdrawal \* \* \* of taxable personal property from the place where it is located for delivery to a point in this State for the purpose of the transfer of title \* \* \* of the property for a consideration." Withdrawal has a common meaning; it is defined by Webster's International Dictionary, second edition, as "removal, as from a place of deposit \* \* \*." Applying this statutory definition of "sale" to the facts here it is clear that a taxable sale was accomplished the moment the decomposed granite was removed from the ground and placed aboard the trucks of the highway carrier consigned to the customer. As none of the transportation charges taxed were incurred until after the material was placed aboard the carrier they did not become a part of appellant's gross receipts except in instances where they were not separately stated.

Respondent makes no contention that the statute is ambiguous but bases its contention that the definition of sale contained in subdivision (b) of the section is not applicable upon the asserted fact that the purpose of the Legislature in enacting this statutory definition was to

enable the State to tax retail transactions that would not otherwise be taxable; i. e., transactions where goods were shipped from one point in this State for sale within territory which had been ceded by the State to the United States without the rights of taxation being reserved to the State such as the military reservation known as "The Presidio" in San Francisco (see *Standard Oil Co. v. People of State of California*, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775, decided in 1935).<sup>3</sup>

[2] We may assume for the purposes of this decision that the purpose of the Legislature was as contended for by respondent; but, there being no ambiguity in the statute, we cannot give it any different meaning from that which the language used compels. We may not, under the guise of interpretation, write into the statute something that is not there in order to give it a meaning other than the meaning expressed. *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365-366, 5 P.2d 882; *People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 475, 224 P.2d 677; *In re Miller*, 31 Cal.2d 191, 198-199, 187 P.2d 722; *People v. White*, 122 Cal.App. 2d 551, 554, 265 P.2d 115.

In *Seaboard Acceptance Corp. v. Shay*, supra, in which the Supreme Court was called upon to interpret a statute, the language of which was such as to defeat the evident purpose of the Legislature in enacting it, that court in refusing to place an interpretation on the statute which would accomplish the legislative purpose and render the statute valid rather than void, said (214 Cal. at pages 365-366, 5 P.2d at page 884): "It is probably safe to assume that the Legislature had in mind the protection of persons dealing with a buyer in possession, but the difficulty is that they have not expressed this intent in the language used. This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This

court is limited to interpreting the statute, and such interpretation must be based on the language used. \* \* \* It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the Legislature must be determined from the language of the statute. (Citations.) 'It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act.'"

[3] In order to uphold the judgment of the trial court and the contention of respondent, it would be necessary to read into the statute a provision which would exclude as a sale any withdrawal which was made for delivery to a point in the State where the property would be taxable. This we cannot do for the unambiguous language of the statute makes the definition applicable where the withdrawal is for delivery to *any* point in the State, irrespective of whether a sale at that point would be taxable.

Respondent asserts that if the definition of sale which we have held applicable is applied the provision of section 6012 that the cost of transportation prior to the sale shall be included as a part of the retailer's gross receipts is rendered nugatory. We see no merit in this contention.

[4] In the first place, the retailer is precluded from segregating from his gross receipts that part of the selling price which consists of the transportation cost paid by him in the acquisition of the goods sold. In the second place, section 6012 and the provisions as to transportation as contained in both sections 6012 and 6011 are only applicable to costs before the sale and as we have pointed out the

3. The definition of sale here in question was first incorporated in the Sales and Use Tax Law as a part of subdivision (a) in 1939 and was not eliminated until

1953 although by federal statute (4 U.S. C.A. §§ 104-110) the State was in 1940 granted authority to levy sales taxes in any federal area.

statute has clearly made the withdrawal from the place of deposit a taxable sale. At most this contention of respondent merely creates a doubt as to the intention of the Legislature and where the meaning of a tax statute is doubtful it must be construed most strongly against the taxing power. *California Motor Transport Co. v. State Bd. of Equalization*, 31 Cal. 2d 217, 187 P.2d 745; *Pioneer Express Co. v. Riley*, 208 Cal. 677, 687, 284 P. 663.

The trial court, as we have pointed out, made no finding upon the issue presented by the pleadings as to whether appellant's charges for transportation were expressly stated. Such a finding was not required under the theory upon which the matter was decided by the trial court, to wit: that subdivision (b) of section 6006 was not applicable and that applying the Uniform Sales Act there was, under the facts proven, no sale until the materials were delivered to the customer. But, as we have come to a contrary conclusion, we must pass upon the question as to whether the procedures adopted by appellant met the requirements of section 6012, Revenue and Taxation Code, that transportation charges incurred after the sale must be separately stated. It is our opinion that those that are in one of the forms of invoice noted above did this.

[5] A taxable sale having been completed by the withdrawal of the materials through placing them upon the trucks for delivery, the purposes of the statute were fully met by the separate entry of the price of the materials and the transportation charges and the tax in appellant's books and by an invoice which was sufficient to advise the customer as to the breakdown in the total amount for which he was billed. Certainly those invoices which separately stated the price of the materials and the amount advanced by appellant for transportation costs fully met the statutory requirement. Those that showed the tax on materials at a certain price per ton of materials required but a simple mathematical calculation by

the buyer to segregate the transportation charge from the total for which he was billed. Those that only showed the tax and noted that it was on materials only did not require a complicated calculation.

[6] Our attention has not been directed by respondent to any published regulations, effective during the period involved here, of the Board of Equalization which required any more detailed separation of the charges and, as the methods adopted were sufficient to prevent evasion of tax, they were in our opinion sufficient, in the absence of specific regulations advising the taxpayer as to procedure to be adopted.

The judgment is reversed.

SHINN, P. J., and WOOD, J., concur.



163 Cal.App.2d 144

**Laura Lennix WILLIAMS, and Marcilette Williams Ingram, as Administratrix of the Estate of Laura Lennix Williams, deceased, Plaintiff and Appellant,**

**v.**

**Lewis Isaac WILLIAMS, Virginia Elizabeth Williams and Ruth A. Harris, Defendants and Respondents.**

**Civ. 23095.**

**District Court of Appeal, Second District, Division 2, California.**

**Aug. 25, 1958.**

**Rehearing Denied Sept. 22, 1958.**

**Hearing Denied Oct. 22, 1958.**

Suit for rescission of deed conveying realty from mother to her adult son. Upon the mother's death her administratrix was substituted in her place. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Fox, P. J., held that son would be required to account for sum which he agreed to hold for payment of future



medical expenses which the mother might incur.

Reversed with directions.

#### 1. Deeds §211(4)

In suit for rescission of deed conveying realty from mother to her adult son, evidence relating to mother's serious illness, her need for constant care which was supplied when son and his wife moved into property deeded to son, and the receipt by mother of money to pay her medical bills, and to her daily association with her two daughters at time of transaction, sustained trial court's finding that transaction was free of undue influence.

#### 2. Appeal and Error §989

When a finding is attacked on ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.

#### 3. Appeal and Error §996

When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

#### 4. Appeal and Error §1071(5)

In suit for rescission of deed conveying realty from mother to her adult son, error in findings that at time of execution of first deed conveying realty to son and his sister, the mother intended to convey all her interest in consideration of agreement with son to borrow money and pay her medical bills and care for her, whereas the conveyance was to facilitate sale of property for mother by son, was inconsequential and harmless, where mother thereafter approved transfer of title from son and sister to son and the latter's wife, pursuant to agreement by which son was to pay mother's medical bills, pay off her mortgage, move his family into her house and provide her with proper food and care.

#### 5. Cancellation of Instruments §57

In suit for rescission of deed conveying realty from mother to her adult son, son would be required to account for sum which he agreed to set aside to defray any future medical expenses which the mother might incur.

Jacque Boyle and Sidney Gordon, Los Angeles, for appellant.

Wilson, Carter & Flournoy, James L. Flournoy, Los Angeles, for respondent Lewis Isaac Williams.

Ruth A. Harris, in pro. per.

FOX, Presiding Justice.

This is a suit for rescission of a deed to real property. Plaintiff has appealed from a judgment in favor of defendants.

Laura Williams was the original plaintiff in this case; upon her death Marcilette Ingram, her administratrix, was substituted in her place. Marcilette is one of Laura's children. Laura's other children, Ruth Harris and Lewis Williams, are the defendants in this suit along with Lewis' wife, Virginia.

Early in 1956 Laura, who was then 61 years of age, became seriously ill and was forced to spend several weeks in a hospital. Laura became concerned over the mounting hospital and doctor bills and had many discussions with each of her children regarding this problem. While Lewis was of the opinion that Laura's home (the property which is the subject of this suit) should be rented to provide an income, both his sisters wanted the property sold. In fact, the sisters made many efforts to persuade Laura to let them sell the furniture. Lewis opposed this action. Finally Laura decided that the house should be sold. It was determined that Laura should either execute a power of attorney or deed the property so that her children could handle the sale for her. Lewis was told by a real estate agent that Laura's transferring the legal title would be more desirable. Lewis suggested to Laura that all three children should be

named in the deed. Laura stated that she did not wish Marcilette to be one of the grantees and even suggested that Lewis should be the sole grantee. However, when Lewis had the deed prepared by his attorney, he directed that Ruth and himself be named as grantees. Thereafter he took the deed to Laura and read her the contents. She approved and executed the deed on March 15, 1956. Although she was in the hospital at the time, she was fully coherent and had command of her faculties. She saw each of her children practically every day.

Lewis contacted several real estate agents in an effort to effect a sale of the property. Laura left the hospital on April 29, 1956, and went to live with Lewis and his family. Laura's doctor had informed the children that she would need constant care and should not be allowed to live alone. Late in May Laura was still worried about her medical bills and the house had not yet been sold. At this time Lewis and his mother entered into an agreement. Lewis was to receive the entire legal title to Laura's home. In return Lewis agreed to borrow \$6,000 with which he would pay all Laura's medical bills, pay off the small mortgage on her house and defray certain expenses necessary in moving his family from his home into hers and in preparing his home for rental purposes. Lewis, his family and Laura were to live together in her home and Lewis was to provide food, clothing and care for Laura for the remainder of her life. There was a balance of \$2,000 from the original loan which Lewis left in the bank; he told Laura that it was her money and that she could have it whenever she wanted it. The purpose of borrowing this extra \$2,000, even though it was not then needed, was to provide a fund for any future operations or hospitalization without having to resort to another loan.

On May 21, 1956, Lewis and Ruth executed a deed conveying the property to Lewis and his wife. Laura approved this transfer. Lewis and his family and Laura moved into the subject property. Lewis effected the loan and paid the various bills.

The dressing on Laura's foot required constant changing and she was on a special diet. Lewis and his wife faithfully fulfilled Laura's needs in these respects.

After a short time Laura became dissatisfied with the arrangement and began to complain. Finally she gave Lewis formal notice of rescission of her transfer of the property in question. Lewis stated in writing that he would be willing to rescind on condition that he received compensation for the various expenses he had incurred and for the services he had rendered Laura. But Laura immediately filed this suit "for rescission, to cancel an instrument, for an accounting, and to quiet title." Laura continued to live in the house with Lewis and his family until the time of her death. Laura died in February, 1957, and the case proceeded to trial with Marcilette substituted as plaintiff. The trial court ruled that neither Laura nor her estate had any right, title or interest in the subject real property and rendered judgment for defendants. The court also denied any accounting.

[1] Appellant's first contention is that the evidence is insufficient to sustain the finding that Laura's conveyance was free of undue influence. The rules governing this situation are clear:

[2] "When a finding is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citations.]

[3] "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" *Primm v. Primm*, 46 Cal.2d 690, 693-694, 299 P.2d 231, 233.

Appellant argues that Lewis was in a confidential relationship with Laura, that Lewis exercised activity in procuring the deed, and that the consideration for the

property was disproportionate to its value. From this she concludes that a presumption of undue influence arose, thereby shifting the burden of proof to Lewis. *Kloehn v. Prendiville*, 154 Cal.App.2d 156, 161, 316 P.2d 17. However, even if we assume that undue influence by Lewis could be presumed, the evidence is still sufficient to support the trial court's finding that the transaction was free of undue influence.

"Undue influence has been defined to be that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment, and whereby the will of the person is overborne and he is induced to do or forbear to do an act which he would not do, or would do, if left to act freely. [Citations.]" *Webb v. Saunders*, 79 Cal.App.2d 863, 871, 181 P.2d 43, 47. "What constitutes undue influence and what constitutes sufficient proof thereof depend upon the facts and circumstances of each particular case." *Sparks v. Sparks*, 101 Cal.App.2d 129, 135, 225 P.2d 238, 242. In the instant case the evidence establishes that Laura transferred her title to the property because she wanted it sold; it was her own decision and Lewis, in fact, was opposed to such sale. Although Laura was in the hospital at the time she executed the deed, the evidence showed that she had full possession of her mental faculties, was at all times coherent, and that she knew what she was doing. She saw all her children regularly and constantly asked whether or not the house had been sold. When the property remained unsold after two months, Laura sought another means of solving her

financial problem. She was living in Lewis' home and was being cared for properly. It appeared that neither of her other children could take care of her as well as Lewis and his wife. The agreement into which she and Lewis entered bestowed a great benefit on her; it completely solved the problems which had been distressing her for several months. Not only would she no longer have to worry about paying her medical bills, but she would also be assured that someone would take care of her for the rest of her life. Under such circumstances the trial court could properly deduce that Lewis did not gain any unfair advantage by the agreement. There was no evidence that Lewis coerced Laura into making this agreement. Her two daughters saw her practically every day during this period, and their constant presence tends to negate any inference that Lewis exerted undue influence upon her. Lewis' testimony clearly indicates that Laura made a free choice and exercised her own will in making the agreement.<sup>1</sup> It was, of course, within the trial court's discretion to believe this testimony. The record as a whole provides ample support for the trial court's conclusion that the transaction was free of undue influence. The court therefore did not err in denying rescission or other relief with respect to the property in question.

[4] Appellant's next contention is that the evidence is insufficient to sustain the findings that on March 15, 1956, Laura intended to convey all her right, title and interest in the property in consideration of the agreement with Lewis. The findings

1. Relative to the discussion which Lewis and Laura had concerning his taking title to her home to the exclusion of the other two children, Lewis stated in part that "she [Laura] said that it was hers to give; that they [the other children] were married, and had less responsibility, and that she was going to live with me, and in the period that she had been at our house, it had been to her liking, and that she wanted to give me the house for me to borrow only enough money to take care of the actual hospital bills,

and moving expenses, and in that way I would have less money to pay per month, and I told her that I appreciated it, but that there was the possibility of the operation, and we had to take that into consideration; that instead of getting one loan after another, it would be better to get one loan that would take care of it, up to \$6,000; that I would give her \$2,000 to be held for an operation or future hospitalization, or as she saw fit to use it."



in this regard are quoted below.<sup>2</sup> In effect the court finds that Laura made the March 15 conveyance in consideration of Lewis' agreement to borrow money and pay her medical bills, care for her, and so forth. This is slightly inaccurate in that the evidence establishes that Laura conveyed the property on March 15 for the purpose of facilitating its sale for her by Lewis. However, she did intend to convey her legal title to the property at that time. Whatever equitable rights she might have had in the property were extinguished by the agreement which she thereafter entered into with Lewis, and under which he was to receive outright title to the property. Pursuant to that agreement she approved the transfer of title from Lewis and Ruth to Lewis and his wife. And Lewis performed the acts required of him by the agreement; he paid her medical bills, paid off her mortgage, moved his family into her house, and provided her with the proper food and care. Laura was thereafter estopped to assert any right to the property. It is thus clear that the error in the findings is inconsequential and harmless.

[5] Appellant's final contention is that "the judgment is against the law in that it upholds the conveyance involved but denies plaintiff the consideration for said con-

veyance." In this connection appellant argues that Laura's estate should recover from Lewis the \$2,000 which Lewis was holding for Laura and the money to pay a \$660 hospital bill which accrued during her last illness. It does appear from Lewis' testimony that part of his agreement was to hold the extra \$2,000 for Laura's benefit.<sup>3</sup> Under such circumstances it appears that the trial court should have ordered that he account to her estate for such amount. However, he should not be required to pay the \$660 medical bill in addition. One of the purposes of having the \$2,000 set aside was to defray any future medical expenses which Laura might incur. Thus, this last bill should be paid out of the \$2,000 which Lewis holds for the benefit of Laura's estate. The findings, conclusions and judgment should therefore be revised to provide for Lewis' payment of \$2,000 to appellant as administratrix of Laura's estate.

The judgment is reversed with directions to enter new findings of fact, conclusions of law and judgment not inconsistent with the views expressed herein. Each side shall bear its own costs on appeal.

ASHBURN and HERNDON, JJ., concur.

2. With respect to the March 15 conveyance the court found:

"II

"That said conveyance was made voluntarily and without fraud or deceit or undue influence; that at the time said conveyance was made, the said Laura Lennix Williams was in possession of her faculties and mentally capable of executing the conveyance, and had knowledge that she had executed said deed, and intended to convey all of her right, title and interest in and to said real property.

"III

"That said conveyance was made in consideration that the said defendant Lewis Isaac Williams would borrow the sum of \$6,000.00 with the said real property as security for said loan; that said defendant would provide support, shelter, food, medical care, and all the necessities of life for said Laura Lennix Williams for her lifetime; that said defendant and his family would remove from defendant's home to the subject real prop-

erty; that the proceeds of the loan would be used in defraying a mortgage indebtedness against the subject real property in the approximate amount of \$600.00; to pay the hospital and other medical expense of said Laura Lennix Williams; to pay all other indebtednesses of said Laura Lennix Williams; and to provide for future medical needs of said Laura Lennix Williams; that further sums were to be expended in repairing the home of defendants Lewis and Virginia Williams, and to provide for certain expenses incident to defendant's moving from his home to the subject real property."

3. On this point Lewis testified as follows:

"Q. Did you tell her in substance, 'I have this other \$2,000 for you, and any time you want it, you can have it'?

A. That was the original deal.

"Q. That is what you told her? A. Yes.

"Q. Did you consider that \$2,000 her money? A. I considered it her money."

162 Cal.App.2d 818

Eleanor MURPHY, Special Administratrix  
of the Estate of Frank J. Murphy,  
Deceased, Plaintiff and Appellant,

v.

The ATCHISON, TOPEKA & SANTA FE  
RAILROAD, a corporation, Ernest Davis  
and Houston Alexander, Defendants and  
Respondents.

Civ. 22916.

District Court of Appeal, Second District,  
Division 2, California.

Aug. 18, 1958.

Hearing Denied Oct. 15, 1958.

Action for wrongful death of plaintiff's decedent, who was killed when a train operated by defendant railroad collided with his truck at a grade crossing. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment for defendant, and denied plaintiff's motion for new trial, and plaintiff appealed from such judgment and order. The District Court of Appeal, Herndon, J., held that where it was determined on prior appeal of action that a question of fact was presented as to whether under the circumstances plaintiff's decedent took precautions which the situation demanded for his own protection, such decision established the law of the case that plaintiff's testimony was not irreconcilable with presumption of due care by decedent, and therefore trial court erred in refusing to give an instruction on such presumption, but, in view of evidence describing decedent's conduct just before the accident, and in view of jury's apparent finding that decedent was guilty of contributory negligence, such error would not be deemed prejudicial.

Judgment affirmed.

#### 1. Appeal and Error ⇨1097(1)

Where evidence presented at a first and second trial of a wrongful death action was substantially the same, and, upon appeal following first trial, court held that plaintiff's evidence did not establish decedent's contributory negligence as a matter of law, such holding was the law of the case.

#### 2. Appeal and Error ⇨1067, 1195(1)

Where it was determined on prior appeal of an action that a question of fact was presented as to whether under the circumstances plaintiff's decedent took precautions which the situation demanded for his own protection, such decision established as the law of the case that plaintiff's testimony was not irreconcilable with presumption of due care by decedent, and therefore trial court erred in refusing to give an instruction, on such presumption, but, in view of evidence describing decedent's conduct just before the accident, and in view of jury's apparent finding that decedent was guilty of contributory negligence, such error would not be deemed prejudicial.

#### 3. Death ⇨58(1)

The only possible justification for employment of presumption of due care of a decedent against the party carrying the burden of proof is to provide a balancing factor to compensate for a handicap resulting from the destruction of a vital source of evidence, and the reason upon which such justification rests is almost nonexistent in a case where the evidence clearly describes activities of the decedent just prior to his death.

#### 4. Appeal and Error ⇨110

A purported appeal from all proceedings taken on a motion for a new trial on all matters to which the same related presented nothing for review and such appeal would be dismissed.

Melvin M. Belli, San Francisco, Ben C. Cohen, Beverly Hills, and Alfred Lubin, Hollywood, for appellant.

Robert W. Walker, and J. H. Cummins, Los Angeles, for respondents.

HERNDON, Justice.

Plaintiff administratrix appeals from a judgment in favor of defendants entered upon a jury verdict in a wrongful death action. The decedent was killed when a passenger train operated by defendant Santa Fe collided with his truck at a grade cross-

ing. Plaintiff advances as her sole assignment of error the refusal of the trial court to instruct the jury that her decedent was presumed to have exercised due care for his own safety. Defendants justify the refusal of the requested instruction on the basis of their contention that the testimony given by plaintiff's witnesses was wholly irreconcilable with the presumption sought to be invoked. No other question is raised concerning the form or content of the instruction as requested.

The instant judgment was entered at the conclusion of the second trial of the case. The first trial ended with a judgment of nonsuit, which was granted upon the ground that plaintiff's evidence established decedent's contributory negligence as a matter of law. The nonsuit was reversed by Division One of this court in *Murphy v. Atchison, Topeka and Santa Fe Railway*, 139 Cal.App.2d 792, 294 P.2d 458. Upon retrial, as we have indicated, the jury rendered a verdict for the defendants and judgment was entered accordingly.

It is undisputed that plaintiff's evidence at the first and second trials was substantially the same. Plaintiff called the same four witnesses and, with relatively minor variations, their testimony, as set forth in the opinion rendered in the former appeal, was repeated at the second trial. Therefore, we limit our present statement of the facts to a general summary referring to the above cited opinion for a more detailed exposition of the evidence.

At about 4 p. m. on July 22, 1952, Frank J. Murphy, the decedent, was proceeding in a westerly direction on Phelan Road in the town of Hesperia, California, driving an eighteen-wheel tractor and trailer which, with its load of potatoes, weighed about 35 tons. The over-all length of the equipment was 52 feet. When he approached the double mainline tracks of the railroad, which cross Phelan Road at right angles, the crossing was blocked by a long freight train traveling in a southerly direction at a speed of 15 to 20 miles per hour on the easterly set of tracks.

Decedent brought his truck to a stop 6 to 12 feet from the easterly set of tracks and waited for the freight train to pass. As the caboose of the southbound freight train cleared the crossing, decedent started his truck forward and on to the railroad tracks. A northbound passenger train traveling approximately 80 miles per hour on the westerly set of tracks collided with the truck amidships and the fatality was instant. There is evidence that the truck had attained a speed of 5 to 10 miles per hour when it was struck.

Except for some conflict as to whether or not the passenger train signalled its approach to the crossing by its horn or whistle, the testimony of all of the several eyewitnesses was essentially consistent and undisputed. Plaintiff's witness Floyd, traveling in an easterly direction on Phelan Road in his 1950 Chevrolet, approached the railroad crossing from the side opposite decedent. As he waited for the freight train to clear, Floyd observed decedent's truck come to a stop on the other side. Floyd proceeded to cross the tracks as soon as the caboose cleared, and as he did so he saw the passenger train approaching from his right at a distance of about 350 feet from the crossing. He also saw decedent's truck moving forward as he was passing over the tracks. He continued to watch decedent's truck through his rear view mirror. Floyd had attained a speed of about 40 miles per hour and had traveled about 150 feet when the collision occurred.

Plaintiff called two other eyewitnesses, both of whom were well positioned to observe the tragedy from different angles. The witness Howell had stopped his car directly behind decedent's truck and saw the truck move forward the instant the caboose cleared the crossing. As stated above, the testimony of the several eyewitnesses as to the conduct of the decedent, the movements, speeds and relative positions of the truck and of the two trains was essentially consistent and without substantial conflict. In other words, the accident was described by testimony which was unusually clear, consistent, and satisfactory, the



only point of conflict relating to the question whether the passenger train sounded its horn as it approached the crossing.

Both sides to this appeal point to and rely upon the unchallenged testimony of a model engineer who demonstrated by means of models constructed to scale the maximum distances that decedent could see to the south on the westerly or northbound track when the truck and the caboose were placed at various assumed positions. Plaintiff summarizes the substance of this testimony as follows: "By a manipulation of the models he demonstrated that when the bumper of the decedent's truck was on the first east rail, and the caboose of the freight train had just cleared Phelan Road and the 'Chief' was down about 140 feet from the crossing, that the driver of the truck would have no vision of the oncoming 'Chief.' But when the front bumper of the truck is on the second west rail and the 'Chief' is 140 feet away, the 'Chief' then comes into vision from the truck driver's seat. With the bumper of the truck on the second east rail, and moving the caboose of the freight train 50 feet south of the crossing with the 'Chief' still at 140 feet south of the crossing, the line of vision would still be obscured from the driver's seat of the truck. The 'Chief' would have to be approximately 135 feet from the crossing before the driver of the truck could see it with the rig having its front bumper on rail No. 3 or the second east rail with the caboose at approximately 50 feet down the track. At 80 miles an hour the 'Chief' would be traveling 120 feet a second so that it would be a matter of a little over one second from the time the 'Chief' first came into view of the decedent until the time of the impact."

The applicable test by which it is to be determined whether the presumption in question may be invoked in such circumstances is stated as follows in *Gigliotti v. Nunes*, 45 Cal.2d 85, 93, 286 P.2d 809, 814: "Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (see *Speck v. Sarver* (1942),

20 Cal.2d 585, 587-588, 128 P.2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence \* \* \* is wholly irreconcilable with the presumption sought to be invoked.' (*Westberg v. Willde* (1939), 14 Cal.2d 360, 365-368, 94 P.2d 590; *Mar Shee v. Maryland Assur. Corp.* (1922), 190 Cal. 1, 9, 210 P. 269; *Chakmakjian v. Lowe* (1949), 33 Cal.2d 308, 313, 201 P.2d 801.)" To the same effect are *Norton v. Futrell*, 149 Cal.App.2d 586, 588, 308 P.2d 887, and *Scott v. Burke*, 39 Cal. 2d 388, 394, 247 P.2d 313.

[1] Since the evidence presented at the first and second trials is substantially the same, plaintiff is correct in contending that it is the law of the case that plaintiff's evidence did not establish decedent's contributory negligence as a matter of law. *Wells v. Lloyd*, 21 Cal.2d 452, 454-457, 132 P.2d 471. Upon this premise plaintiff argues that the prior decision constituted a determination that the testimony produced by plaintiff was not irreconcilable with the presumption that at the time and place in question the decedent exercised due care for his own safety and protection. Plaintiff argues, in other words, that "to hold that the decedent's conduct was irreconcilable with the presumption of due care is tantamount to saying that the decedent was guilty of contributory negligence as a matter of law."

[2] We conclude that the decision reversing the judgment of nonsuit established the law of the case that plaintiff's testimony was not irreconcilable with the presumption of due care. This is made manifest by the concluding sentence of that opinion reading as follows: "Clearly it was a question of fact for the jury to

determine whether decedent, under the circumstances existing at the time, took the precautions which the situation demanded for his own protection." *Murphy v. Atchison, Topeka and Santa Fe Railway*, supra, 139 Cal.App.2d 792, 798, 294 P.2d 458, 461. It logically follows that the instruction in question should have been given.

The conclusion that the refusal of the instruction was error imposes upon us the further duty to canvass the question whether the error requires a reversal. In recent decisions our Supreme Court has furnished us with helpful guidance in the form of restatements of the test properly to be applied in the determination of this question. In *People v. Watson*, 46 Cal.2d 818, at page 836, 299 P.2d 243, at page 254, following a careful and comprehensive review of earlier decisions dealing with the application of Article VI, section 4½ of the California Constitution, Mr. Justice Spence restated the test in the following language:

"Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative approach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision."

More recently, in *Alarid v. Vanier*, 50 Cal.2d 617, 327 P.2d 897, it was held that errors of the trial court in giving two inappropriate instructions were not sufficiently prejudicial to require a reversal.

In the opinion by Mr. Chief Justice Gibson the controlling test is restated in terms consistent with the language from *People v. Watson*, supra.

In obedience to the requirements of these decisions we have made a careful "examination of the entire cause, including the evidence" and from that examination we have reached the opinion that it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." We conclude, accordingly, that there has been no miscarriage of justice.

It seems pertinent to the question whether a miscarriage of justice has occurred to observe that plaintiff has had two trials of this cause. In the first a learned trial judge held (erroneously but perhaps not altogether unreasonably) that decedent had been guilty of negligence as a *matter of law*. In the second trial a jury apparently found the decedent guilty of contributory negligence as a *matter of fact* upon evidence which described decedent's actions with such clarity and consistency as to facilitate a most clear and satisfactory visualization of the tragedy.

[3] Evidence of such completeness, consistency and unquestionable reliability as that which we find in the instant record leaves precious little room for the application of any conclusional presumption concerning the decedent's conduct. Viewing the situation realistically, we think an intelligent jury could not reasonably have given any substantial weight to the presumption in the circumstances of this case. The only possible justification for the employment of the presumption against the party carrying the burden of proof is to provide a balancing factor to compensate for a handicap resulting from the destruction of a vital source of evidence. The reason upon which such justification rests is almost non-existent in such a case as this. It is in marked contrast with cases in which the available evidence concerning the conduct in question was

meager, contradictory or of doubtful reliability.

[4] The purported appeal "from all proceedings taken on motion for a new trial and all matters to which the same relate" obviously presents nothing for review and the same is dismissed.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.  
Hearing denied; CARTER, J., dissenting.



162 Cal.App.2d 799

**Matter of the ESTATE of Thomas W.  
WARNER, Jr., Deceased.**

**Anlta Lipton WARNER, Appellant,**  
v.

**Manuel RUIZ, Jr., etc., et al., Respondents.**  
Civ. 23096.

District Court of Appeal, Second District,  
Division 1, California.

Aug. 18, 1958.

Will contest, involving will and codicil. From a denial of revocation of probate, contestant appealed. The District Court of Appeal, White, P. J., on motion to dismiss appeal, held that judgment denying revocation of probate of will was final and appealable, as against contention that court, which also declared mistrial as to issues concerning codicil, did not finally determine all issues.

Motion denied.

#### **Appeal and Error ⇨77(2)**

In will contest involving will and codicil, judgment denying revocation of probate of will was final and appealable, as against contention that court, which also declared mistrial as to issues concerning codicil, did not finally determine all issues.

West's Ann.Code Civ.Proc. § 963; West's Ann.Prob.Code, § 1240.

Ralph Marks, Los Angeles, and Gunther H. Schiff, Beverly Hills, for appellant.

Max Z. Wisot and Harry Albert, Long Beach, for respondent, Mrs. Marietta Mordue.

WHITE, Presiding Justice.

Respondent, Mrs. Marietta Mordue, moves to dismiss the appeal herein upon the ground that the judgment and/or order from which the appeal was taken is not a final judgment or order within the meaning of Probate Code, Section 1240.

This proceeding presents a contest of will after admission to probate. It involves a will dated July 2, 1953 and codicil dated January 27, 1955. The contest was tried before a jury. When the taking of evidence before the jury was concluded each of the appearing proponents of the testamentary documents made motions for a directed verdict which motions were denied. Sixteen written interrogatories, or special verdicts (eight with an equal number of alternate forms) were submitted to the jury. After more than three days deliberation the jury reported it was able to agree upon only three special verdicts, and was hopelessly deadlocked as to the remainder. These verdicts were received and filed and the jury thereupon discharged. Two of the three special verdicts had reference to the will while the third found that the codicil dated January 27, 1955, "was executed in the form and manner prescribed by law".

Immediately following discharge of the jury, counsel for contestant (appellant herein) being present, counsel for the proponents (respondents herein), presented separate motions under Section 630 of the Code of Civil Procedure, that an order issue for entry of judgment in accordance with the foregoing motions for a directed verdict. After argument and submission on briefs, the court concluded that the motions for a directed verdict should have



been granted with respect to the will of July 2, 1953, as modified by the testator and in accordance with the findings of the jury thereon after motions were made to the court for a directed verdict.

As to the codicil of January 27, 1955, the court concluded that the aforesaid motions for a directed verdict were properly denied.

Order and judgment was thereupon entered:

"(1) That petition for revocation of the will of July 2, 1953, is denied and said will should be admitted to probate as modified by the hand, intent and purpose of the testator on or about January 27, 1955, to the extent and in accordance with the finding and special verdict of the jury with reference thereto. \* \* \*

"(2) That trial of the issues with reference to the codicil of January 27th, 1955, is declared a mistrial."

From that portion of the judgment wherein the court denied revocation of the probate of decedent's will dated July 2, 1953, appellant prosecutes this appeal.

In urging a dismissal of the appeal respondent urges that while the order and judgment appealed from disposed of the issues of due execution, mental competency, undue influence and revocation of the will dated July 2, 1953, it leaves unsettled the issues of mental competency and undue influence of the testator with respect to the codicil of January 27, 1955. That the codicil republishes the content of the will and therefore, the decision rendered does not finally determine all the issues raised by the contest of appellant, to-wit:

"1. Lack of due execution of the Will and Codicil;

"2. Unsoundness of mind and the incompetency of the Decedent to make his Will or Codicil;

"3. Undue influence exerted on the testator in the making of said Will and Codicil;

"4. That the Will (not the Codicil) had been revoked by intentional cancellation, defacement and obliteration which effectively revoked the Will and the Codicil."

Respondent then asserts, "That by reason of the foregoing, the appeal herein is premature and Appellant seeks a piecemeal adjudication in this Court of the issues raised in her contest."

We are not in accord with respondents' reasoning. Section 963 of the Code of Civil Procedure provides that an appeal may be taken "from a superior court in the following cases:

"\* \* \* (3) From such probate orders and decrees as are made appealable by the provisions of the Probate Code", and Section 1240 of the Probate Code provides in part as follows:

"An appeal may be taken \* \* \* from an order \* \* \* admitting a will to probate or revoking the probate thereof; \* \* \* refusing to make any order heretofore mentioned in this section \* \* \*".

In *Re Estate of Estrem*, 16 Cal.2d 563, 566, 107 P.2d 36, 38, our Supreme Court stated: "A preliminary question is raised as to the appealability of this order denying the motion to set aside the probate. The decision in *Re Estate of O'Dea*, [15 Cal.2d 637] 104 P.2d 368, handed down since the filing of the briefs herein, was cited to us on oral argument. That case holds that section 1240 of the Probate Code specifies the only orders and judgments in probate from which an appeal will lie, and an order made on a motion under section 473 of the Code of Civil Procedure, like any other probate order, is appealable only if expressly so declared in section 1240. The effect of the order here under consideration was a refusal to revoke the probate and the letters issued pursuant thereto, and an order either granting or refusing such relief is *expressly made appealable* by section 1240." (Emphasis added.)

See also *In re Sanders' Estate*, 70 Cal. App. 127, 128, 232 P. 733; *Hartman v. Smith*, 140 Cal. 461, 467, 74 P. 7.

An appeal similar to the one now engaging our attention was considered by the court in the case of *In re Ricks' Estate*, 160 Cal. 450, 117 P. 532, and 160 Cal. 467, 117 P. 539. In these companion cases a contest was filed after probate with respect to a will and codicil. A nonsuit was granted with respect to the will and from the judgment contestant took an appeal in the first case. Thereafter trial was had with respect to the codicil and the jury returned a verdict in favor of contestant, and from the resulting judgment and order the proponent appealed in the second case.

In the first case the argument was advanced that since the contest was to both the will and the codicil, no judgment could be entered on the nonsuit, until the entire litigation involving both the will and the codicil was finally adjudicated. The court rejected the contention, stating, 160 Cal. at pages 466, 467, 117 P. at page 539: "The last point made by appellant is that the judgment appealed from entered upon the motion granting the nonsuit as to the contest of the will, should be reversed because it was prematurely entered. His position is that as both the validity of the will and of the codicil were contested in a single petition, upon which the parties went to trial, that while the court might grant a nonsuit as to the contest of the will and deny it as to the contest of the codicil, or *vice versa*, still in law no judgment could be entered upon the order granting the nonsuit as to either until the entire contest, both as to the will and codicil, was finally determined. *We do not think there is any merit in this point.* Respondent had a right to move for a nonsuit, both as to the will and codicil, or as to either, at the close of contestant's case, and if in the opinion of the court the evidence was insufficient to warrant submitting the question of the validity of either instrument to the jury

it was the duty of the court to grant a nonsuit accordingly. And, upon such nonsuit being granted, even if it applied to only one branch of the contest, the party in whose favor it is ordered is entitled to a judgment thereon. Code Civ.Proc., § 581." (Emphasis added.)

In the case at bar, we are persuaded that when the court made its ruling as to the will pursuant to the provisions of Section 630 of the Code of Civil Procedure, respondents were entitled to a judgment thereon though it applied to only one branch of the contest, and that an appeal therefrom is authorized by law.

We find nothing in the cases relied upon by respondents which militates against the conclusions we have arrived at herein. The cited cases of *Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174, and *Gombos v. Ashe*, 158 Cal.App.2d 517, 322 P.2d 933, deal with appeals from a demurrer sustained without leave to amend as to one of several causes of action and where judgment was entered only as to such cause of action. It was held that such a judgment of dismissal did not constitute a final judgment or order within the meaning of Code of Civil Procedure, Section 963, for purposes of appeal thereunder. We are satisfied that such an appeal made under Code of Civil Procedure, Section 963, subd. 1 where a "final judgment" is required is not analogous to the question presented in the case at bar which has to do with an appeal under Probate Code, Section 1240. Equally distinguishable is the case of *Murphy v. Fong Shuck*, 151 Cal.App.2d 64, 311 P.2d 80, involving violations of collective bargaining agreements.

*In re Hart's Estate*, 119 Cal.App.2d 310, 259 P.2d 703, 704, an appeal from the parts of an order settling and assessing costs of trial under Section 383 of the Probate Code and cited by respondent confirms the views herein expressed by us, and states that the right to appeal under Probate

Code, Section 1240 "is determined by the legal effect of an order, not by its form".

The motion to dismiss the appeal herein is denied.

FOURT and LILLIE, JJ., concur.



162 Cal.App.2d 776

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Gordon Travis CAMPBELL, Defendant**  
and Appellant.

Cr. 6093.

District Court of Appeal, Second District,  
Division 3, California.

Aug. 14, 1958.

Hearing Denied Oct. 10, 1958.

Defendant was convicted of drunk driving and of failing to stop, identify himself and render assistance to victim of an automobile collision and from a judgment and order of the Superior Court of Los Angeles County, Edward R. Brand, J., the defendant appealed. The District Court of Appeal, on rehearing, Shinn, P. J., held that refusal of instruction on doctrine of imminent peril and on misdemeanor drunk driving was either not error or not prejudicial that conduct of the trial court did not result in a miscarriage of justice and that testimony as to a conversation had with the victim and the victim's physician was properly excluded.

Judgment and order affirmed.

Opinion, 327 P.2d 187, vacated.

#### 1. Automobiles ⚡332

To establish a violation of the statute, it must be shown that accused drove a vehicle on a public highway when under the influence of intoxicating liquor, that in

so driving he committed an act forbidden by law and neglected a duty imposed by law, and that such act or neglect was proximate cause of bodily injury to some person. West's Ann.Veh.Code, § 501.

#### 2. Automobiles ⚡357

In prosecution for felony drunk driving, refusing an instruction on doctrine of imminent peril was not error where the doctrine was not applicable to the conduct of defendant prior to collision with victim's stopped automobile in that defendant was driving at excessive speed and driving with brakes in defective condition. West's Ann.Veh.Code, §§ 501, 510, 670.

#### 3. Criminal Law ⚡1173(2)

In prosecution for drunk driving, refusal to give an instruction on imminent peril was not prejudicial error under the circumstances. West's Ann.Veh.Code, §§ 501, 510, 670.

#### 4. Criminal Law ⚡1173(2)

In prosecution for felony drunk driving, failure to give defendant's requested instruction relating to misdemeanor drunk driving a lesser and included offense was not prejudicial in view that a verdict of violation of felony drunk driving would have been the same had the instruction been given. West's Ann.Veh.Code, §§ 501, 502.

#### 5. Criminal Law ⚡823(6)

In prosecution of motorist for failure to stop, identify himself and render assistance to collision victim, instruction that a motorist who was rendered unconscious by an accident may not be held criminally liable for failure to perform the statutory duty while he is thus incapacitated was not prejudicial as a misdirection to the jury in view of other instructions given on the issue of criminal intent. West's Ann.Veh.Code, § 480.

#### 6. Criminal Law ⚡656(2)

A trial judge has a duty to render assistance during production of evidence in a jury trial where assistance is needed and it is proper to intervene in order to aid in the elicitation of clear and compre-



hensive testimony but such must be done in a manner that gives no indication of the court's inclination for or against either party.

#### 7. Criminal Law §1166½(12)

Act of the trial court in a criminal case in allegedly interrupting the orderly and efficient interrogation of the people's witnesses by the prosecutor and taking over the latter's duties repeatedly did not result in a miscarriage of justice and hence was not reversible error, where under the evidence and proper inferences the question of defendant's guilt was not a close one. West's Ann.Veh.Code, §§ 482(a), 501.

#### 8. Criminal Law §1038(3)

Defendant could not complain of refusal of the trial court to give an instruction where it is not requested.

#### 9. Witnesses §379(2)

In prosecution for felony drunk driving and failure to render assistance after an accident, excluding testimony of a conversation defendant had with victim and victim's physician at hospital about a week after accident to impeach testimony of victim and physician that victim had been seriously hurt was not error, since fact that victim was feeling better a week after accident would not authorize an inference that he had suffered no injury or that he had not appeared to be hurt.

#### 10. Criminal Law §595(4)

Refusing defendant a continuance in order to produce an absent witness who was not under subpoena was not an abuse of discretion where defendant did not disclose the name of the witness and made no showing that his testimony would be material.

#### 11. Criminal Law §594(1)

If a witness is directed that he need not appear until a certain time and the court is ready to receive his testimony before that time, it is discretionary to deny a continuance requested for the purpose of producing the witness.

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, Gordon Travis Campbell was convicted of violating Vehicle Code, section 501 (Count I) and Vehicle Code, section 480 (Count II). He appeals from an order granting him probation and the denial of his motion for new trial.

At 12:45 a. m. on February 7, 1957, Mario Salcedo was driving his Plymouth automobile south on San Vicente Boulevard in Beverly Hills. The posted speed for automobiles traveling south on San Vicente at that point was 25 miles per hour. Salcedo stopped for a red light at the intersection of San Vicente and Wilshire Boulevard. While he was waiting for the signal to change, a Lincoln automobile, also going south on San Vicente, struck the rear end of the Plymouth, damaging both vehicles and causing severe injuries to Salcedo, who sustained a fractured skull. The Lincoln was registered to "Gordon T. or Elizabeth Campbell." Salcedo was taken to the hospital where he remained for 10 days. At the time of trial, he was still under a doctor's care.

One Porche, who was waiting for the signal in the lane to the right of Salcedo, testified that defendant got out of the Lincoln immediately after the collision, approached to within a few feet of Salcedo, who was lying on the front seat of the Plymouth, and then started to walk west on Wilshire Boulevard without giving his name or exhibiting his driver's license. Porche's passenger, a Mrs. Le Sassier, testified that defendant asked her what had happened and that she replied: "Can't you see what happened? Didn't you just hit this man?"; without saying anything further, defendant walked away.

William Fairlee, a police officer, testified that he drove Porche up Wilshire Boule-

vard in a police car to look for defendant. They found Campbell standing on the northwest corner of Wilshire and La Cienega, which was three blocks away. Fairlee asked defendant for some identification and defendant replied that he did not have to give any identification since he had not done anything. Upon being asked by the officer why he had left the scene of the accident, Campbell answered that he didn't know anything about any accident. When asked to accompany the officer, defendant refused to go. Fairlee forcibly placed Campbell in the car and returned to the scene where they met another officer, Marvin Sullivan.

Upon being questioned further by the officers at the scene, Campbell admitted having had two drinks of scotch at the Red Snapper Restaurant. He told the officers that he was in the Lincoln when the collision occurred, but he was not driving. The driver was a man he had met at the Red Snapper; he did not know the man's name. When the officers asked him whether he had been injured, defendant replied that he had not been hurt; he had no visible injuries. Officer Fairlee stated that defendant's breath smelled of alcohol, his eyes were watery and his face had a bloated appearance. The officers gave him a sobriety test. In their opinion, Campbell was under the influence of intoxicating liquor.

Sullivan testified that he observed 44 feet of skid marks on the street; the marks terminated at the point of impact. In his opinion, the Lincoln had been traveling in excess of 40 miles per hour at the time of the collision; he based his opinion upon the skid marks, the damage to both vehicles and the distance Salcedo's car had been pushed forward by the collision.

Defendant, testifying in his own behalf, denied having been intoxicated. He spent the earlier part of the evening of February 6 with a Miss McNally and a Mrs. Auchincloss. Around 8 p. m. he went to the Red Snapper Restaurant on La Cienega, where he had dinner with the proprietor, a Mr.

Herd, who was a friend. He ordered one drink of scotch at the bar and took it to the dinner table. Defendant sat talking with Herd until 11 or 11:15 when Herd left. Campbell remained for another 45 minutes. He had nothing further to drink before leaving the restaurant. Mr. Herd and Daniel De Blasio, a bartender employed at the Red Snapper, testified that Campbell had only the one drink at the restaurant.

Defendant testified further that after leaving the Red Snapper he drove "very normally, down San Vicente towards Wilshire." Just north of the intersection, Salcedo's car veered suddenly into his lane of traffic from the parking lane to his right. Campbell applied his brakes but they did not hold; he applied the emergency brake, but was unable to stop. He swerved to the right but was unable to avoid striking Salcedo's car. Campbell stated that his chin hit the steering wheel and he could not recall any of the events that happened subsequently or any of the statements that were made by the other witnesses or that were attributed to him. His first recollection was of being in jail, feeling cold, and asking for some blankets. Two of his teeth were broken off and he received a bruise on the right side of his jaw that was visibly red for several days afterward.

On cross-examination, defendant admitted that he probably walked up Wilshire from "instinct" to get help at a service station located on the northwest corner of La Cienega and Wilshire where he often bought gasoline. He had not been aware that there was an all night restaurant located on the south side of Wilshire at its intersection with San Vicente and an all night service station on the northeast corner of Wilshire and La Cienega.

William Welsh, a private investigator called by the defense, testified that he examined the area nine days after the collision and did not see any skidmarks. Miss McNally and Mrs. Auchincloss appeared for the defense and corroborated Campbell's statement that he had not had any drinks while in their company.

Dr. R. W. Hayward, a dentist called by defendant, stated that he examined Campbell's teeth on March 26 and found that two teeth on the right side which held his denture had been broken off. In his opinion, it would have taken considerable force to break off the teeth.

Ernest Bence, a witness for defendant, testified that he operated a service station in Brentwood. Two days before the collision, defendant drove into the station in the Lincoln using the emergency brake. Bence testified that he put in some brake fluid and told Campbell to have the master cylinder fixed "as soon as possible." Some time after the accident, defendant took his car to a repair shop operated by one Safady. A week or ten days after the car was brought in Safady tested it and found that the brakes did not hold. He took the car to a brake specialist, who opened the master cylinder and told him that the cylinder was leaking. In Safady's opinion, the leak was due to wear and tear; he had not examined the brakes and his opinion was based upon his previous experience in the repair business.

In urging a reversal of the judgment and order, defendant argues numerous assignments of error. It is not contended that the evidence was insufficient to support the verdicts.

With respect to Count I of the information which charged Campbell with felony drunk driving, defendant requested and the court refused to give an instruction on the doctrine of imminent peril and an instruction on misdemeanor drunk driving.

The first mentioned instruction was a proper statement of the rule that one who, *without negligence on his part*, is suddenly confronted with unexpected and imminent danger, is expected to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger under the same circumstances.

The evidence which defendant contends rendered the instruction applicable was the following: It appears that the southbound section of San Vicente at the location in

question is a one-way street with four lanes. Campbell testified that he was traveling in lane four, he saw a car in lane three and "Well, I thought the car veered slightly to the left. I thought he was in the third lane. He changed from the third—I say he—as we approached here, he seemed to go from Lane 3 to Lane 4," and he testified, as previously stated, that when his brakes failed he swerved to the right.

[1] In order to establish a violation of Vehicle Code Section 501, it must be shown that the accused drove a vehicle on a public highway while under the influence of intoxicating liquor, that, in so driving, he committed an act forbidden by law or neglected a duty imposed by law, and that said act or neglect was a proximate cause of bodily injury to some person.

[2] The possible violations of law that were to be considered were driving at a speed in excess of 25 miles per hour which, *prima facie*, would have been in violation of Section 510 of the Vehicle Code, driving with defective brakes in violation of Section 670 of the Vehicle Code, or driving without the use of ordinary care or skill, in violation of the duty imposed by Section 1714 of the Civil Code.

Section 670 of the Vehicle Code requires that automobiles when driven upon a highway must be equipped with brakes "adequate to control the movement of and to stop and hold such vehicle, \* \* \*." Defendant knew his brakes were defective. Two days before the accident he was informed that the fluid had leaked out of the braking system and that he had no brakes except the emergency brake. He was told to have the condition repaired as soon as possible. He paid no attention to that admonition. He did not know, and he made no effort to find out, whether the brakes would continue to operate for hours or days or weeks. So far as he knew the leak might have been such as would have depleted a supply of brake fluid at any moment. He gave no thought to the danger that was involved and apparently intended to continue driving until his brakes failed again. This is precisely what happened.



The rule of sudden peril has application only to conduct which follows the unexpected appearance of danger. It was not applicable to the conduct of defendant prior to that time, namely, with respect to his speed or to his driving with his brakes in a defective condition.

Defendant had a right to have the jury instructed in accordance with his own theory of the case, which encompassed also instructions that were pertinent to an expression of his contentions with respect to the legal theories of the prosecution. It is necessary to examine those theories in the light of the evidence.

With respect to a claimed violation of law the contention of the People was that defendant was driving at an excessive speed, and they relied upon evidence of skidmarks of 44 feet which ended at the point of the accident, and upon expert testimony, based upon the skidmarks and the force of the collision, that his car was traveling at 40 miles per hour when the brakes were applied. The People did not contend that defendant was guilty of negligence in failing to make every effort to stop, but, upon the contrary, their evidence tended to prove that he did make a real effort, and that his speed was such that he could not stop. There was nothing in the People's evidence or their theory of the case that would have rendered appropriate the instruction on imminent peril. Neither was the instruction applicable to the defendant's theory of the case, which was that he made every effort to stop and to turn aside, and that so far as his conduct was concerned, the failure of his brakes was the sole cause of his failure to stop. His evidence furnished no reason for application of the rule of imminent peril. We can conceive of no state of facts reasonably deducible from the evidence which would be inconsistent with the theory of the People and also the theory of the defendant. In other words, there was no evidence whatever that would have warranted the jury in finding that defendant did not use ordinary care to come to a stop after he observed the movement of the Salcedo car.

Furthermore, defendant would not have been entitled to the instruction unless the jury could with reason have found that at the time of the appearance of the imminent danger he was driving in the exercise of ordinary care. Where the evidence would have warranted either of two conclusions, namely, that defendant had good brakes and skidded his car 44 feet, or that he had no effective brakes and was unable to stop, the jury could not have reached the absurd conclusion that defendant had good brakes, was driving at a reasonable and prudent speed but did not use ordinary care to stop his car after he saw the movement of the Salcedo car.

If we assume, for the moment, that it was a question of fact whether defendant was guilty of negligence in driving with defective brakes, it is, in our opinion, utterly improbable that the jury would have reached the conclusion that his conduct was that of a reasonably prudent driver. Unless the jury determined that his driving the car with his brakes in the defective condition that was known to him was the conduct of a reasonably prudent man, it would have been obliged to conclude that he was guilty of unexcused violation of Section 670. *Alarid v. Vanier*, 50 Cal.2d 617, 327 P.2d 897. Whether he had good brakes and was driving so fast he could not stop, or was driving with defective brakes, the jury could not, in our opinion, have found that he was free from negligence at the time he observed the movement of the Salcedo car. Unless he was then free from negligence his negligence was one of the causes which created the peril and the instruction was inapplicable.

[3] Finally, the claim of error in failing to give the instruction on imminent peril would be without validity unless there is reason to believe that the jury found that defendant was negligent in his conduct after he discovered the movement of the Salcedo car and might reasonably have reached a different conclusion if the requested instruction had been given. Such a contention would be entirely untenable and for this reason, if for no other, we would have

to hold that defendant suffered no harm in the refusal of the instruction.

[4] The next contention is that the court committed error in failing to give defendant's requested instruction which related to misdemeanor drunk driving, a lesser and necessarily included offense (Vehicle Code, § 502). Under this instruction defendant would have been entitled to an acquittal of violation of Section 501 if the jury determined that although he may have been under the influence of liquor he was not guilty of violation of law which was a proximate cause of the accident.

We do not doubt that despite the evidence respecting the skid marks and the force of the collision the jury could have found that defendant was not driving at an unlawful rate of speed. In that view of the evidence, and absent evidence of any other violation of law, it would have been proper to give the instruction. But if the jury had believed that defendant's speed was not excessive there would have remained the question whether his conduct in driving with defective brakes was that of a reasonably prudent man. We have already expressed the opinion that the jury could not reasonably have reached that conclusion. Being convinced that the verdict of violation of Section 501 would have been the same had the instruction been given, we hold that the failure to give it furnishes no ground for reversal of the judgment as to Count I of the information.

[5] With respect to Count II, which charged him with failing to stop, identify himself and render assistance to Salcedo, defendant requested the following instruction: "Before you can find the defendant guilty as charged, his failure to perform one or more of the duties imposed upon him must have been wilful; and if you believe that he himself was so injured by the collision as not to be in possession of his faculties and his failure was due to that condition, then he should not be convicted." The proposed instruction was refused. At the People's request, the court instructed the jury as follows: "A vehicle

driver who is rendered unconscious by an accident may not be held criminally liable for a failure to perform any duty defined in the foregoing law [Vehicle Code, section 480] while he is thus incapacitated." Defendant contends that the instruction given by the court was a misleading and inadequate statement of the law applicable to his defense that he was not guilty of a conscious failure to perform the duties imposed by the statute. He also contends that the court committed error in refusing to give the instruction proposed by him.

We cannot agree that the jury was misdirected to Campbell's prejudice by the instruction given at the People's request. That instruction, when considered in isolation, is properly to be criticized. If, defendant argues, the instruction means what it says, and no more, the jury might well have been led to believe that Campbell was to be excused only if he had been rendered completely unconscious by the collision, and oblivious to his surroundings and to what had occurred. But in the light of other instructions given on the issue of criminal intent, we do not think the jury could have been so misled. The jurors were told that the duties imposed by the code apply to persons "knowingly" involved in an accident and that the "wilful" failure of a driver to perform any of those duties is a criminal offense; that the statute is applicable to a driver who "knows" that he has been involved in an accident and that his failure to stop, identify himself and render assistance must be "wilful" and in another instruction, given at Campbell's request, that knowledge of the infliction of injury upon another person is an essential element of the offense. A fourth instruction stated that Campbell's conduct was not culpable unless it was knowing and wilful.

The instructions made it clear that inability to know what was going on or what had occurred would be a good defense, even though defendant's mental condition fell short of complete oblivion. In fact, the instructions that were given stated the law in much better form than it was stated in



the refused instruction, which would have invited the jury to consider whether defendant was "in possession of his faculties." The instruction could well have been refused upon the ground of ambiguity. We do not doubt that the jurors understood they were to acquit Campbell on the second count if they believed his testimony respecting his mental incapacity.

Defendant's brief specifies many instances of alleged misconduct on the part of the court. With minor exceptions they relate to interruption of the proceedings by the trial judge by propounding questions to witnesses for the People during the course of their examination by the deputy district attorney. It would unduly prolong this opinion to give the full text of the questioning. A brief summary will suffice. In 15 or more instances, the court interrupted the examination of the People's witnesses by the deputy district attorney by questions which were calculated to and did elicit testimony seriously adverse to the defendant. The court asked a witness whether defendant said anything to any one immediately after the accident, whether he gave his name and address or showed his operator's license to any one, whether the officers' car was painted black and white, whether a witness who was testifying to a conversation with the defendant had made any observation with respect to defendant's sobriety, whether he smelled defendant's breath and what he observed, whether he had questioned the defendant respecting his drinking. When another witness was testifying to the condition of the surface of the highway, the court interrupted to ask whether the witness had an opinion as to defendant's sobriety. In other instances, the court cross-examined witnesses for the defendant in a manner that was abrupt and critical.

The interrogation of the witnesses by the deputy district attorney on direct and cross-examination was orderly and efficient. The questions propounded by the court were only those which would naturally have been asked by the prosecutor. Nothing had been overlooked or was likely

to be overlooked by the prosecutor in the elicitation of all relevant testimony. There was no hesitation upon the part of any of the witnesses to testify freely and no uncertainty whatever in their testimony. There was no occasion whatever for the court to take over the duties of the deputy district attorney in the questioning of the witnesses, and yet this is what the court did persistently.

[6] There can be no doubt as to the duty of a judge to render assistance during the course of production of evidence in a jury trial, where assistance is needed. A witness may be evasive and his answers incomplete or uncertain, important matters may be overlooked by counsel, and in these and similar instances, it is entirely proper for the court to intervene in order to aid in the elicitation of clear and comprehensive testimony. This, of course, must be done in a manner that gives no indication of the court's inclination for or against either party. But for the court in a criminal case to interrupt the orderly and efficient interrogation of the People's witnesses by the prosecutor and to take over the latter's duties repeatedly, as was done in the present case, can scarcely fail to have some influence upon the minds of the jurors adverse to the defendant.

Judges have been admonished time and time again of their duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders upon advocacy. We deem it appropriate to quote in part the remarks of the Supreme Court in *People v. Mahoney*, 201 Cal. 618, 626-627, 258 P. 607, 610: "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence." When the trial judge officiously and unnecessarily usurps



the duties of the prosecutor by taking over the questioning of witnesses and in so doing creates the impression that he is allying himself with the prosecution, harm to the defendant is inevitable. We do not see how any judge could fail to recognize that fact. *People v. Long*, 63 Cal.App.2d 679, 685, 147 P.2d 659.

Our question is not whether the court's conduct was harmful to the defense; we are certain that it was. The difficult question in such situations is whether the invasion of the defendant's rights was of so serious a nature as to have resulted in a conviction which otherwise, in all probability, would not have occurred. If we were in doubt here as to the correct answer we would resolve the doubt in favor of the accused.

[7] Our conclusion is that the conduct of the court did not result in a miscarriage of justice. With respect to an alleged violation of section 501 of the Vehicle Code, the evidence, both direct and circumstantial, firmly established the fact that defendant was intoxicated, if the witnesses for the People were to be believed. With respect to his having been operating his car in violation of law, we have already expressed the view that the jury could not reasonably have failed to find that in driving it with brakes which he knew to be defective defendant was not acting with reasonable prudence and care. There was also persuasive evidence that he was driving at a speed which endangered the safety of persons and property in violation of section 510 of the Vehicle Code. There was, of course, no doubt that Mr. Salcedo was seriously injured as a proximate result of defendant's conduct. There was also convincing evidence of a violation of section 482(a) of the Vehicle Code consisting of the failure of defendant to give his name, address, registration number of his vehicle and name of the owner to Mr. Salcedo, and the failure to render assistance to him. The only excuse offered by defendant for failure to identify himself and for leaving his car in the street while

he departed the scene was that he was rendered unconscious in the sense that he did not know what had happened or understand what he was doing following the accident. His testimony to that effect had but slight, if any, support in the nature of his injuries or in his conduct. There was no convincing evidence that he received a concussion or a blow which was severe enough to seriously impair his mental faculties or which required medical care. He testified that he probably left the scene of the accident to find a telephone for the purpose of making a report of it. There was uncontradicted evidence that his conversation following the accident was lucid and his physical actions normal except for the symptoms of intoxication. There was ample evidence that the injuries he received did not render him unable to understand what had happened and what he was doing thereafter. We are of the opinion that under the evidence and the proper inferences the question of defendant's guilt under either count was not a close one, and we are not convinced that if the interruptions and interrogation of witnesses by the court had not occurred, the verdict would have been different as to either count.

[8] Defendant also contends that the court erred in failing to instruct the jury that he need only raise a reasonable doubt that he was unconscious in order to be entitled to an acquittal. A sufficient answer to this contention is that defendant did not request such an instruction. In the absence of such a request the general instructions on reasonable doubt were sufficient.

[9] The court did not commit error in excluding testimony which defendant proposed to give respecting a conversation he had with Salcedo and Salcedo's physician at the hospital about a week after the accident. Counsel offered to prove that Dr. Laurion told defendant that his patient had suffered a slight concussion, but was about cured, and that Salcedo said he was feel-

ing "wonderful." Defendant's argument is that evidence of the conversation was admissible to impeach the testimony of Salcedo and Dr. Laurion that the former had been seriously hurt and also to prove that Salcedo had suffered no apparent injuries, hence Campbell was not under a duty to assist him. The argument is without merit. Salcedo's condition following the collision was described by Porche and the two police officers and it cannot be doubted that he was injured and in considerable pain. The fact, if it be a fact, that Salcedo was feeling better a week after the accident would not lead to an inference that he had suffered no injury or that he had not appeared to be hurt.

[10] The court likewise did not commit error in refusing defendant a continuance in order to produce an absent witness who was not under subpoena. Counsel informed the court that he had miscalculated the time necessary to present his case, that he wished to call a certain doctor to the stand, but that he had told the doctor to be in court at 2 p. m. It was then late morning. The court refused a continuance and the defense rested.

[11] If a witness is directed that he need not appear until a certain time and the court is ready to receive his testimony before that time, it is within the court's discretion to deny a continuance requested for the purpose of producing the witness. *People v. Morhar*, 78 Cal.App. 380, 386, 248 P. 975. Counsel did not disclose the name of the witness and made no showing that the doctor's testimony would be material. Had counsel deemed the testimony of the witness to be vital to the defense, he could have made a motion to reopen his case at 2 p. m., even though the cause was then being argued to the jury. *People v. Morgan*, 140 Cal.App.2d 796, 804, 296 P.2d 75. The court did not abuse its discretion in denying a postponement of the trial. *People v. Franklin*, 41 Cal.App.2d 669, 670, 107 P.2d 500; *People v. Sherman*, 139 Cal. App.2d 429, 431-432, 293 P.2d 809.

From a consideration of the entire evidence, we are convinced that the judgment and order should be affirmed.

The judgment and order are affirmed.

PARKER WOOD, J., and NOURSE, J.  
pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



163 Cal.App.2d 123

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Herschel Travis TOMS, Jr., and Daisy Belle**  
**Moore, Defendants and Appellants.**

**Cr. 1240.**

**District Court of Appeal, Fourth District,**  
**California.**

**Aug. 22, 1958.**

Defendants were convicted of possession of heroin in violation of West's Ann. Health & Safety Code, § 11500. The Superior Court of Tulare County, Robert K. Meyers, J., rendered judgments of conviction and entered order denying motions for new trial, and defendants appealed. The District Court of Appeal, Mussell, J., held that testimony of officer that in response to questioning by another officer, one of the defendants admitted that she had previously been arrested for possession of narcotics was admissible to show guilty knowledge of narcotic character of article possessed and that the evidence was sufficient to support conviction of both defendants.

Judgments and order affirmed.

#### **I. Criminal Law** $\S$ 372(1)

Except when it shows merely criminal disposition, relevant evidence is not ex-

cluded because it reveals commission of an offense other than that charged.

**2. Criminal Law**  $\hookrightarrow$ 369(2)

Evidence which tends logically, naturally, and by reasonable inference to establish any fact material for prosecution, or to overcome any material matter sought to be proved by the defense is admissible in a criminal case, regardless of whether it embraces commission of another crime, whether such crime is similar in kind, or whether it is part of a single design.

**3. Poisons**  $\hookrightarrow$ 4

Knowledge of presence of object as embraced within concept of physical control with intent to exercise such control is the essence of "possession" within meaning of statute making possession of narcotics unlawful. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

**4. Poisons**  $\hookrightarrow$ 4

Knowledge of narcotic character of article possessed was a material fact in prosecution for unlawful possession of heroin. West's Ann.Health & Safety Code, § 11500.

**5. Criminal Law**  $\hookrightarrow$ 370

In prosecution for unlawful possession of heroin, testimony of officer that in his presence in response to questioning by another officer, defendant admitted that she had previously been arrested for possession of narcotics was admissible to show guilty knowledge of narcotic character of article possessed. West's Ann.Health & Safety Code, § 11500.

**6. Poisons**  $\hookrightarrow$ 9

Evidence was sufficient to support conviction of both occupants of automobile for unlawful possession of heroin found by officer on ground beside automobile where it apparently had been placed or thrown by one defendant while codefendant diverted officer's attention. West's Ann. Health & Safety Code, § 11500.

**7. Criminal Law**  $\hookrightarrow$ 1160

It is the function of jury, in the first instance, and of trial court, after verdict, to determine what facts are established by the evidence, and a verdict approved by trial court may not be set aside on appeal on ground of insufficiency of the evidence, unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

**8. Poisons**  $\hookrightarrow$ 4

Constructive possession of a narcotic constitutes violation of statute, and such possession may be individual, through an agent, or joint with another. West's Ann. Health & Safety Code, § 11500.

**9. Poisons**  $\hookrightarrow$ 4

Where several persons are charged with possession of same contraband and question of whether they had joint control of narcotics involved is properly left for determination of jury, exclusive possession need not be shown. West's Ann.Health & Safety Code, § 11500.

John H. Marshall, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Joe J. Yasaki, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants were charged with violating section 11500 of the Health and Safety Code, a felony, in that on or about November 5, 1957, in Tulare county, they unlawfully had in their possession a quantity of heroin. They entered pleas of not guilty and trial was had before a jury which found them guilty as charged in the information. Motions for new trial and applications for probation were denied. Appellant Toms was sentenced to the State's prison at Vacaville and appellant Moore was sentenced to the State's prison at Corona. This appeal is from the judgments of conviction and from the order denying motions for new trial.



At about 11:00 a. m. on November 5, 1957, appellants were traveling south on highway 99 when they were stopped by a highway patrol officer for speeding. Appellant Toms was driving and was given a citation. At about 1:00 p. m. on the same day another highway patrolman (Morton E. Camp), while patrolling the highway in Tulare county, copied an all-points radio broadcast concerning the Oldsmobile in which appellants were riding. He observed the Oldsmobile and pulled out after it. The Oldsmobile increased its speed to 80 miles per hour and passed several other cars. The officer finally overtook it and ordered the driver to pull over. The officer then pulled up about 10 feet behind the Oldsmobile after it came to a stop. After satisfying himself that there was nothing in the road or the area of the car and that nothing had been thrown from it, he walked over to the Oldsmobile. Appellant Moore was driving it and appellant Toms was seated in the right front seat. Officer Camp asked appellant Moore for her driver's license and then returned to his patrol car. Appellant Moore got out of the Oldsmobile and started walking toward the officer's car and he told her to go back to the Oldsmobile. Shortly thereafter, when officer Camp was in his car, appellant Moore got out of the Oldsmobile, carrying a brown paper bag. She walked to the front of the Oldsmobile, crossed in front of it and walked for some distance to the right, away from the highway and front of the car. Appellant Toms remained seated on the passenger side with his arms over the car door, watching appellant Moore. Officer Camp then proceeded toward appellant Moore. He walked between the two vehicles and along the right of the passenger side of the Oldsmobile. At this time he observed that the area around the Oldsmobile was clear of all "foreign matter." As the officer walked beyond the Oldsmobile towards appellant Moore he had his back to appellant Toms. After retrieving the paper sack which appellant Moore had been carrying, the officer turned back toward the Oldsmobile and saw a crumpled aluminum

foil object on the ground, even with the passenger door and three feet from the car. The object was bright and shiny and was in the clear dirt area near the car door. The object was about three inches long and one inch in diameter and was tightly compressed. Appellant Toms was still seated on the passenger side of the Oldsmobile but the car door was partially open. The officer picked up the object and unwrapped the aluminum foil. Inside was a white, lined paper containing a light grey powder substance, which was later analyzed and found to be 139 grains of heroin, of the value of approximately \$700.00.

Other officers were summoned to the scene and a search was made of the Oldsmobile. The officers found between the front and rear seats a clear plastic bag containing three plastic spoons, an eye dropper, and a glass case containing two hypodermic needles. A box of Kleenex containing a white powder, which later was shown to be milk sugar, was found in the trunk, with a roll of aluminum foil, women's and men's clothing, phonograph records, and other items.

Appellants first contend that it was prejudicial error to permit a prosecuting witness to testify as to appellant Moore's prior conviction. We are not in accord with this claim. The record shows that during the trial highway patrolman Elvin E. Rogers testified on direct examination by the district attorney that he was present at and overheard part of a conversation between patrol officer Pieschke and appellant Moore. Officer Rogers testified:

"A. Well, actually I said nothing to either one of the defendants. Officer Pieschke asked Miss Moore, he says, 'Have you been the route before?' And she stated that she didn't know what he was talking about. And then he asked her, he says, 'Have you ever been arrested for narcotics before?' She stated that she had been arrested at one time for possession."

Following this testimony appellant made a motion for a mistrial. This motion was

denied and the jury was instructed as follows:

"Members of the jury, the Court wishes to instruct you and to admonish you that the testimony heretofore had of this officer as to the oral statement made to him by the defendant Moore as to some previous contact with narcotics is admissible only for the purpose of showing, tending to show, knowledge on her part of the nature of narcotics in connection with the possession. You will not consider any other matter. It has no bearing other than that in this case."

[1,2] The rule is well settled that except when it shows merely criminal disposition, evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged. As is said in *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924, 929:

"The general tests of the admissibility of evidence in a criminal case are: \* \* \* does it tend logically, naturally and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not."

[3-5] In *People v. Gory*, 28 Cal.2d 450, 455, 170 P.2d 433, 436, it was held that "*knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control'" is the essence of the possession announced by the narcotic statute. And in *People v. Candiottio*, 128 Cal.App.2d 347, 353, 275 P.2d 500, it was stated that knowledge of the narcotic character of the article possessed is a necessary ingredient of the offense of possessing narcotics. In the instant case the presence or absence of such knowledge was a material fact and the testimony was properly admitted to show guilty knowledge on the part of appellant

Moore. *People v. Torres*, 98 Cal.App.2d 189, 191, 192, 219 P.2d 140; *People v. Howard*, 150 Cal.App.2d 428, 430, 310 P.2d 120.

[6-9] Appellants' contention that the evidence was insufficient to support the verdict of the jury is likewise without merit. It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Constructive possession of a narcotic constitutes a violation of section 11500 of the Health and Safety Code. *People v. White*, 50 Cal.2d 428, 325 P.2d 985. Such possession may be individual, through an agent, or joint with another. *People v. Bigelow*, 104 Cal.App.2d 380, 389, 231 P.2d 881. Exclusive possession need not be shown where several persons are charged with possession of the same contraband and the question of whether the appellants had joint control of the narcotics involved was properly left for the determination of the jury. *People v. Romero*, 161 Cal.App.2d 404, 327 P.2d 205. Under the circumstances shown by the record herein the jury could reasonably infer that appellant Toms threw or placed the heroin on the ground where the officer found it, and that appellant Moore was in joint possession thereof may also be inferred from her conduct in diverting the officer's attention while appellant Toms threw the heroin on the ground, as well as by her other acts and conduct shown by the evidence. Under the rules announced herein and the record before us, we cannot hold that the evidence is insufficient to support the verdict.

Judgments and order affirmed.

GRIFFIN, P. J., and McCABE, J. pro tem., concur.

163 Cal.App.2d 110

**Etta E. STEIGER and Juanita M. Steiger,**  
**Plaintiffs and Respondents,**

v.

**The CITY OF SAN DIEGO, a Municipal**  
**Corporation, Defendant and**  
**Appellant.**

Civ. 5823.

District Court of Appeal, Fourth District,  
 California.

Aug. 22, 1958.

Rehearing Denied Sept. 11, 1958.

Action by landowners against city to recover damages to property resulting from drainage system, planned by subdividers, and accepted by city as part of system of public works, being constructed near landowners' property and allowing water to flow into draw on landowners' property causing erosion. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for landowners, and city appealed. The District Court of Appeal, McCabe, J. pro tem., held that landowners could not recover from subdividers, but could recover from city.

Affirmed.

#### 1. Eminent Domain ⇨285

Where subdividers presented to city plans which included drainage system in immediate vicinity of landowners' property, and city approved plans, planned improvements were constructed and approved and accepted by city and became part of city's system of public works, and system of drains was so constructed that water was conducted into draw on landowners' property, causing erosion, subdividers were not liable for injury to property.

#### 2. Waters and Water Courses ⇨38

Question of whether depression is watercourse is question of law and not a question of fact.

#### 3. Waters and Water Courses ⇨38

A "watercourse" is a running stream of water, and there must be a stream usually flowing in a particular direction in a definite channel, having bed, sides, or banks, and

usually discharging itself into some other stream or body of water.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Watercourse".

#### 4. Waters and Water Courses ⇨38

In action by landowners against city to recover damages to property resulting from drainage system, which had been accepted by city as part of city's system of public works, and which discharged into draw on landowners' property, evidence was sufficient to support finding that draw on landowners' property was not a watercourse.

#### 5. Eminent Domain ⇨271

Where subdividers presented to city plans which included drainage system in immediate vicinity of landowners' property, and city approved plans, planned improvements were constructed and approved and accepted by city and became part of city's system of public works, and system of drains was so constructed that water was conducted into draw on landowners' property, causing erosion, landowners had cause of action against city for damages.

#### 6. Eminent Domain ⇨309

Where subdividers presented to city plans which included drainage system in immediate vicinity of landowners' property, and city approved plans, planned improvements were constructed and approved and accepted by city and became part of city's system of public works, and system of drains was so constructed that water was conducted into draw on landowners' property, causing erosion, city, obligated to pay damages, was not entitled to easement on theory that there had been a "taking" of land, as a cause of action existed in property owners for damages independent of a "taking." West's Ann.Const. art. 1, § 14.

#### 7. Eminent Domain ⇨308

Where, in action by landowners against city for injury to land caused by construction of drainage system, accepted by city as part of system of public works, resulting in water being conducted into



draw on landowners' property, causing erosion, city did not seek easement by its pleadings, awarding of damages to landowners without adjudging easement in favor of city was not improper.

#### 8. Eminent Domain $\S$ 303

In action by landowners against city for injury to land caused by construction of drainage system, accepted by city as part of system of public works, resulting in water being conducted into draw on landowners' property, causing erosion, measure of damages was difference in reasonable market value of property without injury and reasonable market value of property in damaged condition.

#### 9. Evidence $\S$ 18

It is common knowledge that land in California, and particularly Southern California, has had heavy appreciation in market value price and value subsequent to 1950.

#### 10. Eminent Domain $\S$ 305

In action by landowners against city for injury to land caused by construction of drainage system, accepted by city as part of system of public works, resulting in water being conducted into draw on landowners' property, causing erosion, trial court was justified in making award of \$20,000.

#### 11. Eminent Domain $\S$ 298, 302

Where drainage system accepted by city as part of system of public works was constructed in immediate vicinity of landowners' property, allowing water to flow into draw and to cause erosion, measure of damages was not cost of installation of pipe to carry water through landowners' property, but in action brought by landowners against city, testimony as to cost of installing drainage pipe through land was admissible as evidence of decrease in market value.

McInnis, Focht & Fitzgerald, San Diego, for respondents.

McCABE, Justice pro tem.

From a judgment awarding \$20,000 damages, defendant city of San Diego appeals.

Since 1922 plaintiffs have been the owners of certain land in the Point Loma area of the city of San Diego. Their land holdings in this area were increased in 1945 to a total holding of approximately 13 acres. For longer than the history in the record recites there was a draw or swale which crosses diagonally over the property. From 1922 plaintiffs' evidence indicates there was no running water in the draw except in 1927 and 1935, when there was a heavy rainfall. During these two rainfalls there was a small amount of water which ran through the property and which water caused no damage. One of the plaintiffs testified that even on these two occasions it took three or four days of heavy rain to cause the small run-off then in the draw.

About 1950, defendant subdividers presented subdivision plans to defendant city of San Diego which included a system of drainage, storm drains and highways. These plans pertained to property in the immediate vicinity of plaintiffs' property. These plans being approved by the defendant city, the planned improvements were constructed, approved and accepted by the defendant city and became a part of the defendant city's system of public works. This system of drains was so constructed that the rain water collected therein was conducted through a culvert under Catalina Boulevard and into the draw or swale on plaintiffs' property. In addition, the waters in the immediate vicinity on Catalina Boulevard are directed along the draw by an opening in the berm. At the other end of the draw is a culvert through which the water may leave plaintiffs' property. Most of the installed drainage system received the original and natural drainage area or basin, but there was included within the installed drainage sys-

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J. F. DuPaul, City Atty., Alan M. Firestone, Chief Deputy City Atty., and Frederick B. Holoboff, Deputy City Atty., San Diego, for appellant.

tem lands which were not a part of the natural area or basin.

Shortly after the completion of the drainage system there was a flow of water in the draw after a rain. This flow started within a short time after a rain started. In 1927 and 1935 the flow through the draw was a few feet in width and a few inches in depth. After the drainage system was installed the flow was as much as 100 feet in width and several feet in depth. After the drainage system was installed and over a period of years it became apparent there was a serious erosion problem on plaintiffs' land, which was created by the water channelled onto the land by the drainage system. In places, the erosion has reached a depth of four or five feet. There is testimony that over the course of time the eroding at the upper end will reach a depth of 20 feet before it reaches the hydraulic grade.

[1] When plaintiffs rested their case motions for nonsuit were made by all defendants. The trial court granted the motions as to all defendants except defendant city. This ruling was correct. In *Anderson v. Fay Improvement Co.*, 134 Cal.App.2d 738, 745, 286 P.2d 513, 518, it is said:

"The law is well settled that the contractors or subdividers could not be held liable for the damage in a direct or inverse condemnation suit. 'If the contractor follows the plans and specifications furnished by the public agency, and damage results to the adjacent property, the public agency and not the contractor is liable.'" *Heimann v. City of Los Angeles*, 30 Cal. 2d 746, 757, 185 P.2d 597, 603, quoting from *Veterans' Welfare Board v. City of Oakland*, 74 Cal.App.2d 818, 832, 169 P.2d 1000; see, also, *Marin Mun. W. Dist. v. Peninsula Paving Co.*, 34 Cal.App.2d 647, 94 P.2d 404; *De Baker v. Southern Calif. R. Co.*, 106 Cal. 257, 39 P. 610, [46 Am.St.Rep.] 237; *Shaw v. Crocker*, 42 Cal. 435; *Eachus v. City of Los Angeles*, 130

Cal. 492, 62 P. 829, [80 Am.St.Rep.] 147; *Engebretson v. Gay*, 158 Cal. 27, 109 P. 879."

The defendant city complains of the judgment rendered against it on the grounds (1) the evidence does not support the judgment; (2) if there was a "taking" within the purview of Art. 1, Sec. 14, California Constitution it is entitled to an easement over plaintiffs' property; (3) the evidence does not support the award of \$20,000 damages and an incorrect rule of damages was used.

[2] Defendant city relies upon the cases of *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1 and *San Gabriel Valley Country Club v. Los Angeles County*, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200 in support of its first contention. In each of these cases the court had before it a condition which is described in the opinion as a watercourse or natural watercourse. We therefore must determine whether the draw through the plaintiffs' land properly can be described as a watercourse or is of some other characteristic. The courts of the state have decided that whether a depression is a watercourse or not is a question of law and not a question of fact. *Sanguinetti v. Pock*, 136 Cal. 466, 470, 69 P. 98.

[3,4] In *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 461, 464, 37 P. 375, 376, the court said:

"A watercourse is defined to be 'a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets.' Black's Law Dictionary, title 'Watercourse.' There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary

causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses. Angell on Watercourses, pp 3-7; Shields v. Arndt, 4 N.J.Eq. 234; Hoyt v. City of Hudson, 27 Wis. 656; [9 Am.Rep. 473]; Luther v. Winnisimmet Co., 9 Cush. 171; Washburn on Easements, 209, 210."

The evidence does not bring the draw or swale on plaintiffs' property within this definition of a watercourse. The trial court's determination that in contemplation of law it was not a watercourse is adequately sustained by the evidence in this case.

As to defendant city's second contention, the rule of law and distinctions to be made are clearly set out in Archer v. City of Los Angeles, supra [19 Cal.2d 19, 119 P.2d 4], where it is said:

"In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; see cases cited in 10 Cal.Jur. 283, 284, 295. The liability of the state under article 1, section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the 'police power' (Pennsylvania Coal Co. v. Mahon, supra; Chicago, B. & Q. R. Co. v. City of Chicago, supra; 10 Cal.Jur., supra; see Mugler v. State of Kansas, 123 U.S. 623, 8 S.Ct. 274, 31 L.Ed. 205), and the injury is one that would give rise to a cause of

action on the part of the owner independently of the constitutional provision. Lamb v. Reclamation Dist., 73 Cal. 125, 129-131, 14 P. 625, 2 Am. St.Rep. 775; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; Jefferson County Drainage Dist. v. McFaddin, Tex.Civ.App., 291 S. W. 322. \* \* \* If the property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state. Lamb v. Reclamation Dist., supra, 73 Cal. 129-131, 14 P. 625; San Gabriel Valley Country Club v. County of Los Angeles, supra; Jefferson County Drainage Dist. v. McFaddin, supra. In the present case, therefore, plaintiffs have no right to compensation under article 1, section 14, if the injury is one that a private party would have the right to inflict without incurring liability."

[5, 6] Plaintiffs under the facts of this case would have a cause of action against a private individual and thus, under the rule of law just cited, they would have a cause of action against defendant city. LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Andrew Jergens Co. v. City of Los Angeles, 103 Cal.App.2d 232, 229 P.2d 475; Callens v. County of Orange, 129 Cal.App.2d 255, 276 P.2d 886. Nevertheless, defendant city claims that under article I, section 14, California Constitution, if they have to pay damages they should be given an easement because there is a "taking" of land. We do not think this contention has substance. Prior to 1879 our state constitution provided in article I, section 8, "Nor shall private property be taken for public use without just compensation."

However, in 1879 a portion of article I, section 8 was revised and after that date article I, section 14 provided: "Private property shall not be taken or damaged for public use without just compensation having first been made to \* \* \* the owner \* \* \*"



The case of *Reardon v. City & County of San Francisco*, 66 Cal. 492, 6 P. 317, decided in 1885, is the first appellate case to be decided after the adoption of article I, section 14, and apparently is the leading case on this subject. It has been cited and followed in many cases but has never been overruled. We therefore will apply the rule of the *Reardon* case to the facts of this one. It is to be noted that the *Reardon* case was not an eminent domain case but, as here, was an action to recover damages to property resulting from installations put in by a public body. In construing the provisions of this constitutional provision the court said, 66 Cal. at page 501, 6 P. at page 322:

"To what kind of damage does this word 'damaged' refer? We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer to more than the damage above mentioned, the word 'damaged' in the clause relied on would be superfluous. It seems to us that the direct invasions spoken of would come within the clause as it stood in the constitution of 1849. If the word 'damaged' only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood. In the case above cited from 99 U.S., the court said, referring to a clause in the constitution of Illinois similar to that in the constitution of this state in force since 1879, that 'this is an extension of the common provision for the protection of private property.'"

Also, 66 Cal. on page 505, 6 P. on page 325, the court said:

"We cannot think that the convention inserting in the constitution of this state the word 'damaged' in the

connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed."

The *Reardon* case and others citing it, determined that a cause of action exists in a property owner for damages independent from a "taking."

[7] The trial court was correct in awarding damages without granting an easement. By its pleadings defendant city did not seek an easement. We are not now deciding whether defendant city might seek and obtain an easement in a separate proceeding, but we do decide that under the pleadings and the applicable law the trial court did not commit error in awarding damages without adjudging an easement in favor of defendant city.

[8-10] We have determined that this action does not involve a "taking" of property as though under eminent domain proceedings but it is one for damages to property. The trial judge, as the measure of damages, used the difference in the reasonable market value of the property before and after the injury. Neither party quarrels with this rule of damages but, in effect, defendant city says there was no evidence on which the court could apply this rule and there was no difference in the reasonable market value because the evidence reflects the reasonable market value was greater than it had been before the drainage installations. Defendant city does not contend the installations enhanced the market value but does insist that since there was evidence that the value of the property was greater in later years the court had

W. R. COREY; Dick Haas Motors; Odeene Bateman and Ivarene Bateman, Husband and wife, Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO; Atchison, Topeka and Santa Fe Railway Co., Defendants and Respondents.

Civ. 5857.

District Court of Appeal, Fourth District, California.

Aug. 19, 1958.

Hearing Denied Oct. 15, 1958.

no right to award damages. Defendant city's position would require a court to hold that where there is a general economic inflationary period causing an increased price, and damage is sustained during that period of time, there can be no dollar recovery. We do not believe this position is sound. In the instant case there is substantial evidence that the land without the damage was worth \$131,800 and with the damage, \$83,500. Further, there was evidence that the property in the area had appreciated in value. Apparently there is no one factor to which this may be attributed. It is common knowledge that land in California, and particularly southern California, has had a heavy appreciation in market price and value during the time period here in question. Obviously, plaintiffs' land was no exception. There was evidence that about 1949 the reasonable market value of plaintiffs' land was \$34,600 and at the time of trial and without the damage it had a reasonable market value of \$131,800. Under the evidence in this case the court was justified in making an award of \$20,000, and such an award is sustained by substantial evidence. Therefore, we will not reverse it on this appeal.

[11] Defendant city complains of a ruling of the court allowing evidence to be admitted as to the cost of the installation of a drainage pipe through the plaintiffs' land which would channel and conduct the water and make some portions of the land usable. It was testified the cost would be \$50,000. Defendant city says the trial court used this testimony to arrive at its award. The measure of damages is not the cost of the installation of a pipe to carry the water through plaintiffs' land; however it properly may be considered by the trial court for evidence of the decrease in market value. See *Podesta v. Linden Irr. Dist.*, 141 Cal.App.2d 38, 296 P.2d 401. The ruling of the trial court in admitting this testimony was not erroneous.

Judgment affirmed.

GRIFFIN, P. J., and MUSSELL, J.,  
concur.

Action to quiet title to strip of real property lying in area delineated on town map as a named avenue. The Superior Court of San Diego County, L. N. Turrentine, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, McCabe, J. pro tem., held that where map was referred to and made part of report of court-appointed referees, and such report was confirmed by court and made a part of decree of partition in which city and county were parties, setting aside of land for public purposes was accomplished by decree, decree became final in absence of appeal and was effectual forever.

Affirmed.

Opinion, 327 P.2d 977, vacated.

# 1. Partition $\hookrightarrow$ 95, 116(1)

Where map delineated portion of land to be partitioned as named avenue, map was referred to and made part of report of court-appointed referees, and such report was confirmed by court and made a part of decree of partition in which city and county were parties, setting aside of land for public purposes was accomplished by decree, decree became final, in absence of appeal, and decree was effectual forever. *West's Ann. Code Civ.Proc.* §§ 748.5, 764, 766.

# 2. Partition $\hookrightarrow$ 116(1)

Areas designated and specifically named as streets in partition proceeding were for use and benefit of general public. *West's Ann.Code Civ.Proc.* §§ 748.5, 764, 766.

**3. Dedication** Ⓒ1

To "dedicate" means to appropriate and set apart from one's private property to some public use.

See publication Words and Phrases, for other judicial constructions and definitions of "Dedicate".

**4. Dedication** Ⓒ42

Under statute providing that where proposal to dedicate land for public improvement has been made by map only, land has not been used for such purpose for period of 25 years and property has been subsequently sold to third person and used as if free of dedication there is conclusive presumption that proposed dedication was not accepted, there must be an offer to set apart a portion of property for public use and it must be done by map only and statute was inapplicable where setting apart for public street purposes was accomplished by court decree. West's Ann.Code Civ.Proc. § 748.5.

**5. Partition** Ⓒ116(1)

Where streets were created by partition decree and city was a party to and appeared in and received from the partition action, public could not lose its right in streets by delay in use. West's Ann.Code Civ.Proc. §§ 748.5, 764, 766.

**6. Limitation of Actions** Ⓒ58(2)

Where streets were created by 1874 partition decree which incorporated map of parcel of land and, after lapse of 73 year period during which the growth and development of city was dependent in a large part upon streets and lots laid out by map, action was filed to set aside map, even if statute in effect from date of partition until its repeal in 1883 provided that road that was not used for five years ceased to exist, cause of action to set aside map accrued during such period and could not be sustained after lapse of 73 years. West's Ann. Code Civ.Proc. § 748.5, 764, 766; West's Ann.Streets & High.Code, §§ 969, 1805.

**7. Equity** Ⓒ38

Where court of equity acquires jurisdiction it should consider and determine all rights and claims of parties relating to subject matter and enter decree finally de-

termining them to the end that a multiplicity of suits may be avoided.

Holliday & Folsom, David S. Folsom, San Diego, for appellants.

J. F. DuPaul, City Atty., Jack G. Whitney, Deputy City Atty., San Diego, for respondents.

McCABE, Justice pro tem.

Plaintiffs bring this action to quiet title to a strip of real property which lies in an area delineated on a Map of Middletown made by J. E. Jackson, described as California Avenue. Defendants are the City of San Diego (hereinafter called City) and Atchison, Topeka & Santa Fe Railway Co. (hereinafter referred to as Santa Fe). From a judgment entered in favor of defendants, plaintiffs appeal.

Historically, Middletown was one of four large areas of land within what is now the City of San Diego and in 1874 was undeveloped land. On October 21, 1874, in the case of Baldwin et al. v. Coutts, et al., No. 869, (hereinafter referred to as Baldwin action) a partition decree for Middletown was signed in the 18th Judicial District of the State of California. The Baldwin action was brought to determine the conflicting claims and interests of numerous persons and entities in and to the real property of Middletown. The City of San Diego, the County of San Diego and the predecessors in interests of plaintiffs were among the parties named and appearing in the Baldwin action. Before October 21, 1874, the trial court appointed referees to partition Middletown. The report of the referees, dated October 12, 1874, was filed in the Baldwin case. The referees had a survey and map prepared subdividing Middletown into lots, blocks and streets. The map was referred to and by reference made a part of the decree in the Baldwin action. This map is commonly referred to as "J. E. Jackson Map", "J. E. Jackson Partition Map", "J. E. Jackson Partition Map of 1874", "Map of Middletown made by J. E. Jackson." In the Baldwin decree each litigant was given cer-



tain property described by lot or lots and block with reference to the J. E. Jackson Map. By the decree the City of San Diego was given specifically described property. The Baldwin decree made no specific mention of the disposition of the title to the land upon which the streets were laid out. In part, the Baldwin decree ordered, adjudged and decreed, "that the said Report and Map of the said Referees and all things therein, be and they are hereby ratified and confirmed, and that the partition therein and herein made and set forth, be firm, binding, effectual and final as to all parties and that the pieces and parcels of land as by said Report and this Decree set off to the Said parties, be theirs, their heirs and assigns forever in Severalty. And this Decree shall ratify and Confirm unto the Said parties the pieces or parcels of land therein and herein set off to them the same as if they had each executed and delivered to each other deeds of release and quitclaim in due form and in accordance with said Report and this Decree." The J. E. Jackson Partition Map was filed in the county clerk's Office October 19, 1874 and the Baldwin decree was filed and became part of the official records of the County of San Diego.

On December 21, 1880, one C. P. Noell, one of the litigants in the Baldwin action deeded a certain interest in a strip of land which was part of California Avenue on the J. E. Jackson Map to the California Southern Rail Road Company, which interest has since vested in Santa Fe Railway. By this deed, Noell granted a right of way to "that portion of California Avenue that lies between the front line of each of said lots and blocks and the middle line of said California Avenue as comes within the route of said railroad according to the Map of said railroad Company's railroad \* \* \*"

Plaintiffs, by their complaint to quiet title allege: they and their predecessors in interest have been the owners of certain real property specifically described which lies within the area delineated as California Avenue (now California Street) on the J. E. Jackson Partition Map of 1874; there was no dedication of or acceptance of said

street; the street has never been used for a street by anyone; and since the filing of the J. E. Jackson Partition Map in 1874 the street has been used as if free from any dedication. Also, plaintiffs allege defendant Santa Fe is the owner of a certain specifically described portion of the area delineated on the Jackson Map as California Street. Defendant City answered and denied specifically the allegations of plaintiffs' complaint except it admits the J. E. Jackson Partition Map reflects an area marked California Street. No affirmative defenses were alleged by defendant City. Defendant Santa Fe answered and admitted by failure to deny that it owns the area specifically described in plaintiffs' complaint and the plaintiffs' allegations regarding dedication, non-use and use inconsistent with dedication and affirmatively pleaded the deed from one Noell.

It appears that the plaintiffs' allegations of ownership in defendant Santa Fe, and the affirmative pleadings of defendant Santa Fe do not limit its interest to a right of way but specifically alleges ownership. However, the Noell deed attached as an exhibit to defendant Santa Fe's answer which was later admitted to evidence, states: " \* \* \* hereby grant unto said California Southern Rail Road Company, its successors and assigns, a right of way, \* \* \* over, in and upon the following premises \* \* \*"

The pretrial conference order provided in part: "Issues 1. Whether or not the area in question is now a public street or whether title thereto should be quieted in the plaintiffs and the Railway Company."

On the trial date and during the opening statement of plaintiffs' counsel a title company "Litigation Guarantee," a copy of the Baldwin decree, a copy of the J. E. Jackson Partition Map of 1874 were received and marked as plaintiffs' exhibits. During the plaintiffs' opening statement all parties conceded that plaintiffs, respectively, owned the property contiguous to the parcels of land in litigation. At the close of this opening statement defendant City moved for a di-

rected verdict. During the discussion on this motion there was introduced and marked as defendant Santa Fe's exhibits, a copy of the Noell deed and a map reflecting the location of the railroad in 1880. The trial court stated that apparently defendant City's motion was intended as a motion for judgment comparable to a motion for summary judgment and the evidence would be considered as though in affidavit form. Defendant City concurred in this statement. Then, plaintiffs made an offer to prove the street had not been used as a street, the property had subsequently been sold to third persons, and the property in question had been used as if free from dedication. An objection to the offer of proof was sustained. The trial judge ordered judgment entered in favor of defendant City subject to the easement in defendant Santa Fe.

Plaintiffs appeal from the judgment and "from the whole thereof". Defendant Santa Fe has not filed briefs on this appeal. On this appeal plaintiffs contend (1) the doctrine of *res judicata* is not applicable, (2) Section 748.5, Code of Civil Procedure is applicable, (3) defendant City abandoned any rights to the property under the provisions of Section 2620 Political Code, (as it existed between 1874 and 1883)<sup>1</sup> by the City's failure to work or use the property for a five years' period.

Defendant City contends (a) the street was set aside as a public way pursuant to Section 764, Code of Civil Procedure, in the Baldwin action; (b) the Baldwin decree was effectual forever on all parties to that action and their successors in interest and is *res judicata*; (c) Section 748.5, Code of Civil Procedure does not change the effect of Section 766, Code of Civil Procedure; (d) plaintiffs are barred by laches.

As of the time the decree in the Baldwin action was signed and filed, Section 764, Code of Civil Procedure provided in part:

"\* \* \* Before making partition or sale, the referees may, whenever it will be for the advantage of those in-

terested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. \* \* \*

In part, and in 1874, Section 766 Code of Civil Procedure provided as follows:

"The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

"1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life; \* \* \*

"4. On all other persons claiming from such parties or persons, or either of them."

[1] The J. E. Jackson Map of 1874 delineated a portion of the land to be par-

1. Now Streets & High.Code, §§ 969, 1805.

tioned as streets and gave these streets specific names. This map was referred to and made a part of the report of the court-appointed referees. This report, which had incorporated the map, was confirmed by the court and made a part of the decree of partition in the Baldwin case. No appeal was taken from the Baldwin decree and it thus became final. Under the provisions of section 766, Code of Civil Procedure, *supra*, the decree became "effective forever."

[2] The areas so designated and specifically named as streets were for the use and benefit of the general public. See *Machado v. Title Guarantee & Trust Co.*, 15 Cal.2d 180, 99 P.2d 245; *Loma Vista Investment, Inc., v. Roman Catholic Archbishop*, 158 Cal.App.2d 58, 322 P.2d 35. The creation of the streets was by court decree and not by map only.

Whether or not section 748.5, Code of Civil Procedure, adopted in 1955 is applicable to the facts of this case must now be determined. This section reads as follows:

"Whenever a proposal to dedicate land for public improvement has been heretofore or hereafter made by map only, without any acceptance of the dedication being endorsed thereon, and the land has not been used for the purpose for which the dedication was proposed for a period of 25 years, and the property has been subsequently sold to a third person, after the filing of the map, and used as if free of the dedication, there is a conclusive presumption that the proposed dedication was not accepted, and in a suit to quiet title to such land naming the governmental agency to which the dedication was made by map as defendant, the decree in favor of the plaintiff shall clear the title of the proposed dedication and remove the cloud created by the proposed dedication. (Added Stats. 1955, c. 563, p. 1066, § 1.)"

[3, 4] No case has been cited to us and we have not found a case interpreting this section. The controlling words of the statute have clear and definite meanings. The word "proposal" has been construed to mean an expression of intention (*Taylor v. Miller*, 113 N.C. 340, 18 S.E. 504) and a willingness to do an act (*Salisbury v. Credit Service*, 9 W.W.Harr. 377, 39 Del. 377, 199 A. 674) and an offer (*Black's Law Dictionary*, 3rd Edition). "To dedicate" means "to appropriate and set apart one's private property to some public use —". (*Black's Law Dictionary*, 3rd Edition.) Under these provisions there would have to be an offer to set part a portion of the property to public use, and it would have to be done "by map only." In our case there was no proposal to dedicate by a person by a map only. The setting apart for public street purposes was accomplished by court decree. We must determine the provisions of section 748.5, *supra*, have no application to the facts of this case.

[5] The general rule of law regarding long delayed use or non-used property dedicated to public use is that the public cannot lose its right by delay in use. See, *Archer v. Salinas City*, 93 Cal. 43, 28 P. 839, 16 L.R.A. 145; *Wheeler v. City of Oakland*, 35 Cal.App. 671, 170 P. 864; *Gross v. City of San Diego*, 125 Cal.App. 238, 13 P.2d 820; *Sacramento County v. Lauszus*, 70 Cal.App.2d 639, 161 P.2d 460. In absence of statutory law to the contrary, we believe this same rule of law is applicable to streets created by partition decree where the defendant City was a party to and appeared in and received from the partition action.

[6] Plaintiffs contend that between 1874, the date of the Baldwin decree, and 1883 the date of its repeal, Section 2620, Political Code provided that where a road was not used for a period of five years it ceased to exist. Assuming, without deciding, that such was the effect of this section and that it was not amended prior to 1883, plaintiffs and their predecessors in interest had a cause of action accrue to them as early as



1883. No action was filed by plaintiffs or their predecessors in interest for over 73 years. After 73 years of growth and development of the defendant city, dependent in large part upon the streets and lots laid out by the J. E. Jackson Map of 1874, plaintiffs seek to set aside this map and to declare it a nullity. If a cause of action ever existed in favor of plaintiffs or their predecessors in interest we believe that it is too late to be sustained after a lapse of 73 years.

[7] It is an oft and properly followed rule of equitable proceedings that where a court of equity acquires jurisdiction it should consider and determine all the rights and claims of the parties relating to the subject matter; and to enter a decree finally determining them to the end that a multiplicity of suits may be avoided. 30 C.J.S. Equity § 599 and numerous California cases therein cited. We are satisfied that the trial judge followed this rule to the end that the conflicting claims have been properly and equitably adjudicated.

Although plaintiffs appeal from the judgment and the whole thereof, they do not argue against the judgment entered in favor of defendant Santa Fe. By their complaint plaintiffs affirmatively allege ownership interest in defendant Santa Fe in California Street. This is admitted by defendant City. During the proceeding in the trial court all parties stated to the trial judge that they recognized defendant Santa Fe's easement. On this appeal no point is raised questioning the existence of this easement. This being the state of the record it is clear that plaintiffs concede ownership in defendant Santa Fe. We will not review this portion of the judgment.

We have considered the other contentions of the parties. We believe the equitable disposition of this case disposes of these contentions.

Judgment affirmed. 

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

162 Cal.App.2d 860

In the Matter of the ESTATE of Kathryn Z. WHITNEY, Deceased.

Robert A. ZIMMERMAN, Petitioner, Contestant, and Appellant,

v.

The ORIENTAL MISSIONARY SOCIETY, National Holiness Missionary Society and Church of the Nazarene, Legatees and Respondents.

Civ. 22658.

District Court of Appeal, Second District, Division 3, California.

Aug. 18, 1958.

Will construction case. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., rendered judgment, and contestant appealed from a part thereof. The District Court of Appeal, Vallée, J., held that where will directed executor to "see that money from estate be tythed to the amount of twenty-five per cent and given to" named charities for missionary work and provided that if "this money cannot be used for missionary work—then to help some poor theological students" and residuary clause gave grandson "any money and stocks or other personal property that I may have at the time of my death", the phrase "money from estate" meant distributable assets of estate and not merely cash, and consequently 25% of distributable estate would be equally divided among the three charities and the money and stocks or other personal property then remaining would pass to grandson under the residuary clause.

Affirmed.

#### I. Wills 487(3)

In case involving construction of dated holographic will which was uncertain on its face, admission of undated holograph was error where the undated holograph did not constitute a circumstance under which the dated holographic will was made. West's Ann.Prob.Code, § 105.

**2. Wills** ⚡440, 441, 487(3)

When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding the oral declarations of the testator as to his intentions. West's Ann.Prob.Code, § 105.

**3. Wills** ⚡486

In case involving construction of dated holographic will which was uncertain on its face, it was proper to admit parts of petition to determine heirship, signed by testatrix' grandson, showing appraised value of estate, amount of cash on hand at testatrix' death, and that testatrix had established trust accounts for grandson and that accounts had been paid to grandson and were not a part of the estate. West's Ann.Prob.Code, § 105.

**4. Wills** ⚡706

In case involving construction of dated holographic will which was uncertain on its face, error in admitting undated holograph was not prejudicial where the District Court of Appeal construed the will by its four corners and considered the parts of the petition to determine heirship received in evidence and determined that the ultimate conclusion of the probate court was correct.

**5. Wills** ⚡566

The word "money" used in wills is essentially ambiguous; in a bequest it means money and money only, unless there is in the context of the will something to indicate that the testator intended a more extended meaning; it has no fixed or technical meaning but is a term of flexible scope having either a restricted or a wide meaning according to the signification which the testator intended to give the word, and it may mean cash only, personal property, or even property of any kind that may be converted into cash.

See publication Words and Phrases, for other judicial constructions and definitions of "Money".

329 P.2d—7½

**6. Wills** ⚡566

Where context of will discloses intent of testator to attribute to word "money" a specific meaning which is more comprehensive than the meaning ordinarily given to it, that meaning will be adopted and may comprehend any class of property defined by the context.

**7. Wills** ⚡566

Where will directed executor to "see that money from estate be tythed to the amount of twenty-five per cent and given to" named charities for missionary work and provided that if "this money cannot be used for missionary work—then to help some poor theological students", and residuary clause gave grandson "any money and stocks or other personal property that I may have at the time of my death", the phrase "money from estate" meant distributable assets of estate and not merely cash, and consequently 25% of distributable estate would be equally divided among the three charities and the money and stocks or other personal property then remaining would pass to grandson under the residuary clause. West's Ann.Prob.Code, § 103.

See publication Words and Phrases, for other judicial constructions and definitions of "Money From Estate".

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Stanley C. Anderson, Los Angeles, for appellant.

Thomas S. Bunn, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from part of a judgment determining heirship. The question is the proper construction of a will.

The holographic will of the decedent, Kathryn Whitney, reads:

"Last Will and Testament

"I, Kathryn Z. Whitney at the age of seventy-five and being of sound mind and memory, and not acting under the influence of any person what

ever, declare this my last Will and Testament.

"I direct that my executor here after named, pay my funeral expenses. That he see that money from estate be tythed to the amount of twenty-five per cent and given to the Nazerine Church—head quarters at Kansas City Mo The Oriental Missionary Society head quarters in Los Angeles Cal and National Missionary Society head quarters Marion Indiana for missionary work. If for any reason this money cannot be used for missionary work—then to help some poor theological students.

"I want five hundred dollars given to my daughter-in-law to pay her for grave and vault to put casket in.

"If anything should come up at this time in regard to my former husband Norman G. Whitney or his estate it is my wish that he be given the sum of one dollar What I have was mine before I met Mr Whitney.

"Then I give and bequith to my Grandson Robert A. Zimmerman any money and stocks or other personal property that I may have at the time of my death.

"I name and appoint my Grandson Robert Z. Zimmerman the executor of this my Will with out bond and revolk any former Will made by me

"Signed

"Kathryn Z. Whitney

"February fifteen Nineteen Hundred and forty-nine."

The court found the will is ambiguous and uncertain but that it means there shall be distributed to the three charities, to be equally divided among them, 25 per cent of the distributable estate. The judgment decreed that on distribution of the estate  $8\frac{1}{3}$  per cent of the distributable assets of the estate be distributed to each charity and that 75 per cent be distributed to decedent's grandson, Robert A. Zimmerman. Robert A. Zimmerman appeals from that

part of the judgment decreeing that  $8\frac{1}{3}$  per cent of the distributable assets of the estate be distributed to each charity.

Appellant claims that by the phrase "money from estate" the testatrix meant only cash, and not the distributable assets of the estate as held by the probate court. Respondent says the probate court's interpretation of the will is in accord with the intention of the testatrix and the applicable law.

[1-4] At the hearing, the probate court, over appellant's objection, admitted in evidence an undated holograph in the handwriting of decedent and a part of the petition in the present proceeding to determine heirship. Appellant asserts the rulings were prejudicially erroneous. The will was signed February 15, 1949. The testatrix died October 17, 1955. There was no evidence as to when the undated holograph was written. The ruling admitting the holograph was clearly erroneous. The uncertainty is patent—it appears on the face of the will. When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding the oral declarations of the testator as to his intentions. Probate Code, § 105; *In re Estate of Sargavak*, 41 Cal.2d 314, 319-320, 259 P.2d 897. There was no showing that the holograph constituted a circumstance under which the will was made. The parts of the petition to determine heirship admitted in evidence showed that the appraised value of the estate was \$21,014.98; that the amount of cash on hand at decedent's death was \$138.98; that on January 8, 1949, 38 days before the will was executed, the testatrix established a trust account for the benefit of appellant in the amount of \$3,922.67, and that on March 9, 1955 she established another trust account for the benefit of appellant in the amount of \$524.16, and that the accounts had been paid to appellant and at no time had been a part of



the estate. There was no error in admitting the parts of the petition to determine heirship in evidence. The petition was signed by appellant and it was a representation to the court by appellant to be considered by it in construing the will. *In Re Estate of Sargavak*, supra, 41 Cal. 2d 314, at page 319, 259 P.2d 897, at page 900, it is said:

"As there was an 'uncertainty' on the face of the will the trier of fact may consider such matters 'as the size of the estate, the property involved in the gift, the circumstances of the parties, and their relation to each other and to the testator.'"

Since we have concluded that construing the will by its four corners together with the parts of the petition to determine heirship received in evidence, the ultimate conclusion of the probate court was correct, the error in admitting the holograph is of no moment.

"A will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect if possible. Each case depends on its own particular facts and precedents are of small value. *In re Estate of Wilson*, 184 Cal. 63, 66-68, 193 P. 581. Lord Coke made the sage observation that 'wills and the construction of them do more perplex a man than any other learning, and to make a certain construction of them, this excedit juris prudentum artem.' (*Roberts v. Roberts*, 2 Bulstr. 130, 80 Eng.Rep. 1008.)" *In re Estate of Luckel*, 151 Cal.App.2d 481, 487, 312 P.2d 24, 29.

"Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." Prob.Code, § 103.

[5,6] The word "money" used in wills is essentially ambiguous. *Thompson on Wills*, 2d ed., 384, § 245. In a bequest it means money and money only, unless there

is in the context of the will something to indicate that the testator intended a more extended meaning. *In re Estate of Boyle*, 2 Cal.App.2d 234, 236, 37 P.2d 841. When used in a will it has no fixed or technical meaning, but is a term of flexible scope having either a restricted or a wide meaning according to the signification which the testator intended to give the word, and may be used to mean cash only, personal property, or even wealth—that is, property of any kind that may be converted into cash. *Industrial Trust Co. v. Saunders*, 71 R.I. 94, 42 A.2d 492, 495; 26 Cal.Jur. 970, § 269; 96 C.J.S. Wills § 759 d, p. 162; Annotations, 93 A.L.R. 514; 173 A.L.R. 656. Where the context of a will discloses the intent of the testator to attribute to the word "money" a specific meaning which is more comprehensive than the meaning ordinarily given to it, that meaning will be adopted and may comprehend any class of property defined by the context. *In re Rogers' Estate*, 91 N.J.Eq. 294, 109 A. 16, 17; *In re McKendrie's Estate*, 150 Misc. 665, 271 N.Y.S. 228, 230; *Mann v. Haines*, 146 Kan. 988, 73 P.2d 1066, 1073; *Hinckley v. Primm*, 41 Ill.App. 579.

[7] In determining whether testatrix meant only cash or the distributable assets of her estate by her use of the words "money from estate be tythed to the amount of twenty-five per cent" in the bequest to respondents, we believe a broad construction of the word "money" is required. A reading of the will from all four corners, in light of testatrix' apparent intention at the time she made it, indicates the more extended meaning should be given. Testatrix was 75 years old at the time she made her will and, although the will contains mistakes of spelling, it is fairly well written and reflects her awareness not only of the nature of her act and persons to be benefited thereby, but the nature of her property—money, stocks, and other personality.

The testatrix directed that her executor "see" that money from her estate be "tythed" to the amount of 25 per cent and given to the named charities for missionary work. And she said that if "this money

cannot be used for missionary work—then to help some poor theological students.” The testatrix did not direct her executor to “see” that money *in* the estate be tithed; she directed that he “see” that money “from” the estate be tithed. Her language presupposes action by the executor in liquidating the estate for the purpose of obtaining funds to make distribution to the charities. One meaning of “from” is “out of.” Webster’s New Inter. Dict., 2d ed., 1012. The phrase “from estate” manifestly enlarges the term “money” to include all property which the testatrix might have at death. “Estate” in the sense used obviously means “the totality of the assets and liabilities of the decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal.” In re Estate of Adams, 148 Cal.App.2d 319, 323, 306 P.2d 623, 625.

Testatrix’ use of the word “tythed” is of significance.<sup>1</sup> It implies that the value of that which is to be tithed must first be determined. A “tithe” is a tenth part of some specific thing. 41 Words and Phrases, p. 661. To “tithe” is to pay or give a tenth part of some specific thing. Webster’s New Inter. Dict., 2d ed., 2655. Here the testatrix increased the amount to be given from a tenth to a quarter. Her direction to her executor is, in effect, to “see” that 25 per cent of her estate be taken and given to the named charities.

The residuary clause reads: “Then I give and bequith to my Grandson Robert A. Zimmerman any money and stocks or other personal property that I may have at the time of my death.” The word “Then” can mean only one thing: after the executor had done that which she had directed him to do, “Then \* \* \*.” The word “any” modifies the words which follow, showing knowledge on the part of testatrix that he would not receive *all*. No comma appears after the word “money” to suggest that “any” should modify only the word “money.” As

it stands, “any” modifies money and stocks and personal property.

Appellant argues that the word “stocks” appears in the residuary clause only, indicating testatrix divided her assets into the categories of “money” and “stocks.” The phrase “any money and stocks or other personal property” does not conflict with the broad construction of the phrase “money from estate” in the previous provision. The later provision must be read in light of the prior provisions of the will. The phrase “money from estate” is a more comprehensive term than the word “money” standing alone, as used in the residuary clause. Testatrix, having indicated her intention in the first bequest that the executor tithe up to 25 per cent of the money from her estate to the named charities after payment of funeral expenses, it necessarily follows that when she made the final bequest to appellant of “any money and stocks or other personal property” in her estate at her death she meant *that which remained after all the prior bequests had been distributed* and her directions carried out. See In re Estate of Miller, 48 Cal. 165, construing the word “money” in a will as synonymous with “property and estate”; In re Estate of Carrillo, 187 Cal. 597, 203 P. 104, 105, construing a bequest of “1 third of cash that is left after my demise” in a holographic will as including a note and mortgage; In re Miricks’ Estate, 193 Misc. 211, 82 N.Y.S.2d 778, 779, construing the words “money of my estate” as used in a holographic will as including all personal property not otherwise bequeathed; In re Smith’s Will, Sur., 131 N.Y.S.2d 390, construing the words “All money in” various depositaries in a holographic will as encompassing the testatrix’ entire estate; McCabe v. Cary’s Ex’r, 135 Va. 428, 116 S.E. 485, construing a bequest to a sister of “the use of the income from all money in my name from my father’s & mother’s estate” as including all property which the testatrix had received from her father and mother; Walcott v. Pitcher, 7

1. The word “tithe” was also formerly spelled “tythe.” 9 The Century Dict. and Cyclopedia 6355.

R.I. 555, construing a direction that annuities be paid "by my executor from my estate" as requiring payment from the corpus of the estate.

It was manifestly the intention of the testatrix that the charities should benefit substantially. Anything less than substantial benefits would not have been provided for division among three charitable institutions or for the help of "poor theological students." The construction of the will urged by appellant—division of 25 per cent of \$138.98—would exclude the charities from any real benefits.

We conclude that the phrase "money from estate be tythed to the amount of twenty-five per cent" is used in the will at bar as "property" or "estate." The probate court correctly concluded that it means there shall be distributed to the three charities, to be equally divided among them, 25 per cent of the distributable estate.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



163 Cal.App.2d 73

REFINANCE CORPORATION, a corporation,  
Plaintiff and Respondent,  
v.

NORTHERN LUMBER SALES, Inc., a corporation;  
John M. Coughlan and Xerline Coughlan, Defendants and Appellants.

Civ. 22973.

District Court of Appeal, Second District,  
Division 2, California.

Aug. 20, 1958.

Rehearing Denied Sept. 17, 1958.

Action for breach of contract for factoring or purchasing corporate defendant's receivables. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for plaintiff, and the defendants

appealed. The District Court of Appeal, Ashburn, J., held that substantial evidence supported trial court's finding as to amount of fictitious receivables sold by corporate defendant to plaintiff.

Affirmed.

#### 1. Contracts ⚡322(3)

In action for breach of contract for factoring or purchasing corporate defendant's receivables, substantial evidence supported trial court's finding as to amount of fictitious receivables sold by corporate defendant to plaintiff.

#### 2. Appeal and Error ⚡1010(2)

Appellants must demonstrate that there is no substantial evidence to support challenged findings.

#### 3. Appeal and Error ⚡1010(2)

Appellants' mere summary of the evidence given by various witnesses, without argument as to the effect or specific application of the evidence, is not the required demonstration that there is no substantial evidence to support the challenged findings.

#### 4. Assumpsit, Action of ⚡5

Where the amended complaint specifically pleaded contract for factoring or purchasing corporate defendant's receivables, and breach of such contract through assigning to plaintiff fictitious receivables, and damage suffered therefrom, there was nothing in the nature of a common count.

#### 5. Fraud ⚡58(1)

The rule that fraud must be proved by clear and convincing evidence is one for governance of trial judge, not a court of review.

#### 6. Usury ⚡98

Usury goes only to the matter of interest and does not preclude recovery of the principal by the lender either from the primary obligor or from the guarantor.

#### 7. Usury ⚡117

In action for breach of contract for factoring or purchasing corporate defendant's receivables, evidence warranted finding that the transactions were bona fide



purchases and were not usurious loans not enforceable against individual defendants who guaranteed the performance of the obligations of the contract.

#### 8. Usury ☞31

The giving of the guarantee is simply an item of testimony or evidence which the trial court may consider in determining whether the transaction is in fact a loan, and a usurious one, or, what it purports to be, a purchase and sale of a chose in action.

#### 9. Joint Adventures ☞1.15

In action for breach of contract for factoring or purchasing corporate defendant's receivables, wherein individual defendants, guarantors, asserted that plaintiff and one of the individual defendants entered into a joint venture and then diverted to that project funds which belonged to the reserve account, thus substantially increasing the burden of the guarantors to their exoneration, evidence sustained finding that there was no such joint venture.

#### 10. Guaranty ☞53(3), 59

Guarantors of contract for factoring or purchasing corporation's receivables were not relieved from their obligation by fact that in certain instances the plaintiff charged a greater factoring fee than was provided for in contract and by fact that certain customers of corporation had failed to take their discounts and that such amounts had been deducted from the invoices and held by plaintiff when the purchase price of those receivables was computed where these things were not done by agreement with corporation and such amounts were deducted from plaintiff's ascertained loss.

#### 11. Guaranty ☞60

Contract for factoring or purchasing corporation's receivables gave plaintiff right to charge to reserve account an indebtedness owing by corporation and to apply balance of reserve account to corporation's out-of-pocket loss without thereby invading rights of guarantors.

#### 12. Judgment ☞527

The judgment is the only real conclusion of law and displaces all former statements in the findings on the subject.

Hy Schwartz, Beverly Hills, for appellants.

Sidney Fischgrund, Los Angeles, for respondent.

ASHBURN, Justice.

Defendants appeal from a judgment for plaintiff for \$54,025.77, growing out of a contract for the "factoring" by plaintiff of all accounts receivable of defendant Northern Lumber Sales, Inc. (hereinafter designated as Northern); performance of the obligations of this contract were guaranteed by the individual defendants, John M. Coughlan and Xerline Coughlan, his wife. Plaintiff sued upon the ground that certain receivables were sold and assigned to it, between June 3, 1955 and August 10, 1955, which were "false, fictitious and non-existent for the reason that said defendant Northern Lumber Sales, Inc. did not sell or deliver merchandise to the persons named in said bills of sale, and no accounts receivable were due, owing and payable as set forth in said bills of sale." The court found this allegation to be true, held that plaintiff had been damaged in the sum of \$62,379.41, and, after adjusting the account between the parties, awarded judgment for the sum first mentioned herein.

Plaintiff Refinance Corporation (hereinafter designated as Refinance) was engaged in the factoring of accounts receivable in the sense of buying same for its own account from vendors of various commodities. Defendant Northern was engaged in the wholesale lumber business. Defendant John M. Coughlan owned the control of said corporation and was active manager of its business. On October 9, 1953, plaintiff and defendant Northern made a written agreement whereby plaintiff became "sole factor for all sales of your [Northern's] merchandise." (The words "you" and "your" designated Northern

throughout the agreement.) It was agreed that Northern should assign to plaintiff all its "bona fide accounts receivable" and convey title to all merchandise therein mentioned that might be returned by Northern's customers. Plaintiff agreed to purchase, without recourse to Northern, all its accounts for merchandise sold "provided that prior to the time of charging and delivery of merchandise to your customers, the account and terms of sales are approved by us in writing." Northern was required to deliver an assignment of each account, together with duplicate invoices, evidence of shipment and stamped addressed envelopes so that the original invoices could be mailed by plaintiff to the customers of Northern who were indebted respectively upon the assigned accounts. Each invoice was to bear an endorsement that it had been assigned and was payable to Refinance only. Northern represented and warranted "that each account is based upon an actual unconditional sale and delivery of merchandise; and that the customer has made himself or itself absolutely liable for the payment of the amount stated in the invoice without reservations of any kind." On sales where credit of the customer was approved in advance by plaintiff, "all purchases of your accounts by us are irrevocable and we will assume any loss by reason of the insolvency of the customer." Upon receipt of assignment of account plaintiff was to pay the full face of the invoice less the customer's discount shown thereon and a factoring charge of  $1\frac{1}{4}$  per cent of the gross purchase price, i. e. 80 per cent thereof to be paid concurrently with assignment of account and the balance on the 5th and 20th days of the month after payment of said account. It was understood that at no time should the "amount withheld" or reserve be less than 20 per cent of the remaining entire balance of unpaid accounts. While the written contract primarily dealt with accounts which were to be purchased without recourse, it also by implication and practical construction covered other receivables which were purchased with recourse because the buyer's credit was not approved

in advance by Refinance. During the period of October, 1953 to August, 1955, more than \$2,000,000 of receivables were "factored" by plaintiff, of which sum \$957,000 face amount were purchased with recourse. The agreement made no distinction between receivables purchased with and those purchased without recourse so far as the necessity of assignment of a bona fide receivable, accompanied by appropriate delivery proofs, was concerned. In addition to the factoring transactions, defendant Northern borrowed large sums of money from plaintiff aggregating about \$174,000 and represented by promissory notes. These transactions appear to have been separate from the factoring activities.

[1] There is no real challenge of the court's finding of the sale by defendant Northern to plaintiff of fictitious receivables. At a pretrial hearing it was stipulated: "That various accounts receivable for which the defendant, Northern Lumber Sales, Inc., executed assignments, and for which the plaintiff paid to the defendant, Northern Lumber Sales, Inc., various sums, for which [sic] non-existent, for the reason that the defendant, Northern Lumber Sales, Inc., did not sell or deliver merchandise to the persons named in said invoices and no accounts receivable were due, owing or payable as set forth in the said invoices." However, there was reserved as a contested issue: "The amount of the accounts receivable for which the defendant, Northern Lumber Sales, Inc., executed assignments and for which the plaintiff paid defendant, Northern Lumber Sales, Inc., various sums of money between June 3, 1955 and August 10, 1955, which were false, fictitious and non-existent." That the amount found by the court, \$62,379.41, is incorrect has not been established.

[2, 3] Although appellants assert insufficiency of the evidence in this and several other respects, they have not "demonstrated" that there is no substantial evidence to support the challenged findings as they are required to do in order to sustain that claim of error. *Nichols v. Mitchell*, 32 Cal.2d

598, 600, 197 P.2d 550; *New v. New*, 148 Cal.App.2d 372, 383, 306 P.2d 987. Appellants' mere summary of the evidence given by various witnesses, without argument as to the effect or specific application of the same, does not suffice for this purpose.

[4] Counsel argues that one cannot sue upon a common count to recover under an express contract which remains executory in some of its aspects. Conceding that to be the general rule, it does not apply here. The amended complaint specifically pleads the contract, its breach through assigning to plaintiff fictitious receivables, and damage suffered therefrom. There is nothing in the nature of a common count at bar.

[5] Next it is said that fraud must be proved by clear and convincing evidence, and that measure has not been filled at bar. The rule is one for governance of the trial judge, not a court of review (23 Cal.Jur.2d, § 83, p. 210). Moreover, this is not an action for fraud but one for breach of contract.

Northern is insolvent and appellants' efforts are directed chiefly to exoneration of the individual defendants, John M. Coughlan and wife, who were held liable upon their written guaranty. As above shown, the factoring contract expressly warrants that each account assigned to plaintiff "is based upon an actual unconditional sale and delivery of merchandise." The guaranty agreement which the Coughlans signed incorporates the factoring contract by reference, recites that purchase of accounts by Refinance will be made "all at the request of the undersigned and upon the inducement of this waiver and guaranty and [Refinance] would not have executed said sales agreement and will not in the future buy said accounts except upon said request and inducement." The document guarantees "prompt and faithful performance of all and singular the covenants, promises, warranties, guaranties, representations and stipulations made by the seller [Northern] in said sales agreement and/or to be made by it in said bills of sale."

[6] Usury is asserted upon the theory that a usurious obligation is not enforce-

able against a guarantor. It is settled, however, that usury goes only to the matter of interest and does not preclude recovery of the principal by the lender either from the primary obligor (see *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A.L.R. 725; *Campbell v. Realty Title Co.*, 20 Cal.2d 195, 196, 124 P.2d 810), or from the guarantor (see 91 C.J.S. Usury § 132 b, p. 727; 24 Am.Jur. § 43, p. 902). This is not an action for recovery of interest in any shape or form. It seeks recovery of moneys paid by plaintiff for fictitious receivables, plus the agreed factoring fee. However, defendant Northern seeks the recovery of interest alleged to have been paid in excess of the lawful rate.

Reliance upon *Milana v. Credit Discount Co.*, 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621, indicates that appellants consider the amount paid for the receivables to have been a loan and the amount of the factoring charge to be interest upon a loan. The instant case is clearly distinguishable from *Milana*, however. That was an appeal from a nonsuit and the court held that the factoring contract there under consideration furnished, in the light of attendant evidence, substantial proof of a loan in the guise of a purchase of receivables. It did not hold that a contract for factoring or purchasing receivables is per se a loan or an usurious one. The contract in that case provided that each receivable be purchased at a two per cent discount additional to the customer's discount; it also contained a warranty that each debtor was solvent and would remain so until maturity of the account; also guaranteed that each account would be paid within 60 days after date of assignment; the reserve account was to stand as security for payment of the assigned accounts. The court said: "In the present case the defendants made cash advances less discounts and in taking assignments of the accounts they exacted the plaintiff's guaranty of payment of their face value in full within sixty days. In practice they subjected defaulted accounts to payment from reserves, or return to the



plaintiff and 'repurchase' by the defendants under the same guaranties by the plaintiff. By the defendants' own testimony accounts not paid within the sixty-day limit were returned, and because the plaintiff was 'hard pressed' for money and unable to meet the terms of her guaranties, she chose to 'resell' them to the defendants at an additional two or two and one-half per cent discount for a further sixty-day period. In brief, the defendants by their contracts and practice secured themselves against loss and protected a return of two or two and one-half per cent for each sixty days or less during which their advances were in use by the plaintiff." 27 Cal.2d at page 340, 163 P.2d at page 871. "Contractors are free to buy and sell their property, and this may include promissory notes and other instruments, at a price agreed upon, and when the bona fides of the parties is established the percentage of profit has no relation to the usury law." 27 Cal.2d at page 340, 163 P.2d at page 872. "From the evidence introduced by the plaintiff in the case at bar the trier of the facts could reasonably conclude that the contracts of the parties provided for a conditional transfer of title; that advances by the defendants were contemplated to be repaid within a specified time at a charge for the use of the money which was deducted in advance; that the essence of the agreements was the use by the plaintiff of the funds at prescribed rates of interest which were in excess of the constitutional rate; that the transactions were not sales of accounts receivable but loans secured by assignments of the accounts at usurious rates of interest; that the intent to accomplish such a result was discernible from the contracts themselves; and that the negotiations and the conduct of the parties under the contracts further tended to dissipate any doubt arising from the employment of sales terminology. A finding on the plaintiff's case alone to the effect that the sale form was used merely as a cover for the real intent would find support from the written contracts, the conduct of the parties, and the surrounding circumstances." 27 Cal.2d

at page 341, 163 P.2d at page 872. "The significant fact is that if the defendants had really purchased the accounts and had taken absolute title there would be no occasion for the provision or practice relating to guaranties of payment within specified periods, or reversions of title and 'repurchase' in the event of delayed payment by the customer." 27 Cal.2d at page 342, 163 P.2d at page 872.

[7] At bar there was a real purchase, not a loan, no guaranty of repayment of the purchase price, but on the contrary a purchase without recourse in cases where the customer's credit had been approved in advance by plaintiff; in other cases the seller, Northern, would take the account back upon default of the customer. The trial judge found that there was no usury, no receipt of usurious interest for the use and forbearance of money, and that the factoring agreement was not "a part of a plan and scheme to circumvent the usury laws of the State of California." It cannot be said that the evidence did not warrant the conclusion that the transactions in question were bona fide purchases and were not loans.

[8] The record does not clearly show whether any part of the \$62,379.41 (found to be plaintiff's damage) grew out of any purchases of receivables with recourse. Findings IV, VI and VII carry a contrary inference. But if it be conceded (as orally argued by appellants' counsel) that some part of said \$62,379.41 derived from purchases made with recourse, it does not follow as matter of law that those transactions were loans or usurious ones. Milana, supra, does not so hold. It is quite consistent with the rule stated in *O. A. Graybeal Co. v. Cook*, 111 Cal.App. 518, 531, 295 P. 1088, 1093, "that the giving of a guaranty is simply an item of testimony or evidence which the trial court may consider in determining whether the transaction is in fact a loan, or, what it purports to be, a purchase and sale of" a chose in action. Upon ample evidence the trial judge drew the inference of a bona fide sale in the case before us. *Coast Finance Corporation v.*

Ira F. Powers Furniture Co., 105 Or. 339, 209 P. 614, 615, 24 A.L.R. 855: "When the holder of an instrument, such as the conditional sales contract held by defendant, transfers the instrument at a discount and is required to indorse or otherwise guarantee it so that the vendor becomes liable contingently to pay the purchaser at a future day a sum greater than that received with legal interest, the authorities present different views. The great weight of authority is that such a transaction should be regarded as a valid sale of a chattel with a warranty of soundness, and the purchaser is allowed to enforce the obligation to its full extent against his own indorser and all prior parties. 39 Cyc. 933." That this represents the weight of authority appears from Annotation in 165 A.L.R. at page 691; 91 C.J.S. Usury § 19 a(3), page 595; 66 C.J. § 85, page 188; 55 Am. Jur. § 26, page 344; § 29, page 346.

[9] Appellants claim that plaintiff and defendant John M. Coughlan entered into a joint venture for the purchase and operation of certain lumber mills and then diverted to that project funds which belonged to the reserve account, thus substantially increasing the burden of the guarantors to their exoneration. The court found, however, that this allegation was untrue, that there was no such joint venture, that there was no agreement whereby funds required for operation of a lumber mill were to be provided and furnished by plaintiff and that plaintiff never agreed to advance funds for use of a joint venture with defendant Coughlan. A reasonable construction of the evidence upon this issue is that William I. Stein, who was president and active manager of plaintiff corporation, made an individual deal with John M. Coughlan whereby he advanced to him personally certain moneys for purchase of a lumber mill or mills, with the understanding that Stein was to receive certain shares of the capital stock in one of those concerns, but the evidence does not compel a finding that this was a corporate venture of Refinance or that reserve funds pertaining to the

factoring agreement were diverted to that personal deal of Stein's.

[10] Alterations in the factoring agreement are claimed to have been made as a result of certain departures in manner of its performance, and it is argued that the guarantors were thereby released from their obligation. In certain instances plaintiff charged a factoring fee of  $2\frac{1}{4}$  per cent, instead of the agreed  $1\frac{1}{4}$  per cent, and the trial judge charged back to plaintiff \$5,525.40 for this reason when arriving at the amount of the judgment. It was also found that certain customers had failed to take their cash discounts, which amounts had been deducted from the invoices and held by plaintiff when computing the purchase price of those receivables; that plaintiff should account to defendant for the same. The court accordingly charged an amount of \$2,828.24 to plaintiff and deducted it from plaintiff's ascertained loss when fixing the amount of the judgment. It will be noted that these things were not done by agreement with Northern; they did not effect modifications of the contract and could not prejudice the guarantors whose liability was reduced by application to the amount otherwise recoverable of those items charged by defendant in excess of what the contract permitted.

[11] It is also said that plaintiff wrongfully charged to the reserve account an indebtedness of \$50,000 owing by Northern and later wrongfully applied the balance of the reserve account, \$37,703.65, to its out-of-pocket loss, which last mentioned entry occurred after this lawsuit was begun. But the contract expressly provides (as the trial judge pointed out at the trial): "We shall have the further and irrevocable right to offset any and all claims which we may have against you, arising from any cause, contract, agreement or promise whatsoever, against any moneys or other assets in our possession belonging or payable to you, and we shall have the further irrevocable right to deduct from and retain any such moneys or assets to repay us in full for any such

claims against you." Thus it appears that these applications of funds worked no wrong upon the guarantors because they invaded none of their rights (cf. *S. W. Towle Lumber Co. v. Anderson*, 208 Cal. 371, 374, 281 P. 500).

[12] The court did not fail to find upon material issues as asserted by appellants. In this connection counsel specifies the matters of usury, alteration and modification of the principal contract, and claimed release of guarantors. All these matters are covered directly or indirectly by the findings as made. The argument is directed to the subject of appropriate conclusions. "The judgment is the only real conclusion of law and displaces all former statements in the findings on the subject." In *re Estate of Buckhantz*, 159 Cal.App.2d 635, 324 P.2d 317, 325; see, also, cases therein cited.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



163 Cal.App.2d 129

**Leola WASHINGTON, Plaintiff and Respondent,**

**v.**

**George WASHINGTON, Defendant and Appellant.**  
**Civ. 17855.**

District Court of Appeal, First District,  
Division 2, California.

Aug. 25, 1958.

Rehearing Denied Sept. 24, 1958.

Hearing Denied Oct. 22, 1958.

Divorce action wherein the husband appealed from an order for attorney's fees and costs to enable wife to resist appeals taken by the husband from two orders in the wife's favor. From an order of the Superior Court, City and County of San Francisco, Orla St. Clair, J.,

entering an order for attorney's fees and costs the husband appealed. The District Court of Appeal, Dooling, J., held, *inter alia*, that where husband appealed from order finding that he was in arrears for child support and also from an order which imposed a lien upon a balance remaining from a judgment recovered by husband against third party to secure the balance accrued and nonpaid to divorced wife under order for temporary alimony, court had power under statute to order husband to pay to wife attorney's fees and costs to enable wife to resist the appeals from such orders.

Affirmed.

See also 47 Cal.2d 249, 302 P.2d 569.

#### 1. Divorce $\S$ 284, 312.4

Where husband appealed from order finding that he was in arrears for child support and also from an order which imposed a lien upon a balance remaining from a judgment recovered by husband against third party to secure the balance accrued and nonpaid to divorced wife under order for temporary alimony, court had power under statute to order husband to pay to wife attorney's fees and costs to enable wife to resist the appeals from such orders. West's Ann.Civ.Code,  $\S$  137-3.

#### 2. Divorce $\S$ 182

The statute which after providing for award of attorney's fees in court during pendency of action for divorce provides in respect to services rendered after entry of judgment that court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding authorizes court to allow reasonable attorney's fees and costs in any proceeding taken in divorce action, after final judgment has been entered, which the court has jurisdiction to entertain. West's Ann.Civ.Code,  $\S$  137.3.

#### 3. Divorce $\S$ 219

Divorced wife was entitled to amounts accrued under order for temporary ali-



mony up to time when that order was terminated or superseded by further order or the interlocutory decree of the court, and court had jurisdiction after final judgment to take the necessary action to enforce satisfaction of such accrued obligation.

#### 4. Divorce ⇨307

While an allowance for support of wife may not afterwards be made if the final decree makes no provision for alimony and contains no reservation of power to make such order in the future, court has continuing jurisdiction to make awards for child support although the final decree is silent on that subject, which power is found in statute which gives court continuing jurisdiction over custody of the children. West's Ann.Civ.Code, § 138.

#### 5. Divorce ⇨306

The fact that father created a trust for future support of child could not affect the right to recover amounts accrued under order for child support before the trust was created nor could father successfully argue that fact that mother had supported the child after support order was made barred her from recovering the amounts due and unpaid under that order. West's Ann.Civ.Code, § 138.

#### 6. Divorce ⇨284, 312.4

Where divorced husband appealed from orders which found a certain sum to be accrued and unpaid under order for child support and which imposed a lien upon a balance remaining from a judgment recovered by husband to secure the balance accrued and nonpaid to divorced wife under order for temporary alimony, the necessity for allowance to divorced wife of attorney's fees and costs to enable her to resist the appeals taken by the husband was sufficiently shown by wife's affidavit that she had no funds for nor property with which to pay counsel fees and costs, her only property being an interest in community property under the management and control of her then husband. West's Ann.Civ.Code, § 137.3.

Edward D. Mabson, San Francisco, for appellant.

Terry A. Francois, San Francisco, Carl B. Metoyer, Berkeley, for respondent.

DOOLING, Justice.

Defendant appeals from an order for attorney's fees and costs to enable plaintiff to resist two appeals taken by defendant from two orders in plaintiff's favor.

A final decree of divorce was entered herein on May 11, 1951. By the terms of that judgment, which has long since become final, the custody of the minor child of the parties was awarded to plaintiff but no order for any payments for the support of said child was included therein, nor did said judgment contain any provision for alimony.

On February 10, 1955, the court made an order modifying the final decree to require defendant thereafter to pay \$75 per month for the support of the child. No appeal was taken from this order. On December 14, 1956, the court found that the sum of \$1,650 was accrued and unpaid under the previous order for child support. Defendant filed notice of appeal from this order.

On October 22, 1946, before the entry of the interlocutory decree of divorce herein, the court made an order for temporary alimony. No appeal was taken from this order. On December 31, 1956, the court made an order imposing a lien upon the balance remaining from the judgment recovered by defendant in *Washington v. City and County of San Francisco*, 123 Cal.App.2d 235, 266 P.2d 828, to secure the balance accrued and unpaid to plaintiff herein under said order for temporary alimony. Defendant appealed from this order.

It was to enable plaintiff to oppose these two appeals that the order herein appealed from was made.

[1,2] The basic power to allow attorney's fees and costs to enable plaintiff to oppose the two appeals is found in Civil

Code, section 137.3 as it read in April 1957 when the order appealed from was made. That section after providing for the award of attorney's fees and costs during the pendency of an action for divorce, continued: "In respect to services rendered after the entry of judgment \* \* \* the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein \* \* \*". Stats.1953, p. 1864. We have no doubt that this language is broad enough to give the court power to allow reasonable attorney's fees and costs in any proceeding taken in the divorce action, after final judgment has been entered, which the court has jurisdiction to entertain.

[3] Plaintiff is legally entitled to the amounts accrued under the order for temporary alimony up to the time when that order was terminated or superseded by further order or the interlocutory decree of the court. *Millar v. Millar*, 175 Cal. 797, 809-810, 167 P. 394, L.R.A.1918B, 415; *Solomon v. Solomon*, 118 Cal.App. 2d 149, 155, 257 P.2d 760. Under settled principles the divorce court has jurisdiction after final judgment to take the necessary action to enforce the satisfaction of this accrued obligation.

[4] As to the order for payments for the support of the child appellant argues that since the final judgment made no provision for child support and contained no reservation of power to make a future order in that regard the court was without power to make its subsequent order, citing *Howell v. Howell*, 104 Cal. 45, 47, 37 P. 770. The *Howell* case was explained in *McKay v. Superior Court*, 120 Cal. 143, 146-147, 52 P. 147, 40 L.R.A. 585, as not covering the case of awards for child support. Since the decision in *McKay* our courts have consistently held that while an allowance for the support of the wife may not afterwards be made if

the final decree makes no provision for alimony and contains no reservation of power to make such order in the future (*McClure v. McClure*, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257), the court does have continuing jurisdiction to make awards for child support although the final decree is silent on that subject (*Krog v. Krog*, 32 Cal.2d 812, 816-817, 198 P.2d 510). This power is found in Civil Code, section 138 which gives the court continuing jurisdiction over the custody of the children.

Since both proceedings were "subsequent proceedings" in the divorce action which the court had jurisdiction to entertain the portion of Civil Code, section 137.3 above quoted gave the court the power to make the award of counsel fees and costs.

[5] Appellant points out that he has created a trust for the future support of the child, but this cannot affect the right to recover the amounts accrued under the order for child support before the trust was created, nor can appellant successfully argue that the fact that the mother has supported the child after the support order was made bars her from recovering the amounts due and unpaid under that order. *McKay v. McKay*, 125 Cal. 65, 57 P. 677, cited by appellant only holds that an order for past support cannot be made by the court, not that an order for future support cannot be enforced as to past due instalments.

[6] The necessity for the allowance is sufficiently shown by plaintiff's affidavit that she has no funds nor property with which to pay counsel fees and costs, her only property being an interest in community property under the management and control of her present husband.

The order is affirmed.

DRAPER, J., concurs.

162 Cal.App.2d 513

**Edmund G. BROWN, Attorney General of the State of California, Plaintiff,**

**v.**

**MEMORIAL NATIONAL HOME FOUNDATION, a non-profit charitable corporation, and American Gold Star Mothers, Inc., a non-profit charitable corporation, Defendants.**

**Edmund G. BROWN, Attorney General of the State of California, Plaintiff, Cross-Defendant and Respondent,**

**and**

**American Gold Star Mothers, Inc., a non-profit charitable corporation, Defendant, Cross-Complainant and Respondent,**

**v.**

**MEMORIAL NATIONAL HOME FOUNDATION, a non-profit corporation, Defendant, Cross-Defendant and Appellant**

**and**

**Eleanor D. Boyd, Cross-Defendant and Appellant.**

**Edmund G. BROWN, Attorney General of the State of California, Plaintiff and Respondent,**

**v.**

**MEMORIAL NATIONAL HOME FOUNDATION, a non-profit charitable corporation, and American Gold Star Mothers, Inc., a non-profit charitable corporation, Defendants.**

**MEMORIAL NATIONAL HOME FOUNDATION, a non-profit charitable corporation, Defendant and Appellant,**

**v.**

**R. E. ALLEN and George D. Lyon, Receivers and Respondents,**

**and**

**American Gold Star Mothers, Inc., a non-profit charitable corporation, Defendant, Cross-Complainant and Respondent, Civ. 22766, 22871.**

District Court of Appeal, Second District, Division 2, California.

Aug. 1, 1958.

As Modified on Denial of Rehearing  
Aug. 27, 1958.

Hearing Denied Sept. 24, 1958.

Action by Attorney General for declaratory relief as to conflicting claims to assets of charitable trusts created for

benefit of Gold Star mothers. From judgment and orders of the Superior Court of Los Angeles County, Lloyd S. Nix, J., defendant and cross-defendant appealed. The District Court of Appeal, Ashburn, J., held that diversion of trust funds to unauthorized uses, inefficiency and mismanagement, hostility to beneficiaries and assumption of adverse trust afforded good grounds for removal of trustee.

Judgment and order approving, settling and allowing report and first account current of receivers, etc., affirmed; other appeals dismissed.

#### 1. Charities ☞33

In action by Attorney General for declaratory relief as to conflicting claims to assets of charitable trusts created for benefit of Gold Star mothers, evidence sustained finding that charitable corporation acquired funds in trust for benefit of all needy members of patriotic organization of Gold Star mothers and acquired certain property in trust for benefit of needy parents of servicemen who were World War II victims, that corporation repudiated trusts by attempting to dedicate property and funds to partially different uses and to exclusion of management of patriotic organization, that there were inefficiency and mismanagement of property and trust funds, hostility to beneficiaries and assertion of adverse trust, justifying removal of charitable corporation as trustee. West's Ann.Civ.Code, §§ 2232, 2234; West's Ann.Corp.Code, § 9603; Lanham Act, § 601(b) as amended 42 U.S.C.A. § 1581(b).

#### 2. Charities ☞40

Where a corporation becomes trustee of a benevolent trust, the courts look first to its charter to determine the nature and extent of the dedication of its assets to eleemosynary purposes.

#### 3. Trusts ☞171

A trustee cannot change the trust upon which it holds property.

#### 4. Appeal and Error ☞931(1)

The reviewing court reviews the evidence favorably to respondents.



**5. Charities** ⇨33

A charitable trustee will be removed on the same grounds as the trustee of a private trust.

**6. Trusts** ⇨166(2)

Diversion of trust funds to unauthorized uses, inefficiency and mismanagement, hostility to beneficiaries and assumption of an adverse trust are good grounds for removal of trustee. West's Ann.Civ.Code, §§ 2232, 2234.

**7. Charities** ⇨50

The proper administration of a benevolent trust, especially the prevention of departures from its legitimate objects and the redressing of breaches and repudiations of the trust, are matters of large public interest which preclude application of the doctrines of laches and estoppel, and particularly so in an action brought by the Attorney General.

**8. Charities** ⇨50

Attorney General could maintain action for declaratory relief as to conflicting claims to assets of charitable trusts created for benefit of Gold Star mothers, notwithstanding that Attorney General did not allege breach of trust or a departure from its general purposes. West's Ann.Corp. Code, §§ 9505, 10207.

**9. Statutes** ⇨212.1

In enacting and codifying statute providing that nonprofit corporation which holds property subject to public or charitable trust is subject to examination by Attorney General to ascertain the condition of its affairs and to what extent it may fail to comply with the trusts which it has assumed or may depart from the general purpose for which it is formed and in the event of any such failure or departure to institute the proceedings necessary to correct the noncompliance or departure, the legislature presumptively was cognizant of decision holding that Attorney General represents the community in seeing that charitable trusts are properly performed. West's Ann.Corp.Code, § 9505.

**10. Charities** ⇨49

The statute authorizing Attorney General to institute proceedings necessary to correct noncompliance with or departure from general purposes of charitable trust imposed on Attorney General an obligation to institute such a proceeding when he has concluded after investigation that there has been such noncompliance or breach and did not deprive Attorney General of his historic right and duty to supervise charitable trusts and to represent the community in seeing that such trusts are properly performed. West's Ann.Corp. Code, § 9505.

**11. Declaratory Judgment** ⇨322

In action by Attorney General for declaratory relief as to conflicting claims to assets of charitable trusts created for benefit of Gold Star mothers, one of the conflicting claimants could maintain a cross complaint, where the Attorney General in his pleading and the deputy attorney general in his closing argument impliedly consented to the prosecution of the cross complaint by such claimant standing in the position of a relator.

**12. Parties** ⇨5

A "relator" is a party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official; the Attorney General prescribes his own rules for granting his consent and such rules may be entirely informal.

See publication Words and Phrases, for other judicial constructions and definitions of "Relator".

**13. Quo Warranto** ⇨5, 21  
**Trusts** ⇨165

Court of equity could remove corporate trustee of benevolent trust and transfer to another fiduciary the management of all property held by the corporate trustee for such purpose, and quo warranto was not the exclusive, or indeed the appropriate, remedy for the removal of the corporate trustee, notwithstanding that the removal

of the corporation as trustee would strip it of all its assets. West's Ann.Corp.Code, §§ 4690, 4691.

#### 14. Declaratory Judgment ⚖️298

Directors of nonprofit charitable corporation were not necessary parties to action by Attorney General for declaratory relief as to conflicting claims of such corporation and another to assets of charitable trusts, notwithstanding that charitable corporation was removed as trustee of all the trust assets.

#### 15. United States ⚖️135

United States was not necessary or indispensable party to action by Attorney General for declaratory relief as to conflicting claims to assets of charitable trusts created for benefit of Gold Star mothers, notwithstanding that United States under Lanham Act had deeded temporary housing project for defense workers and armed forces personnel to one of the claimants, a nonprofit charitable corporation acting as trustee for the charitable trust, and that by contemporaneous agreement certain conditions had been imposed, where the judgment removing trustee and appointing receivers could not affect any rights of United States growing out of a prospective violation of the agreement. Lanham Act, § 601(b) as amended 42 U.S.C.A. § 1581(b).

#### 16. Charities ⚖️43

Where court had jurisdiction over action by Attorney General for declaratory relief as to conflicting claims to assets of charitable trusts created for benefit of Gold Star mothers, and the court removed trustee, the court possessed incidental jurisdiction to appoint receivers pursuant to the usages of equity. West's Ann.Code Civ.Proc. § 564, subsd. 3, 4.

#### 17. Charities ⚖️50

Where monthly allowance to receivers of charitable trust was named "pending the further order of this court", affirmance of the order would not control the future action of the court upon the matter of receivers' compensation.

#### 18. Appeal and Error ⚖️133

Minute order directing preparation of interlocutory judgment and restraining order and preliminary orders and rulings were not appealable.

Trent G. Anderson, Jr., Wright, Wright, Goldwater & Wright, Loyd Wright, Richard M. Goldwater, Dudley K. Wright, Los Angeles, for appellant Memorial Nat. Home Foundation.

George W. Trammell, Long Beach, for appellant Eleanor D. Boyd.

Edmund G. Brown, Atty. Gen., George M. Goffin, Deputy Atty. Gen., for respondent Atty. Gen.

Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondent receivers.

Wise, Kilpatrick & Pulley, George E. Wise, and Robert J. Kilpatrick, Long Beach, for respondent American Gold Star Mothers, Inc.

ASHBURN, Justice.

Two appeals in the same case are presented together. One of them (No. 22766) is taken from a judgment removing Memorial National Home Foundation (hereinafter designated as Foundation) as trustee of a charitable trust and granting other relief; the other (No. 22871) attacks an order fixing compensation of receivers, etc.

Appeal from Judgment.

Basically the litigation is a struggle between Foundation and American Gold Star Mothers, Inc. (herein referred to as Gold Star) for control of the assets of charitable trusts created for the benefit of Gold Star mothers. The attorney general instituted an action against both of these corporations seeking declaratory relief as to their conflicting claims; Gold Star filed a cross-complaint. The assets were in the name and under the control of Foundation. The court held it had abused and abandoned its trusts, should be removed as trustee and a new trustee should be appointed; it also appointed receivers to manage the property

pending the selection of a successor trustee, the taking of an accounting from Foundation, etc. Though designated as interlocutory, this court held the judgment to be final for purposes of appeal (*Brown v. Memorial Nat. Home Foundation*, 158 Cal. App.2d 448, 322 P.2d 600).

[1] Gold Star's ultimate position is that Foundation is its subsidiary and agent which acquired title to property intended for use in furtherance of Gold Star trusts and then repudiated those trusts, declared its independence of Gold Star and dedicated the property to partially different uses and to the exclusion of Gold Star management. Foundation and appellant Eleanor D. Boyd come to rest upon the proposition that Foundation has been at all times a distinct entity which never was a subsidiary of Gold Star, that its trusts are defined by its charter, which basic instrument it has amended to change the scope of the trusts as it had a lawful right to do.

The appellants (Foundation and Eleanor D. Boyd, cross-defendant) argue first that the evidence is insufficient to sustain the court's findings and conclusions as to the trusts assumed by Foundation and the class of beneficiaries to be benefited thereby. This raises the important question in the case. Did Foundation, under the dominating influence of Mrs. Boyd, acquire property and money dedicated to the relief of members of Gold Star and attempt to divert it to uses which defeat, at least partially, the trust for the benefit of members of Gold Star? The initial assets belonged to Gold Star; those and subsequent acquisitions were turned over to Foundation, held in its name, administered and claimed by it, and the claims of Gold Star with respect thereto were denied and ignored by Foundation. The story is long, but the result seems clear—that Foundation did acquire property, (cash and other donations and grants) to be held in trust for members of Gold Star, and having done so diverted them to uses divergent from and partially destructive of those of Gold Star, and also excluded Gold Star from any voice in administration of the trust.

Gold Star, which has its headquarters in Washington, D. C., was formed as a corporation for charitable and patriotic purposes under the laws of the District of Columbia, in January, 1929, under the name of American Gold Star Mothers. Its purposes were stated as follows: "[T]o unite with loyalty, sympathy, benevolence, charity, and love for each other, mothers whose sons or daughters have made the supreme sacrifice while in any branch of the Military or Naval Service of the United States of America, or who have died as a result of such service, \* \* \*" By amendment of 1937 the objects were restated to contain the following definition of purposes: "To extend needful assistance to all Gold Star Mothers and when possible, to their descendants \* \* \*. This is an association of Mothers whose sons and daughters served and died in the Allied Cause in the Great World War, or died as a result of such service." In November, 1950, the name was changed to "American Gold Star Mothers, Inc." and the objects again amended to add a definition of the word "mothers" as used in the original and amended articles, viz., "mothers whose sons or daughters have made the supreme sacrifice while in any branch of the Armed Services of the United States of America or have died as result of such service and are designated as 'Gold Star Mothers' by the laws of the Congress of the United States and/or the Rules and Regulations issued by the Department of National Defense or any branch thereof"; the amendment retained the following expressed purpose: "\* \* \* to extend needful assistance to all Gold Star Mothers and when possible to their descendants."

In 1950 Mrs. Boyd, then president of Gold Star, described the organization as the one "that has been known for more than twenty years as the National Organization for Gold Star Mothers." At the time of trial in July, 1956, it had more than 500 chapters and over 20,000 members in good standing. Membership dues are three dollars a year and fathers of persons dying as a result of war injuries become as-



sociate members without vote and without dues.

Mrs. Boyd was elected president of Gold Star in June, 1946, and continued to be such until June, 1952, with the exception of the period from June, 1947 to June, 1948. Prior to the convention of June, 1947, she had conceived or adopted the idea of establishing a home for needy members of Gold Star. At that meeting she presented the matter as a "No. 1 objective of the organization," saying in part: "I feel we should keep faith with our sons and daughters for forming a Foundation within our present organization for a National Memorial Home for these forgotten mothers. This can be done under the direction of the American Gold Star Mothers, Inc., which is a non-profit organization. \* \* \*" A resolution fostered by her was adopted, reading as follows: "Resolved that President Eleanor D. Boyd be, and she is hereby authorized and directed to proceed with the formation and establishment of a national home for needy members of Gold Star mothers, which home shall at all times be under the auspices of the American Gold Star Mothers, Inc.

"Resolved, further, that the president, Eleanor D. Boyd, be and she is hereby directed to make a full report as soon as possible showing the action which she has taken with respect to the formation of the Memorial National Home." Articles of Incorporation for such a project had been previously drafted and were filed in July, 1947. They created a charitable nonprofit corporation under the laws of California. "[T]he primary purpose of its Articles of Incorporation was to benefit members of American Gold Star Mothers, Inc." according to appellants' opening brief.

[2] Where a corporation becomes trustee of a benevolent trust the courts look first to its charter to determine the nature and extent of the dedication of its assets to eleemosynary purposes. *Pacific Home v. County of Los Angeles*, 41 Cal.2d 844,

852, 264 P.2d 539, 543; "Similarly, all the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes. It follows that neither plaintiff nor its successor could legally divert its assets to any purpose other than charitable purposes \* \* \*." *In re Los Angeles County Pioneer Society*, 40 Cal. 2d 852, 860, 257 P.2d 1, 6: "[A] devise to a society organized for a charitable purpose without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created."

The original articles of Foundation adopt the name "American Gold Star Mothers, Incorporated, Memorial National Home Foundation." Its purposes as therein stated are to acquire, manage and maintain homes, rest homes, etc. for "distressed and needy members in good standing of American Gold Star Mothers, Incorporated, in any State or Territory"; to receive funds and other property to be used for the "protection, health, welfare and relief of sick, destitute, distressed and needy members in good standing of American Gold Star Mothers, Incorporated." The articles also provide for a board of five directors and prescribe that "[a] majority thereof shall be members in good standing of American Gold Star Mothers, Incorporated"; the directors "shall be the sole and only members of the corporation."<sup>1</sup> Although the

1. This limitation of membership in such corporations was then legal (Civ.Code § 600), as it is now (Corp.Code § 9603).

organization of a separate corporation was probably a violation of the Convention's mandate (cf. *Shattuck v. Wood Memorial Home*, 319 Mass. 444, 66 N.E.2d 568, 573), the original articles afford evidence of a deliberate effort to comply with the resolution of June, 1947; the corporate name "American Gold Star Mothers, Incorporated, Memorial National Home Foundation" definitely ties into that of the organization whose Convention authorized the establishment of a national home for needy members. The restriction of membership in the new corporation to members of Gold Star, with such members dominating the board of directors, effectively placed the control in the parent corporation. At that point Foundation truly could be said to exist "under the auspices" of Gold Star and to be its subsidiary. Although Mrs. Boyd testified at the trial that she did not think of the home as an American Gold Star Mothers project and did not explore the possibility of working it out within the framework of Gold Star, and further declared that the resolution of June, 1947, did not control the Foundation, her conduct at the time of organizing that corporation paints a different picture which is far more persuasive than the assertions made at the trial of July, 1956.<sup>2</sup>

The fact of organizing a separate corporation, though contemplated by Mrs. Boyd in advance of the June, 1947 Convention, was not then disclosed because, as she testified, she did not consider that necessary at the time. The fact was first stated in a bulletin sent by Mrs. Boyd to all chapters and members of Gold Star in

July, 1947, the explanation being that this was necessary for exemption from taxes.<sup>3</sup> At that 1947 Convention the members contributed 441 dollar bills to be used in establishing the home; additional donations had increased the total to \$1,498 by the time said bulletin was issued.

When apprised of the fact of a separate organization, various members, chapters and officers of Gold Star became apprehensive and dissatisfied and there was acrimonious correspondence between them and Mrs. Boyd, who not only was president of Gold Star at the time but was also president of Foundation continuously from its organization and selected and dominated its board of directors at all times. In further bulletins to chapters and members, issued by her in October and December, 1947, she asserted that the authority of the June resolution had been carefully pursued and that a separate corporation was necessary for tax and other reasons. In the third bulletin (in December, 1947) she said: "I am now in receipt of a letter from the National President of the American Gold Star Mothers, Inc., demanding that the National Board have complete control of the Memorial National Home Foundation, that I surrender all monies to her and that I cease sending bulletins to the chapters. A bulletin has also been issued on her letterhead, which states that the Corporation has been rejected by the National Board.

"The Memorial National Home Foundation is still a legal and functioning corporation. It will remain so until action taken by legal delegates in a legally called an-

2. The court recited in its findings that it "does not question the honesty and integrity of Eleanor D. Boyd" but it specifically found that she "owed and still owes a fiduciary obligation to the defendant and cross-complainant, American Gold Star Mothers, Inc., and the members of its chapters and National Executive Board, in connection with her activities in forming and managing the Memorial National Home Foundation and acting as an officer and President of said corporation," and that such fiduciary obligation had been violated.

3. This viewpoint was elaborated in a complaint filed by Foundation against Gold Star in 1952 seeking control of the assets of the trust. The pertinent allegation is that Gold Star "has no provision in its Constitution or By-Laws for its funds upon dissolution to be delivered to a non-profit foundation or other corporation; that as a result thereof said defendant is unable to obtain an exemption from Federal Taxation Laws." But this theory does not appear to have been explained previously to Gold Star officers or members.

nual National Convention of the American Gold Star Mothers, Inc. decrees otherwise.

"\* \* \* The Directors of the Memorial National Home Foundation have a dual obligation. Their responsibility lies not only in providing a National Home for distressed and needy members of American Gold Star Mothers, Inc., but they must conduct their affairs in such a way that no donor to the Memorial National Home Foundation shall ever question the singleness of purpose for which the funds they gave are applied.

"The National President and National Board of American Gold Star Mothers, Inc. have plenty to do to establish new chapters and carry on other work of the parent organization."

In January of 1948, before the June Convention at which she was re-elected president of Gold Star, Mrs. Boyd caused the articles of Foundation to be amended. The name was changed to "Memorial National Home Foundation," thus dropping the words "American Gold Star Mothers, Incorporated." The provision that a majority of directors must be members of Gold Star was changed to read: "A majority thereof shall be Gold Star mothers (mothers whose children were killed in the service of the United States of America)." The purpose clause of the articles was amended to eliminate reference to members of Gold Star and to say, for the "welfare and relief of sick, destitute, distressed and needy Gold Star mothers (mothers whose children were killed in the service of the United States of America)." This was done without the consent or knowledge of Gold Star, its officers, or national executive board. It was a plain attempt to change the scope of a charitable trust by mere amendment of the trustees' charter.

[3] Counsel for appellants argue that this could be done lawfully but they cite no authority which supports the proposition. Reliance upon *In re Los Angeles County Pioneer Society*, supra, 40 Cal.2d 852, 257 P.2d 1, proves futile, for that case held that an attempted amendment of the charter which was in derogation of the

trusts expressed in its original articles was nugatory, the court saying at page 862 of 40 Cal.2d, at page 7 of 257 P.2d: "Pioneer's course of conduct throughout these proceedings thus demonstrates that it has abused and abandoned its trust and amply supports the determination of the trial court that a new trustee should be appointed. [Citations.] 'If the trustees abandon, or in any way abuse, their trust, equity will correct the abuses, and remove the offenders.'" It is obvious that a trustee cannot thus change the trust upon which it holds property. This attempt at *ex parte* divorce was doomed to failure.

In 1950 the Foundation articles were again amended to eliminate the words "needy Gold Star Mothers (mothers whose children were killed in service to the United States)" and to say: "The purpose for which this corporation is formed is the acquisition and/or creation and operation of a nonprofit home for parents of persons who served in the armed forces during World War II and who died of service connected illness or injury." In 1956 they were again amended to substitute these words: "The specific, primary, and only purpose of this corporation shall be the establishment and maintenance of a nonprofit home or shelter for destitute, distressed, or needy parents of persons who served in the Armed Forces of the United States during World War II and who died of service connected illness or injury."

It should be noted that the Foundation articles as amended in 1950 and 1956 restrict its beneficiaries to the parents of victims of World War II, while those of Gold Star never have been restricted to any specific war or even to its own members. Its membership extends to "mothers whose 'sons and/or daughters served and died in line of duty in World War I, World War II, or the Korean conflict, or died as a result of injuries received in such service.'" As shown by its articles and the testimony of Mrs. Boyd "one of the purposes of that organization is to help all Gold Star Mothers, whether they be members or not of [the] organization."



The erroneous notion that this legerdemain of charter amendments could succeed is reflected in Mrs. Boyd's activities at all subsequent times. Legerdemain would seem a harsh word were it not for the fact that Mrs. Boyd, who was re-elected president of Gold Star in 1948 and each successive year until 1952, who was at all times president and dominating personality of Foundation, actively, but without disclosing the attempted divorce, encouraged and solicited all chapters and members of Gold Star to raise money for the home through such familiar devices as bazaars, raffles, sales of plaques, donations in honor of the president's birthday, etc.; all this was done under the assurance that it was done for "your home." This procedure continued until Mrs. Boyd and Foundation openly repudiated any trust for members of Gold Star (as such) in May, 1953. At that time Foundation had accumulated from members' activities and similar sources, \$73,577.12. All of it had been contributed, as found by the trial judge, "for the purpose of establishing a home for sick, destitute, distressed and needy mothers of the American Gold Star Mothers, Inc." As stated in June, 1949, by Mrs. Boyd, in a newspaper known as "Gold Star Mothers,"<sup>4</sup> the said funds "largely represent donations from individual chapters and from the mothers in memory of their sons, or other loved ones."

At the June, 1948, Convention of Gold Star, where she was re-elected president, Mrs. Boyd told the assembled members that the word "incorporated" had been dropped from the name of Foundation, but did not mention elimination of the words "Gold Star Mothers." She said (contrary to the existing fact) that the controlling vote in Foundation was with Gold Star and would so continue; also that Gold Star Mothers were in control; that the Foundation belonged and always would belong to Gold Star and "it is your organization."

Although the delegates made Mrs. Boyd president, they also adopted a resolution at the same Convention, reading: "We, the members of American Gold Star Mothers, Inc., \* \* \* desire that the National Memorial Home Foundation be an integral part of our organization under the supervision and management of our duly elected and appointed officers and committees." They rejected a proposed resolution worded as follows: "We, the delegates \* \* \* desire that the present directors of the Memorial National Home Foundation, American Gold Star Mothers, be kept and the Foundation be under the present management." Mrs. Boyd, though not so stating to the Convention, decided to ignore the resolution which had been passed, and actually reported to Foundation's attorney in Los Angeles that the other one had been adopted. At the trial she said: "I considered it null and void, having not carried or lost by the method we had used for resolutions," further explaining that it had not passed by a two-thirds vote. In fact, there was no such requirement in by-laws or custom. Never did she take any steps to conform to this resolution.

During World War II the United States Government had established at Long Beach a temporary project for defense workers and armed forces personnel consisting of about 90 acres of land with some 1,000 family dwelling units on it. It had been named Truman Boyd Manor in honor of Mrs. Boyd's son who had been killed in the service. As early as August, 1947, Mrs. Boyd began a campaign to induce the government to relinquish this project to Foundation as a home for Gold Star Mothers, under the authority of the Lanham Act (42 U.S.C.A. § 1581(b)). In these activities she contacted senators, representatives, Public Housing Administration officials and others having authority concerning the subject. She now claims to have acted solely as president of Foundation, but the record she made at the time refutes this conten-

4. Published by Gold Star but controlled by Mrs. Boyd in all respects and sent to all chapters and members of Gold Star.

tion. She told various senators that "Memorial National Home Foundation is incorporated to take care of the needy members of the American Gold Star Mothers, Inc., as well as other needy Gold Star Mothers and Fathers.

"The American Gold Star Mothers, Inc. is a National organization qualified in the District of Columbia after World War I. The Memorial National Home Foundation was incorporated to take care of the needy Gold Star Mothers and Fathers on a National scale." Congressman Doyle of Long Beach was quoted in one of the letters in evidence as stating that "he participated with Mrs. Boyd in the Congressional and Navy Department discussions at the time the enabling legislation was passed, and that it was assumed on all sides that this was a charitable project of the American Gold Star Mothers, Inc." There was much correspondence with government officials, most of which was upon the letterhead of Gold Star and signed by Mrs. Boyd as president of that organization and chairman of the board of Foundation. She introduced herself and was introduced to various officials as president of Gold Star. Finally, in 1950, an amendment was incorporated in the Lanham Act which was intended and understood to apply to Gold Star, viz.: "[W]here the Administrator determines that the housing involved is urgently needed by parents of persons who served in the armed forces during World War II and died of service-connected illness or injury."<sup>5</sup>

When formal application for relinquishment was made it was presented in the name of Foundation. However, it included a copy of a resolution adopted at the Gold

Star Convention of 1949, reading: "Resolved that the American Gold Star Mothers, Inc. authorize the Chairman of Memorial National Home Foundation to proceed to acquire the emergency Housing Project \* \* \* that project being ninety (90) acres, which assures us of plenty of room to take care of the mothers and fathers who need assistance; to be known as the Memorial National Home Foundation property for Gold Star mothers and fathers throughout the nation."<sup>6</sup> Also included was a financial statement of Gold Star written upon its own letterhead. This application caused surprise and questioning within the Housing Administration (which had jurisdiction over this matter) and it required that a relinquishment of the property to Foundation be approved in writing by Gold Star. When this was received and the executive board of Gold Star had appeared in support of the application, same was approved, for the Housing Administration then concluded that "Memorial National Home Foundation was a corporation that had been established to take title to the property as an operating organization for" American Gold Star Mothers, Inc. The court found, upon adequate evidence, "that the Housing and Home Finance Agency, Public Housing Administration, did believe that the said Truman Boyd Manor was being conveyed to an organization which was an integral part of and controlled by the defendant, American Gold Star Mothers, Inc." Before the matter could be accomplished the Korean conflict arose and a freeze was placed on all such relinquishments.

Early in 1953 the subject of lifting the freeze on this property was considered and

5. This was the language of the statute at the time the relinquishment to Foundation was approved on June 7, 1950, "for the purposes of acquiring and operating a Home for the parents of persons who served in the Armed Forces during World War II and who died of service connected illness or injury."

By amendment of October 26, 1951, the words "during World War II" were stricken and the following phrase was substituted, "at any time on or after

September 16, 1940, and prior to July 26, 1947, or on or after June 27, 1950, and prior to such date thereafter as shall be determined by the President." (65 Stat. 648, Ch. 577, Sec. 2.)

6. The corporate name of Gold Star did not include "Inc." until the amendment of November, 1950. It is a fair inference that the phrase "Gold Star Mothers" had a generally accepted secondary meaning which signified respondent corporation and its members.



the question again arose whether Foundation would be a proper grantee. Mrs. Boyd then furnished the authorities a copy of a resolution adopted at the Gold Star Convention of 1952, to the effect "that the National Executive Board of the American Gold Star Mothers, Inc., uphold and recommend the continuance of the policy of the Memorial National Home Foundation, also, that in accord therewith each chapter shall proceed to annually elect a member to the advisory committee of the Memorial National Home Foundation. \* \* \*" Careful scrutiny of this resolution shows that it related only to the policy of the Foundation to have members of Gold Star upon its advisory committee. But the resolution satisfied the government officials, the freeze was lifted and the property deeded to Foundation on May 29, 1953, for a price of \$138,404.63<sup>7</sup> with a down payment of \$944.66. The entire balance was paid in the ensuing year out of current revenues from the property, which grosses approximately \$500,000 a year. An appraisal made for Foundation showed a value of \$2,698,143.15.

An action was brought in June, 1952, by Foundation against Gold Star to establish its right to all the trust property. It was later voluntarily dismissed and was followed by another similar action filed on July 31, 1953, which was likewise dismissed.

The deed to the government property having been received in May, 1953, Mrs. Boyd in that same month openly repudiated any trust for the benefit of members of Gold Star. This she did through a news release given to the Long Beach Independent. It said, in part: "Memorial National Home Foundation was incorporated in July, 1947, while Mrs. Boyd was National President of Gold Star Mothers. It has no connection with that organization, however, except that Gold Star Mothers have been invited to name an advisory board." No convention of Gold Star members had been told that these corporations were independent. Mrs. Singer, who was president

of Gold Star at the time of trial, testified that she always believed that control and ownership of Foundation was in Gold Star; also that Mrs. Boyd always said at chapter meetings "this is yours. It is for American Gold Star Mothers." Mrs. Broom, who was first vice president of Gold Star during all the years of Mrs. Boyd's incumbency as president, never learned of the amendments to the charter of Foundation until 1953. Mrs. Boyd testified at the trial that she did not feel that Gold Star was the parent organization of Foundation.

Shortly after the press release the 1953 Convention of Gold Star was held in June, and a resolution was there adopted "that the National Executive Board of American Gold Star Mothers, Inc., be, and it is hereby authorized and directed, in order to protect the interests of the members and Chapters of American Gold Star Mothers, Inc., to take all action and to do all things, as said National Executive Board shall, in its sole discretion, deemed necessary and proper, for bringing about a change in the control, management and operation of Memorial Home Foundation so as to place the said control, management and operation of such Foundation in the duly authorized representatives of American Gold Star Mothers, Inc. \* \* \*"

In May, 1951, while the Long Beach property was frozen, Foundation, without consulting Gold Star, its officers or executive board, acquired certain property at Ojai, California, professedly as a home "for Gold Star parents." The court found "that the said property was purchased as a home for 'needy and distressed parents' of American Gold Star Mothers, Inc." The property consists of eight acres which then had on it a single residence and servants' quarters. The purchase price was \$55,330, and Foundation spent \$20,212.74 on improvements, consisting mainly of a single cottage which was supposed to be a model of homes for needy mothers. The court found that the initial payment on the purchase price

7. This represented the cost of the land to the Government of \$133,182.49, plus a payment in lieu of taxes of \$4,277.48,

and the sum of \$944.66 for accounts receivable.



"was from funds contributed by American Gold Star Mothers, Inc., its National Executive Board, and its members, chapters and friends." Though no finding to that effect was made, it seems a fair inference that later payments on the price and other expenses came from the earnings of Truman Boyd Manor. All contributions had been mingled as received and appellants' brief says: "Exhibit X shows that all of the net cash receipts through May 31, 1952, were invested in the Ojai property excepting only the sum of \$1,097 shown as cash unrestricted at that date." The Ojai property has had a total income of less than \$2,000 and a total loss of over \$40,000, an average of \$8,000 a year. The purchase was made somewhat hurriedly so that Mrs. Boyd could announce at the June Convention of Gold Star the existence of a home for mothers.

The property was and is zoned for single family residence. After its purchase an effort was made by Foundation to change the zoning, but this failed because of protests of neighbors who stressed a shortage of water in the area. Foundation has no license from the State to care for needy persons, and no definite plans have been made for the further improvement of this property. The only permanent resident has been a caretaker. There have been a few overnight and weekend guests. Foundation also obtained an option to buy an adjoining 32 acres and Mrs. Boyd solicited all chapters and members of Gold Star to contribute \$200 per chapter toward the option price. Addressed to "Dear Presidents and Chapter members of American Gold Star Mothers, Inc.," one appeal commenced as follows: "Memorial National Home Foundation was organized to benefit our Gold Star Mothers and Fathers." After the June, 1953, resolution of the Gold Star Convention, Foundation placed on a single door in the Ojai "Manor House" a plaque reading: "The American Gold Star Mothers,

Inc." and has since contended that the total property owned by it and devoted exclusively to the needy members of Gold Star "is a bedroom at Ojai of 187 square feet in area, together with the right to use jointly with other occupants a service area of 2407 square feet, not counting 8.14 acres of land." This was based upon the amount of contributions made prior to the amendment of Foundation's articles in January, 1948,—\$2,170.08. Ojai has at all times been a dead loss and promises to be so for an indefinite future time.

[4] The foregoing review of the evidence (which of course is based upon the testimony, exhibits and inferences favorable to respondents; *Nichols v. Mitchell*, 32 Cal.2d 598, 600, 197 P.2d 550; *New v. New*, 148 Cal.App.2d 372, 383, 306 P.2d 987), amply sustains the court's findings that all funds accumulated prior to the purchase of Truman Boyd Manor "were funds accumulated for benevolent and charitable purposes and held in trust by the Memorial National Home Foundation for the purposes as set forth in paragraph III herein," which means for the benefit of members of Gold Star in good standing; also that Truman Boyd Manor is held in trust "for 'needy and distressed parents' of World War II veterans for the purposes as set forth in paragraph III herein, but limited to needy and distressed parents of World War II veterans."<sup>8</sup>

It thus appears that there were imposed upon Foundation two trusts, one of which is for the benefit of all needy members of Gold Star, and the other, Truman Boyd Manor, for the benefit of needy parents of World War II victims. The first classification grows out of the specific declaration of Foundation's original articles of incorporation and the second out of the circumstances attending the acquisition of Truman Boyd Manor, the statute being expressly restricted to providing relief for World War II parents. The Ojai property

8. The phraseology of the statute as amended in 1951 (see footnote 5, *supra*) is broad enough to include the Korean conflict, but the conveyance to Founda-

tion was made on the basis of the 1950 approval of relinquishment and the statute then prevailing.

probably falls partially within each of the two classifications for it was acquired primarily with funds contributed by members of Gold Star for the expressed purpose of establishing a home for members and secondarily from the funds derived from operation of Truman Boyd Manor (for World War II parents only).<sup>9</sup>

The evidence also supports the finding "that the defendant and cross-defendant, Memorial National Home Foundation, has abused and abandoned its trusts and new trustees should be appointed to carry out the terms of the trusts." This is true because all funds and property have remained throughout all the maneuvers of Foundation impressed with a trust for the exclusive benefit of members of Gold Star, except property which is held in trust for the exclusive benefit of needy parents of victims of World War II,<sup>10</sup> namely, Truman Boyd Manor and the Ojai property; that is to say, that Foundation, as the subsidiary of Gold Star, initially committed itself to a trust for the benefit of members of Gold Star, has never been released from this dedication and could not without concurrence of Gold Star and the Court release itself from that fiduciary obligation through charter amendment or other device. So far as Truman Boyd Manor is concerned (and to some extent Ojai), the trust was narrowed to parents of World War II victims through the circumstances of the grant, but it still remains for the benefit of members (regular and associate) of Gold Star. Foundation persists in denial of any obligation to members of Gold Star, as such, and thereby it continues to repudiate its trust and to emphasize the necessity for its removal as trustee.

As an additional ground for removal, the court also found "that hostility, strife and

antagonism has existed and does exist between members of the Board of Directors of the defendant, Memorial National Home Foundation, and particularly between its president, Eleanor D. Boyd, and members of the American Gold Star Mothers, Inc., and its National Executive Board. The Court further finds that the defendant and cross-defendant, Memorial National Home Foundation, and its president, Eleanor D. Boyd, cannot, with fairness and impartiality, carry out the provisions of its charter, insofar as its beneficiaries are concerned, under existing conditions without detrimental results to its trusts and beneficiaries." Also that Mrs. Boyd dominates Foundation and "is unduly influenced by passion and prejudice emanating from personal differences with members of the National Executive Board and members of the chapters of the American Gold Star Mothers, Inc."

The record is replete with illustrations of hostile reaction on Mrs. Boyd's part to any questioning or criticism of her regime. Reference has been made above to the two actions brought in 1952 and 1953 by Foundation against Gold Star in an effort to exclude it from the management of the trust. Smaller incidents are also revealing. In response to one member's question about the acquisition of a home, Mrs. Boyd said "that she was taking care of it and we would be informed when she was ready." She told the 1951 Convention: "We are directed to take care of the Memorial National Home Foundation and not ask so many questions that are not necessary to be told to you at this time." When told that a Mr. Geisler had a photostatic copy of the charter amendments, Mrs. Boyd said: "You had no business to go down there. That isn't any of your business at all. That

9. Under Gold Star management the trust has a wider scope, relief of all Gold Star mothers whether members of the organization or not, except as to Truman Boyd Manor and (in part only) the Ojai property; the benefit of the Long Beach property is limited to parents of World War II victims in its entirety; but Ojai was acquired from two sources,

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only one of which is limited to World War II parents; the exact proportion must be determined through the accounting ordered by the trial court.

10. By courtesy, husbands of members of Gold Star become associate members if they are parents of the victims of the designated wars, World War I, World War II, and the Korean conflict.

is the business of the Memorial National Home Foundation." When Mr. Geisler replied that he thought it the business of all members of Gold Star, she further said: "Well, I don't interfere in your business, and I don't think you should interfere in mine, and this is my business." On another occasion when Mrs. Geisler referred to having photostatic copies of the amendments, the following colloquy occurred: Mrs. Boyd: "You misrepresented or you could not have gotten them." Mrs. Geisler: "I did not misrepresent, the record books are open to all who wish to see them." Mrs. Boyd: "You had to swear you were entitled to them; you had to tell a lie to get them; you could not have gotten them otherwise." In 1949 a dissident faction of Gold Star organized an entity known as National Gold Star Mothers, and the October issue of the paper "Gold Star Mothers" referred to them as "quislings" and "fifth columnists" and "not honorable Americans."

As to Mrs. Boyd's lack of experience and lack of qualification to manage a two million dollar trust, the history of Ojai above recited furnishes potent proof. The administration of the Long Beach property is also convincing. The City of Long Beach has an ordinance which permits temporary housing until 1961 only; it would cost a million dollars to bring the Truman Boyd Manor up to the ordinance standard; though its gross income is a half million dollars a year, no reserve fund has been set up and no plans have been made to do this work or otherwise construct a home on the premises. True, preliminary drawings were made after this action was filed, but when presented to the City Council of Long Beach they were rejected because the proposed location is directly in the path of a freeway which the State intends to put through the property. The same is true of a duplex plan and a hospital plan submitted to the city. Not more than 20 to 30 Gold Star parents have been given housing in the 994 rental units of this property; they are in scattered units; there are about 300 Navy families there who pay

no more rent than do the Gold Star parents. During this long period of relative inactivity and bickering the rents have been accumulating, the total in bank on May 31, 1956 being \$103,697.64. Dr. Boyd, husband of appellant, operates a clinic upon the premises but Mrs. Boyd was unable to testify to any facts about his arrangement with Foundation, what rent he paid or whether it ever had been changed.

[5, 6] A charitable trustee will be removed on the same grounds as the trustee of a private trust. 3 Scott on Trusts, § 387, page 2049: "A trustee of a charitable trust may be removed as trustee for the same reasons for which a trustee of a private trust may be removed. Thus he may be removed for serious breaches of trust, for unfitness, for long continued absence and the like. He can also be removed where his views are hostile to the purposes of the trust, as in the case of a religious trust where he ceases to hold religious views which it is the purpose of the trust to promote." To the same effect, see, Restatement of Law of Trusts, § 387, page 1181. That diversion of trust funds to unauthorized uses, inefficiency and mismanagement, hostility to the beneficiaries, assumption of an adverse trust, afford good grounds for such removal is well established.

Civil Code, § 2232: "No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter." Section 2234: "Every violation of the provisions of the preceding sections of this Article is a fraud against the beneficiary of a trust." "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of



the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated." *May v. May*, 167 U.S. 310, 320, 321, 17 S.Ct. 824, 828, 42 L.Ed. 179. "If hostility between trustee and beneficiary is such that the best interests of the trust are jeopardized, the trustee will be removed." 45 A.L.R. 331, 333.

[7] The pleas of laches and estoppel which are aimed at Gold Star cannot be sustained. Firstly, the complaint of the attorney general, as is hereinafter shown, sustains this proceeding regardless of capacity of Gold Star to complain of Foundation's mismanagement or repudiation of the trust. Secondly, the proper administration of a benevolent trust, especially the prevention of departures from its legitimate objects and the redressing of breaches and repudiations of the trust, are matters of large public interest which preclude application of the doctrines of laches and estoppel and particularly so in an action brought by the attorney general. "No length of diversion from the plain provisions of a charitable trust will prevent restoration to its true purpose." *William Buchanan Foundation v. Shepperd*, Tex.Civ.App., 283 S.W.2d 325, 336. "The lapse of many years is no bar to such action. 'Generally it is true that no length of time of diversion from the plain provisions of a charitable foundation will prevent its restoration to its true purpose.'" *Shattuck v. Wood Memorial Home*, supra, 319 Mass. 444, 66 N.E. 2d 568, 573. To the same effect, see, *Trustees of Andover Theological Seminary v. Visitors of Theological Inst., etc.*, 253 Mass. 256, 148 N.E. 900, 918.

[8] Appellants argue that neither the attorney general nor Gold Star (which filed a cross-complaint herein) has authority to maintain this action.

As to the attorney general, appellants rely primarily upon § 9505 Corporations Code, which says: "A nonprofit corpora-

tion which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure." Section 10207, which appears in the part covering corporations organized for charitable or eleemosynary purposes, contains almost identical language. Counsel say that the statute imposes a condition precedent to a suit by the attorney general, namely a finding by him that there has been a failure to comply with the trust or a departure from its general purposes; that such finding was not made at bar and therefore the predicate for a suit by the attorney general was not laid. Emphasis is placed upon the fact that this is an action for declaratory relief. The complaint alleges that Foundation has possession and control of charitable trust assets of the value of approximately one million dollars; that Gold Star contends it is entitled as trustee to possession and control of same; that Foundation claims it is entirely independent and not subject to control of Gold Star and is the only proper trustee of said charity; that plaintiff has been unable to determine "the precise nature and extent of the charitable trust and/or trusts involved, or to resolve the dispute between said defendants regarding the right to possession and/or control, as Trustees, of the aforesaid charitable trust assets." Also, "that all the charitable trust assets chargeable to and in the possession and/or under the control of defendant, Memorial National Home Foundation, were solicited by and tendered to said Memorial National Home Foundation with the understanding that said assets were to be administered by the American Gold Star Mothers, Inc. and that at least a substantial portion of said assets would be

devoted toward the rendering of aid and assistance to needy and distressed members of said American Gold Star Mothers, Inc." Again, that public interest requires a prompt determination of the nature and scope of the charitable trust or trusts involved, and the designation of the proper trust or trustees to accomplish the purpose or purposes of same. The prayer is for judgment determining the nature and scope of the trusts and which defendant is the proper trustee of each trust; that "defendants be required to account for all assets properly chargeable to said trusts to enable the court to further clarify the rights and duties of plaintiff in hereafter enforcing and supervising said trusts, as his statutory and common-law duty. Plaintiff also prays for such other and further relief as the court may deem just in the premises, including costs of suit incurred herein."

[9,10] It is true that the complaint makes no allegation of a breach of trust or departure from its general purposes. But § 9505 does not impose such a finding as a condition precedent to any suit by the attorney general. All counsel seem to agree that that official has an historic right and duty to supervise charitable trusts and to maintain such actions as may be appropriate to protect the public interests therein. 3 Scott on Trusts, § 391, page 2052, says: "In England the records show that even before the enactment of the Statute of Charitable Uses in 1601 suits were brought by the Attorney General to enforce charitable trusts. The community has an interest in the enforcement of such trusts and the Attorney General represents the community in seeing that the trusts are properly performed." People ex rel. Ellert v. Cogswell, 113 Cal. 129, 136, 45 P. 270, 271, 35 L.R.A. 269: "The state, as *parens patriae*, superintends the management of all public charities or trusts, and in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been

changed in this state. Even in those states, such as Massachusetts, where by special statute the attorney general is instructed to prosecute such actions, it is declared that the statute does not narrow or diminish in this regard the common-law powers incident to the office. Parker v. May, 5 Cush., Mass., 336. The principle and rule are thus succinctly stated in Attorney General v. Compton, 1 Younge & C. Ch. 417: Where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the crown should be entitled to intervene by its officers for the purpose of asserting, on behalf of the public generally, the public interest and the public right, which probably no individual could be found effectually to assert even if the interest were such as to allow it. 2 Kent's Commentaries, 10th ed., 359; Lewin, Trusts, § 665; 1 Daniell's Chancery Practice, § 13; Perry, Trusts, § 732." The soundness of this ruling is emphasized by the California concept that "[t]he Attorney General, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests." Pierce v. Superior Court, 1 Cal.2d 759, 761-762, 37 P.2d 453, 460, 461, 96 A.L.R. 1020. The legislature presumptively was cognizant of the Cogswell decision when enacting § 605c Civil Code in 1931 (Stats.1931, Ch. 871, p. 1852), and codifying it as § 9505, Corporations Code, in 1947. It is to be inferred that there was no intention to change the law by stripping the attorney general of a recognized and important function in the absence of clear and explicit language so indicating. In re Guardianship of Thrasher, 105 Cal.App.2d 768, 777, 234 P.2d 230, 236: " \* \* \* it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of

law unless such intention is made clearly to appear either by express declaration or by necessary implication. *Lowe v. Yolo County Consolidated Water Co.*, 8 Cal.App. 167, 174, 96 P. 379; 23 Cal.Jur. 782, sec. 158.' See, also, *Freeman v. Jergins*, 125 Cal.App.2d 536, 552-553, 271 P.2d 210. The utmost effect to be attributed to § 9505 is the imposition upon the attorney general of an additional obligation (rather than a mere discretion) to institute suit when he has concluded after investigation that there has been a breach of a charitable trust or a departure from the general purposes for which the corporation was formed. There was no error in ruling that the present suit is properly maintained by the attorney general.

[11] Appellants' argument that Gold Star has no capacity to maintain its cross-complaint rounds out the thought that nobody can maintain an action to correct abuse in administration or repudiation of a charitable trust until the attorney general has made an investigation and reached the decision specified in § 9505, Corporations Code. The argument is that Gold Star has proceeded upon the theory that it has standing to sue as creator of the trusts held by Foundation, or that it represents the donors to those trusts. It seems to be the law of this State that the trustor or donors of a charitable trust cannot maintain an action such as this independently of the attorney general. *O'Hara v. Grand Lodge I. O. G. T.*, 213 Cal. 131, 139, 2 P.2d 21, 24, says: "[E]ven if defendant be treated as the creator of this trust, it does not appear what standing it has in this action to claim any interest in the real property. Defendant parted with its entire interest in the property for a valuable consideration, subject to the trust, and retained no reversionary interest therein. Under such circumstances, it has no standing in a court of equity, except as a relator, to attempt to compel the proper execution of the trust, or to claim any interest in the trust property. The law is well settled that when property has become fully vested in trustees for a valid charita-

ble purpose, neither the creator of the trust nor his heirs or assigns have any standing in court in a proceeding to compel the proper execution of the trust, except as relators." To the same effect are *Pratt v. Security Trust & Savings Bk.*, 15 Cal.App. 2d 630, 640, 59 P.2d 862; *George Pepperdine Foundation v. Pepperdine*, 126 Cal. App.2d 154, 161, 271 P.2d 600.

The Gold Star pleading named the attorney general as cross-defendant, and that official filed an answer which admitted or denied various allegations and concluded with the prayer "that the Court hear and determine all the issues raised by the pleadings herein and that it enter judgment accordingly, including the awarding to this answering cross-defendant of costs of suit; and such other and further relief as the Court may deem just in the premises."

[12] A relator is a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official. The term is thus defined in 2 Bouv. Law Dict., Rawle's Third Revision, page 2863: "At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of 9 Anne. In this country, even where no similar statute prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators." The attorney general prescribes his own rules for granting such consent and they may be entirely informal.

In *People v. San Francisco*, 36 Cal. 595, 605, an interested party filed a mandamus proceeding under the title of *People ex rel. Ferguson*. The application and notice thereof were signed by the attorney for the relator, but not by the attorney general. The court said in this connection: "Though the Attorney General did not sign the notice, he unites in the brief in support of the application, and thereby, impliedly at least, consents to the use of the name of the People." That ruling is applicable at bar. The attorney general has impliedly con-



sented to the prosecution of the cross-complaint by Gold Star standing in the position of a relator. Not only did he do so by his pleading, but the deputy attorney general in charge of the case stated, in closing his argument below: "Upon a complete examination of this record and with the great realization of what I am about to advocate, it is my earnest conclusion that, with the view in mind to properly benefiting the beneficiaries in carrying out the trust purposes, removal of the present trustee is essential." The attorney general has also filed a respondent's brief in this court which argues: "The Findings of Fact are Fully Supported by the Evidence and Required the Removal of Memorial National Home Foundation as Trustee. \* \* \* The Trial Court Properly Removed Memorial National Home Foundation as Trustee of Charitable Assets," and concludes: "This respondent concludes that the evidence and the law clearly supports the decree and the procedure by which it was obtained. \* \* \* This respondent concludes that this action was proper and was more than justified by the substantial evidence elicited." We hold that Gold Star's cross-complaint was properly entertained by the court, even if it were to be conceded (which we do not) that the attorney general's own complaint was not sufficient to sustain the action.

[13] Next it is argued that the removal of Foundation as trustee stripped it of all its assets and therefore operated as a dissolution; that an action in *quo warranto* is the exclusive applicable procedure, and it cannot be pursued without compliance with § 4691, Corporations Code, which gives the corporation an opportunity to cure its derelictions by charter amendment or other corporate action.<sup>11</sup> It appears, however, that this section applies only to

an action brought under § 4690, not strictly *quo warranto* but one "to procure a judgment dissolving the corporation and annulling, vacating, or forfeiting its corporate existence." "Apart from statutes extending the existence of, or conferring powers upon, corporations for the purpose of winding up their affairs, the dissolution of a corporation implies the termination of its existence and its utter extinction and obliteration as an entity or body in favor of which obligations exist or accrue or upon which liabilities may be imposed." (13 Am.Jur., § 1342, p. 1191.) See, also, Restatement of Conflict of Laws, § 157, Comment a, p. 227. The instant action has no such purpose; it leaves Foundation intact as a corporation, qualified to undertake and administer any new charitable trusts which do not impinge upon those whose administration has been taken from it. In *re Los Angeles County Pioneer Society*, supra, 40 Cal.2d 852, 257 P.2d 1, has established the law for this State that a court of equity may remove a corporate trustee of a benevolent trust and transfer to another fiduciary the management of all property held by it for such purpose. There is no merit in the contention that *quo warranto* was the exclusive, or indeed the appropriate, remedy to be pursued at bar.

[14] Absence of indispensable parties is urged on two grounds,—that the directors of Foundation and the United States are in that category.

As to the directors, the argument proceeds as if the action sought their removal from office, which obviously is not the case. Authorities cited to the proposition that the directors are essential parties to such an action are not in point. Although the corporation was removed as trustee of all the trust assets in the instant case, the

11. Corp.Code, § 4691: "However, if the cause of action is a matter or act which the corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action, such suit shall not be maintained unless (a) the Attorney General, at least 30 days prior to the institution of suit,

has given the corporation written notice of the matter or act done or omitted to be done, and (b) the corporation has failed, neglected, or refused to institute proceedings to correct it within the 30-day period or thereafter fails to prosecute such proceedings."

corporation is not dissolved and the directors remain able to function as such. Title to the trust assets was vested in the trustee, not in the directors, and the judgment takes nothing from them to which they were entitled as individuals. They were neither indispensable nor necessary parties.

[15] The United States is not an indispensable or necessary party. The contention that it is rests upon a collateral agreement made at the time the government deeded Truman Boyd Manor to Foundation. That was done by quitclaim deed which contained no covenants or conditions. A contemporaneous agreement was made between the United States, "represented by the Department of the Navy," and the Foundation, under date of May 27, 1953. It recites the request of Foundation for transfer of Truman Boyd Manor pursuant to the Lanham Act, also the willingness of the Administrator of the Housing and Home Finance Agency to effect the transfer "on the expressed condition that a satisfactory agreement be entered into between the Foundation and the Department of the Navy, with respect to operation of the project, its availability for occupancy by persons engaged in defense or mobilization activities and reasonable rentals." Then follows the agreement that so long as there is a defense need for the project, as determined by the Navy, Foundation will continue to operate it for housing purposes and maintain reasonable rents, that it will give preference to military and other defense personnel in filling vacancies, will consult with the naval commander prior to changing any rent schedules, and in the event of hostilities will, if requested by the Navy, make the project available for full military use. The condition mentioned was that a satisfactory agreement be made, and when the agreement under discussion was executed the condition had been performed and hence ceased to be further operative. At best, its violation could amount to a partial failure of consideration (Foundation paid \$138,-404.63 for the property),—partial failure

which the United States might be able to capitalize in some proceeding brought for that specific purpose. But this agreement left no cognizable interest in the property in the United States. Its rights, if any, growing out of a prospective violation of the agreement could not be affected by the judgment at bar, for the receivers and the new trustee take with full notice of the contract and become subject to all the sanctions which could be invoked against Foundation with respect to it. Under the principles announced in *Bank of California, Nat. Ass'n v. Superior Court*, 16 Cal.2d 516, 520-524, 106 P.2d 879, the United States cannot be held a necessary or an indispensable party to this action.

Finally, appellants argue that "[t]he trial court has in effect determined that it, rather than Congress and the Housing and Home Finance Agency, should determine who is to manage Truman Boyd Manor"; and that "[t]he contract between the United States and Memorial National Home Foundation demonstrates that the United States has not completely disposed of Truman Boyd Manor." Hence, counsel say, this judgment interferes with the power of Congress to dispose of and make all needful regulations concerning property of the United States. (U.S.Const., Art. IV, § 3, clause 2.) There is no merit in this contention for, as shown above, United States parted with its entire interest in Truman Boyd Manor; if perchance it has any rightful complaint as to performance of the contract with the Navy above discussed, that right is not affected by the judgment herein.

No other points concerning the judgment require discussion.

#### Appeal from Order Fixing Compensation of Receivers.

By the judgment herein the court appointed Messrs. Roy E. Allen and George D. Lyon receivers of all the trust property "pending the appointment of a new trustee, or trustees." They qualified, took possession and in due course presented their Report and First Account Current wherein they prayed for an allowance of compensation and averred that their "joint work is

reasonably and fairly worth \$2,500.00 per month." Supporting testimony was given. As the court was about to rule, counsel for appellant Foundation objected to payment of any moneys to the receivers "out of the funds of Memorial National Home Foundation" on the ground of lack of jurisdiction, the reference apparently being directed to jurisdiction over the action and jurisdiction to appoint a receiver. The court made its "Order Approving, Settling and Allowing Report and First Account Current of Receivers, Fixing Compensation of Receivers, etc.," stating that "the circumstances are such that this is an appropriate case for allowance of compensation to the receivers on a salary basis, and that the fair and reasonable value of the services of the said receivers in their capacity as such receivers in this action is the sum of \$2,500.00 per month, pending the further order of this court. \* \* \* That the said receivers be and hereby are allowed, pending the further order of this court, the sum of \$2,500.00 per month for their services as such receivers herein, and that out of the funds in their possession, they are authorized to disburse \$1,250.00 per month to each of the said receivers, from the date of their qualification herein as such receivers, pending the further order of this court." From this order Foundation has taken appeal No. 22871.

No contention is made that the award is excessive, or that the court abused its discretion in any respect. Appellant's brief says: "The resolution of the instant appeal would seem to be governed by the disposition of the appeal by appellant from the interlocutory judgment which among other things appointed the respondent receivers"; also, "[a]s earlier stated, the resolution of this issue is ancillary to and dependent on the decision of the main appeal in No. 22766."

Appellant argues two points, (1) that the court had no jurisdiction over the action, hence the order appointing receivers is void and the costs of same cannot be assessed

against the receivership assets but must be borne by the party which secured the void order;<sup>12</sup> (2) that, even if the appointment was not void, where "the party objecting to the receivership has the property restored on the merits, the general rule is that the receiver is not entitled to compensation out of the property but instead must look to the applicant for the receiver for such compensation."

[16] Our disposition of the appeal from the judgment reveals that the court had jurisdiction over the action and hence possessed incidental jurisdiction to appoint receivers pursuant to the usages of equity (Code Civ.Proc., § 564, subds. 3, 4; *Bowles v. Superior Court*, 44 Cal.2d 574, 584, 283 P.2d 704).

[17] The affirmance of that judgment precludes the possibility of restoration of the property to appellant upon the merits and renders any discussion of the contrary hypothesis wholly unnecessary. However, we suggest in that connection that the allowance to receivers on a monthly basis was made "pending the further order of this court." Mr. Allen testified: "I do not feel that a court setting a salary is bound, after the event, to maintain that salary longer. We would like to have some idea of what we are being paid"; and counsel for the receivers say in their brief: "It should be remembered that permitting the receivers to look to the fund in the first instance and as between themselves and the parties, does not necessarily settle the ultimate incidence of liability for the receivership costs and expenses. These may be allocated against all or some of the parties in accordance with the circumstances and the purpose of bringing about a fair result. That, however, is a matter which need not—indeed, probably cannot—be reached until the receivership has been finally disposed of." We agree that affirmance of the order, phrased as it is, does not control the future action of the court upon the matter of receivers' compensation.

12. Apparently the receivers were appointed on the court's own motion in order to

protect the assets pending appointment of a successor trustee.



### Multiplicity of Appeals

[18] The notice of appeal from the judgment, and the whole thereof, adds the words "including the Minute Order of the above entitled Court entered on October 24, 1956, signed on the 7th day of December, 1956 and entitled 'Interlocutory Judgment' and all preliminary orders and rulings of said Court in the above entitled action to the Supreme Court of the State of California." That minute order directs the "Attorney General to prepare the Interlocutory Judgment and Restraining Order"; hence the minute order is not appealable. *Herrscher v. Herrscher*, 41 Cal.2d 300, 304, 259 P.2d 901. The other matters mentioned in the omnibus clause of the notice are not appealable.

The notice of appeal from the order allowing compensation to the receivers specifies both the formal order and the minute order which preceded it. That appeal was heretofore dismissed by this court so far as it relates to the minute order.

The judgment and the Order Approving, Settling and Allowing Report and First Account Current of Receivers, Fixing Compensation of Receivers, etc., are affirmed. All other appeals are dismissed.

FOX, P. J., and HERNDON, J., concur.



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**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Mike CALDARALLA, Defendant and**  
**Appellant.**

**Cr. 3393.**

District Court of Appeal, First District,  
Division 1, California.

Aug. 19, 1958.

Hearing Denied Oct. 15, 1958.

Defendant was convicted of an assault with a deadly weapon and from a

329 P.2d—9½

judgment and order denying a new trial in the Superior Court, City and County of San Francisco, Walter Carpeneti, J., the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence sustained conviction as against claim of self-defense; that error in cross-examination of character witnesses of the defendant was not prejudicial; that it was not error to refuse defendant right to testify as to his own state of mind; and that the prosecutor was not guilty of prejudicial misconduct.

Affirmed.

### 1. Assault and Battery §92

Evidence sustained conviction of assault with a deadly weapon as against claim that defendant acted in self-defense. *West's Ann.Pen.Code*, §§ 195, subd. 2, 197, subds. 2, 3, 692, 693.

### 2. Witnesses §274(1)

In prosecution for assault with a deadly weapon, questions to character witness of the defendant concerning his arrest for liquor violations may be proper if showing the extent of the witness' familiarity with the defendant's reputation. *West's Ann. Bus. & Prof.Code*, § 23000 et seq.

### 3. Witnesses §274(2)

Even if the crimes charged have no relevance to the character trait testified to by character witness for the defendant; his knowledge of community rumors concerning an arrest of defendant would be relevant to his qualifications to speak on the defendant's reputation.

### 4. Witnesses §280

Where character witnesses for defendant were asked whether they "knew" of the arrests of defendant for liquor violations, questions were improper in form, since inquiry is general talk about the defendant and not truth of the rumors.

### 5. Criminal Law §1170½(5)

In prosecution for assault with a deadly weapon, improper form of questions to character witnesses for the defendant was not prejudicial under the circumstances.

**6. Criminal Law** Ⓒ1170½(1)

In prosecution for assault with a deadly weapon, where witness was questioned by prosecutor concerning statements he had made to police inspector, failure of prosecutor to complete impeachment of witness by introduction of testimony of what witness said to inspector immediately after the shooting was not prejudicial where statements were not impeaching but were consistent with testimony witness gave at trial. West's Ann.Code Civ.Proc. § 2052.

**7. Criminal Law** Ⓒ448(3)

In prosecution for assault with a deadly weapon, statements of defendant attempting to testify as to victim's state of mind in attempting to kill the defendant were properly excluded.

**8. Criminal Law** Ⓒ1170(4)

In prosecution for assault with a deadly weapon, refusing to permit defendant to testify on direct examination as to his own state of mind was not prejudicial where the pertinent question whether the defendant was afraid of the victim was asked and answered without objection during the direct examination.

**9. Criminal Law** Ⓒ715

In prosecution for assault with a deadly weapon, that the prosecutor in a court demonstration apparently attached arrows to an inspector's suit to show the bullet holes and had him stand as if he had one knee on the bar and fall down and roll over to attempt to show that the victim was shot at least twice while on the floor, was not improper.

**10. Criminal Law** Ⓒ814(17)

In prosecution for assault with a deadly weapon, refusing instructions on circumstantial evidence was not prejudicial where the only evidence that could be characterized as "circumstantial" was whether the defendant shot the victim while lying on the floor.

**11. Assault and Battery** Ⓒ96(3)

In prosecution for assault with a deadly weapon, giving instructions that privilege of defense ends when danger ends

and that a person is not justified in using a deadly weapon in self-defense under certain circumstances was proper where the instructions embodied the prosecution's theory and found support in evidence.

**12. Criminal Law** Ⓒ829(5)

In prosecution for assault with a deadly weapon, refusing an instruction respecting an assault made only with the hands or fists and right to resist the attack with whatever force would be deemed necessary was not prejudicial in view of the instructions given.

**13. Criminal Law** Ⓒ772(2)

In prosecution for assault with a deadly weapon, failure to give an instruction taining definition of assault was proper as unnecessary.

**14. Criminal Law** Ⓒ781(1)

In prosecution for assault with a deadly weapon, failure to give an instruction that oral admissions of a party should be viewed with caution was not error under the circumstances.

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Gregory Stout, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Charged with an assault with a deadly weapon with intent to kill, defendant was convicted of an assault with a deadly weapon and sentenced to one year in the county jail. In support of his appeal he claims insufficiency of the evidence, errors in the examination of witnesses, errors in the giving and refusing of instructions to the jury, and misconduct of the prosecutor.

### I. Is the Evidence Sufficient?

[1] Defendant claims that he acted in self-defense and that the preponderance of the evidence demonstrates that he acted reasonably in defending himself.

"Lawful resistance to the commission of a public offense may be made \* \* \* by the party about to be injured." Pen. Code, § 692. "Resistance sufficient to prevent the offense may be made by the party about to be injured: \* \* \* 1. To prevent an offense against his person, or his family, or some member thereof. \* \* \*" Pen. Code, § 693. See also Pen. Code, § 195, subd. 2, and § 197, subds. 2 and 3.

John Mahan, the victim, was employed by the defendant as a relief bartender. On June 22, Mahan came to work between 11:30 and 12:00 o'clock. At about 1:30 or 2:00 he called defendant, saying he would like to "terminate". Defendant appeared between 4:00 and 4:30. He told Mahan he could have his check later in the evening.

Mahan testified that he returned around 10 o'clock. Defendant gave him the check. Mahan complained that it was \$5.50 short. Defendant said they would fix it later. After first refusing, defendant cashed the check. Mahan then asked to be paid for overtime. Defendant said he would pay Mahan later. Then he took out \$15 and offered it to Mahan. Mahan said he owed much more. Defendant put out another \$15. Mahan said, "Mike, that isn't going to do it. \* \* \* You owe me at least \$50 or \$60." Defendant asked if Mahan would take a check, and Mahan agreed. Defendant opened a drawer of the cash register, turned around and shot Mahan. Mahan remembered being hit in the shoulder, and heard the report of a gun while he was lying on the floor. Mahan then got up and walked out.

Dr. Jew examined Mahan at the Mission Emergency Hospital in the early morning hours of June 23, and found that five bullets had been fired into Mahan, producing eight holes with two bullets remaining in the body.

The defense witnesses had more colorful descriptions of the encounter. Robert Batchelder testified that he was in the bar on the evening of June 22, 1956. Mahan came in shortly after eleven, got the

check and demanded it be cashed. Mahan said to defendant, "What the hell good is this Goddamn check? I want my money," wadded up the check and threw it over the back of the bar. When the defendant bent down to pick up the check, Mahan raised his hand and struck a blow. The witness could not tell from his vantage point whether he actually hit the defendant or not. Defendant then agreed to cash the check. He bought drinks for a number of patrons, including Mahan, and the argument subsided. Then Mahan demanded payment for overtime work. After a momentary lull, Mahan "jumped up, and with one leg upon the bar he grabbed for the defendant and said, 'I'll kill you \* \* \*.'" Defendant backed away, took out the gun "which didn't seem to scare Mr. Mahan at this particular time, as he kept coming, and then he [defendant] began firing."

John J. Toomey was also at the bar on June 22, 1956. His account of the events of the evening was substantially the same as Mr. Batchelder's except that he testified Mahan reached over the bar to grab defendant, and had not started up over the bar. James Lynch testified that immediately before the shooting, Mahan was "on top of the rail" and threatened defendant's life.

Defendant testified to the same arguments and threats, that Mahan actually struck him in the face when he bent down to pick up the check and that immediately before he got the gun, Mahan had grabbed him around the necktie and shirt.

Defendant argues that the evidence preponderates in favor of the theory that he shot Mahan in self-defense. It is not clear whether his conclusion is that the judgment should be reversed on that ground or is merely a preliminary argument to establish the premise that any error occurring at the trial was prejudicial. It is clear that there was sufficient evidence in Mahan's testimony to support the verdict, even though numerically more witnesses supported defendant's version of the incident. The prejudicial effect of any



errors occurring at the trial will be considered in conjunction with the alleged errors.

Defendant argues that there is no evidence in the record that defendant shot Mahan while he was lying on the floor "so that the evidence to support appellant's conviction is legally insufficient." The evidence would be sufficient to support defendant's conviction without evidence that defendant shot Mahan while he was on the floor if Mahan's testimony concerning what happened before he found himself on the floor is to be believed. Moreover, there is clear circumstantial evidence indicating defendant kept on shooting after Mahan was immobilized. Mahan testified he heard one shot after he was on the floor although he did not feel himself being hit after the first wound. The gun had five spent shells in it when the police took it from defendant. Five bullets had struck Mahan. If Mahan's testimony that he heard one shot while he was lying on the floor is believed, it is clear that defendant shot him at least once while he was on the floor.

## II. Asserted Errors In the Examination of Witnesses

### A. *Character Witnesses.*

Several witnesses testified that the defendant had a good reputation for peace and quiet. Defendant assigns error in the allowance of certain questions asked of these witnesses upon cross-examination.

In respect to the cross-examination of the witness Gasland, the following appears:

"Q. \* \* \* Were you familiar with the fact that there had been several arrests of the defendant at the premises for violation of the Alcoholic Beverage Control Act [Bus. & Prof. Code, § 23000 et seq.], which was the act under which you were employed—Are you familiar with that? A. I am.

"Q. Would the fact that the defendant in 1946 and 1953 had been convicted of staying open after hours,

selling to minors, would that in any way affect your judgment as to defendant's reputation for peace and quiet in the community? A. At that time I was not in the San Francisco District and was not familiar with the charges.

"Q. No. I say, if you had known those facts, would those facts affect your judgment as to what the defendant's reputation in the community is for peace and quiet?

"Mr. Skillin: Wait a minute. Did you say he was arrested for selling to minors?

"Mr. Berman: That is correct \* \*

"Mr. Skillin: He was never arrested for selling to minors, so we object to that question on the ground that it states facts not in evidence, and not correct. [Here follow several questions establishing the content of several sections of the Alcoholic Beverage Control Act.]

"Q. Had you been aware of the fact that this defendant had been arrested for these offenses, would that have affected your judgment as to his reputation in the community for peace and quiet?

"Mr. Duane: We will object to that question on the grounds that it is incompetent, irrelevant and immaterial; argumentative; calling for the opinion and conclusion of the witness.

"The Court: Objection overruled.

"Mr. Duane: There is no evidence here that he was convicted."

Character witness Senn testified that he was familiar with the arrest for these offenses, and without objection was asked whether that fact affected his estimate of defendant's reputation for peace and quiet. The witness said no. Then,

"Q. Did you ever familiarize yourself with whether the Ensign Cafe, No. 1 Market Street, was a hangout for homosexuals?

"Mr. Skillin: Wait a minute. The question is objected to as assuming

facts not in evidence, incompetent, irrelevant and immaterial, and not proper cross-examination.

"Mr. Berman: I think it has to do with the question of peace and quiet.

"The Court: Objection overruled.

"Mr. Duane: There is no evidence before this Court that that place was a hangout for homosexuals. \* \* \*

"The Witness: A. There has been homosexuals in the place, that I believed were homosexuals—I have been in there on various times, as I have been into most bars on the Embarcadero.

"Mr. Berman: Q. Knowing that fact, did that in any way affect your judgment as to the reputation of the defendant for peace and quiet? A. No,—because the Embarcadero has got a few homosexuals on it."

Character witness Koryell was asked by the prosecutor: "You are familiar that there had been some trouble in Mr. Caldaralla's cafe over a number of years? A. Yes. Q. Didn't that affect your judgment of his reputation for peace and quiet? A. Considering the time I was down there, he was in very little trouble, considering he had been on the waterfront for many years." No objections were interposed during the examination of this witness.

The witness Kruger was asked by the cross-examiner: "As a matter of fact, you knew that the bar there had been in difficulties through 1946 to 1953, during that period of time?" The line of questioning continued, without the mention of specific offenses. No objection was made.

Witness Lang was asked by the prosecutor: "Q. Are you familiar with the fact that arrests had been made of the defendant at the premises there at No. 1 Market Street?" The witness stated he was not, and that if he had, this would not affect his opinion as to defendant's reputation for peace and quiet. No objections were made by defense counsel.

The witness Moriarity was asked: "Q. You knew the defendant had been arrested for maintaining a bar and selling liquor after hours, did you not?" The witness replied he did know this, and it would not affect his opinion as to defendant's reputation for peace and quiet. No objection was made to the foregoing question. The witness was also asked without objection whether he knew the defendant was charged with selling liquor to minors.

It is possible that allowance of the questions concerning the arrests, even if deemed error, did not operate prejudicially. The question was asked and answered twice by Mr. Gasland before objection was made by defense counsel. Any damage that could have been done by the questions was probably fully accomplished then. However, on the possibility that repetition could do more harm, the problem of error will be discussed.

Respondent's counsel does not mention the questions concerning homosexuals frequenting the bar, apparently conceding these to be improper. He also apparently concedes that keeping a bar open after hours, or serving to minors, indicate only that defendant was not always a law-abiding citizen. However, respondent argues that being a law-abiding citizen has relevance to a reputation for "peace and quiet."

Two cases cited by respondent, *Weakley v. State*, 168 Ark. 1087, 273 S.W. 374, 377 and *State v. Lindsey, Mo.*, 7 S.W.2d 253, 254, do equate "peace and quiet" with "law-abiding." Both involved convictions for second degree murder. In the first, the court held it was proper to question the witness about his knowledge of drinking parties for boys sponsored by the defendant. The witness had previously testified that he had never known the defendant to be in any trouble except for his drinking, and the questions concerning his knowledge of the parties could be impeachment of this statement. In the second case, the court held it was error, when witnesses had testified to defendant's

reputation for peace and quiet, to fail to give instructions on good character.

There appear to be no cases in California directly holding that "peace and quiet" is equivalent to "law-abiding." There is language in *People v. Burwell*, 44 Cal.2d 16, 279 P.2d 744, which indicates that "peace and quiet" means an absence of violence and quarrelsomeness, not merely law-abiding: "This defendant chose to put in issue his reputation for peace and quiet, and the people had the right to counter this showing by evidence indicating an unruly and violent disposition, and to impeach the testimony of his own witnesses." 44 Cal.2d at page 35, 279 P.2d at page 754. See also *People v. Moran*, 144 Cal. 48, 62, 77 P. 777, implying that vagrancy is not relevant to peace and quiet.

It appears that respondent misconceives the import of *People v. Logan*, 41 Cal.2d 279, 286, 260 P.2d 20. In a prosecution for assault with a deadly weapon and robbery, it was held proper to ask character witnesses on cross-examination whether they had heard of the defendant being arrested, and whether they had heard that he had been convicted of assault and battery. The witnesses had previously testified to defendant's good reputation for peace and quiet. Apparently the assault and battery arrest, which would be relevant to a reputation for peace and quiet, was the only subject of the questioning. Respondent states in his brief that the witness was asked "whether or not they had heard that he had had a little trouble." This was not the question. It was the response made by the character witness.

[2,3] Nevertheless, questions concerning arrests may be proper as showing the extent of the witness' familiarity with the defendant's reputation. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 215, 93 L.Ed. 168, cited with approval in *People v. Burwell*, *Supra*, 44 Cal.2d 18, 36, 279 P.2d 745, 755, contains an excellent review of the law and problems of reputation testimony. Character witnesses had attested to the reputation of defendant, who was tried for bribing an officer, for honesty

and truthfulness and "for being a law-abiding citizen." Four witnesses were asked whether they had heard that the defendant was arrested for receiving stolen goods in 1920, twenty-seven years before the trial. The court held this was not reversible error. The opinion first discusses the relevancy of the entire subject of character, and the countervailing considerations of prejudice and confusion that might result from opening the inquiry, setting forth the rules concerning putting character in issue. But once the defendant puts it in issue, "his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate." 69 S.Ct. at page 220. Concerning impeachment of the witness' qualifications to speak on the reputation of the defendant, the court said: "The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation." 69 S.Ct. at page 222.

[4] Thus, even if the crimes charged had no relevance to the character trait testified to by the witness, his knowledge of the community rumors concerning an arrest would always be relevant to his qualifications to speak on the defendant's reputation. Therefore, the subject of the questions here appear to be proper. But they were not properly put. The witnesses were all asked whether they *knew* of the arrests, an improper form of the question since the inquiry is general talk about the defendant, not the truth of the rumors. *Michelson v. United States*, *supra*, at 69 S.Ct. 221; see also *People v. McDaniel*, 59 Cal.App.2d 672,



676, 140 P.2d 88; and *People v. Neal*, 85 Cal.App.2d 765, 770, 194 P.2d 57.

[5] The form of the question was improper; the subject was not. The question of prejudice is a difficult one. On the one hand, the case was a close one in that both the defense and the prosecution had plausible accounts of the events of the evening. It might well be concluded that any improperly introduced derogatory information about the defendant, no matter how remote, would be sufficient to swing the balance toward conviction. On the other hand, the charges on which defendant had previously been arrested were very remote from the essentials of the crime charged in this trial, could have been brought about by a momentary lapse of memory or attention and should have been given very little weight by the jury. They were not such as to arouse the passions of the jury against the defendant. Although generally in a close case any error may be sufficient to require a reversal, the peculiarly innocuous nature of the errors in this case would not seem to. Moreover, the information was first put before the jury without objection. The same could be said of the questions concerning homosexuals frequenting the bar, which the respondent does not discuss. A bar is a public place, and the officer who was asked this question testified that this information would not affect his judgment concerning the reputation of the defendant for peace and quiet, "because the Embarcadero has got a few homosexuals on it."

#### B. *Impeachment of the witness Toomey.*

[6] Toomey was questioned concerning certain statements he had made to Inspector Shelley. The prosecutor asked: "At that time, isn't it true that you told the police that at all times both Mr. Mahan's feet were on the floor?" Mr. Duane: Wait a minute. I think if the witness is being interrogated by a paper which Mr. Berman has in his hand, we are entitled to see the paper." The court did not require the prosecutor to produce the paper for inspection by the witness and defense counsel.

Code of Civil Procedure, section 2052 provides: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." Defendant does not complain of the failure to show the witness the statement at the time defense counsel asked for it, on the authority of *People v. Jones*, 160 Cal. 358, 365, 117 P. 176, 179, where the court held that it was proper to ask the witness, "'Did you not testify that you did not know the man until later, at the preliminary examination?'" before a foundation for impeachment was laid. The court's theory was that such questions are not necessarily impeaching questions. "Frequently such questions may be properly asked upon collateral matters, where the answer would bind the questioner without right to impeach. Frequently they are designed to test the recollection of the witness, and frequently, as in the instance before us, the question is proper, though ultimately, and according to the answer which may be made to it, it will or will not be followed by a strictly impeaching question." 160 Cal. at page 365, 117 P. at page 179.

However, defendant does complain that "because of the prosecutor's failure to complete his impeachment of the witness by the introduction into evidence of testimony relative to what Toomey said immediately after the shooting, either by stipulation or by means of either Inspectors Shelley or Asdrubale, error occurred." Respondent cites *People v. Ellena*, 67 Cal.App. 683, 691, 228 P. 389, which held in that particular instance, the failure to complete the impeachment was not prejudicial, and did not show bad faith on the part of the prosecutor.

Here, there was no purpose in calling the inspectors to testify that the witness made the statements claimed because they were not impeaching, but consistent with the testimony at the trial, as the witness explained. On the examination in chief, the witness did not testify as to the position of Mahan's extremities immediately before the shooting began. On cross-examination, the witness was asked, "When you saw that happen [Mahan reaching out to grab the defendant], where were Mr. Mahan's feet? A. Well, I couldn't see his feet, but I surmise from where he was he must have had them on the rail." He was then asked whether he saw Mahan's knee on the bar, and the witness explained that other persons were obstructing his view. After the witness confirmed that he was twice interviewed by the police, he was asked, "At that time [the first interview after the shooting], isn't it true that you told the police that at all times both Mr. Mahan's feet were on the floor? \* \* \* Isn't it true that you told the police at that time that the only thing that was on the bar at the time he was shot were his hands, not his feet, not his knees, but just his hands? A. I don't recall that. Q. Well, specifically, were you asked this question, to which you gave this answer: \* \* \* 'Q. Did he have his hands, knees, or feet on the bar? A. Well, maybe his hands.' \* \* \* A. Well, he could still have his hands and be inclined over the bar. \* \* Q. But at no time did you see his knee on the bar? A. Well, my view was obstructed. There were other people in the way. I could see a portion of his waist coming on the bar." Giving the prosecution the benefit of the doubt, the answer previously given to Inspector Shelley was ambiguous. The witness explained the ambiguity, removing its impeaching effect. There would seem to be no point in producing the Inspector to testify that the question and answer were actually given in that situation.

#### *C. Examination of the defendant.*

Defendant complains that it was error "to refuse to him the right to testify as to

his own state of mind," relying on *People v. Sonier*, 113 Cal.App.2d 277, 278, 248 P.2d 155, 156. There, the court held it was error to sustain an objection to the question, "'Q. Mr. Sonier, were you in fear that you would receive serious bodily injury from the shoe rest if you did not take some action against the complaining witness?'"

The following interrogation appears to be the one to which the complaint relates:

"Q. Well, tell us his position. A. Yes, well, he come in the bar, he have one foot on the bar and the left leg right on top of the bar there. \* \* \* And he tried to come behind the bar, and the only way I could protect my life, to stop him, was—

"Mr. Berman: Just a moment. I object to that and ask that it be stricken out.

"The Court: That may go out. \* \* \*

"The Witness: If he get behind that bar I wouldn't be here to make a statement.

"Mr. Berman: Just a minute. I ask that he be stricken out, and that the witness be admonished to respond to the questions only. I ask that the answer be stricken out.

"Mr. Duane: Tell us what he did. \* \* \* A. He jumped on top of the bar and I try to talk to him, but it didn't do me no good.

"Mr. Berman: I ask that be stricken out.

"The Court: That may go out.

"The Witness: A. So, to protect myself and my life,—

"Mr. Berman: I ask that that be stricken out.

"The Court: That may go out.

"Mr. Berman: I ask that the interrogation of this witness be conducted in question-and-answer fashion.

"The Court: I think that is best, Mr. Duane. \* \* \*

"Mr. Duane: Q. Now, go ahead.  
\* \* \*

"The Witness: A. He come on top of the bar to kill me.

"Mr. Berman: I ask that that be stricken out.

"The Court: That may go out.  
\* \* \*

"A. Now, what can I do? What else? I wouldn't be here if I don't protect myself.

"Mr. Berman: I ask that that be stricken out. \* \* \*

"The Court: \* \* \* You can only answer the questions. You can't give your opinion and conclusion.  
\* \* \*

"Q. Now, what happened next?  
\* \* \* A. Well, he want to kill me.

"The Court: Just a moment. The objection is overruled. \* \* \*

"Q. He grabbed you by the necktie? A. He grabbed me by this way, and I pull.

"Q. You pulled back? A. I pulled back. And I said, 'Don't jump behind this bar, because I am going to kill you,' and he jumped on top of the bar, and the only way I could do to protect myself—

"Mr. Berman: I ask that that be stricken out.

"The Court: That may go out."

After testimony about taking the gun out of the cash register, the following occurred: "Q. How many shots did you fire? A. I don't remember. I was scared, frightened. I don't remember how many times I shot. \* \* \* Q. And you were afraid of him [complainant], were you? \* \* \* A. Yes, I am afraid."

On cross-examination, the following questions and answers pertaining to defendant's state of mind were given:

"Q. You were aiming at him, too?  
A. No, I just got the gun, I was frightened, I just kept on shooting.  
\* \* \*

"Q. So it was your intention to kill him if he jumped over the bar? A. To protect my life, yes. Me and him have come to the point it was me or him.

"Q. That's it, and when you fired the gun you intended to kill him, didn't you? A. To protect myself."

[7, 8] The witness was clearly in error in attempting to testify as to Mahan's state of mind. ("He come on top of the bar to kill me"; "Well, he want to kill me.") The protestations that his actions were "to protect himself" were conclusionary statements and not responsive to the questions. Moreover, he was allowed without objection to so testify on cross-examination. The pertinent question, whether he was afraid of Mahan, was asked and answered without objection during the direct examination. There appears to be no error in the court's ruling.

### III. Was the Prosecutor Guilty of Prejudicial Misconduct?

Defendant asserts misconduct in respect to certain matters heretofore discussed, the attempted impeachment of witness Toomey, and the cross-examination of the character witnesses. He argues that it was misconduct to argue to the jury that Mahan was shot while lying on the floor. As discussed above, there was support in the evidence for such argument. He also objects to the use of Inspector Shelley as an illustrative exhibit during the argument.

[9] The prosecutor apparently attached arrows to Mr. Shelley's suit to show the bullet holes, had him stand as if he had one knee on the bar, and fall down and roll over to attempt to show that Mahan was shot at least twice while on the floor. No objection was made to this demonstration at the time. Appellant cites no case holding such a demonstration erroneous.

In *People v. Mullen*, 115 Cal.App.2d 340, 345, 252 P.2d 19, it was held proper for the prosecutor, during the course of the argument, to show that a knife introduced into evidence fitted a hole in the victim's shirt which was admitted into



evidence. In *People v. Freeman*, 107 Cal. App.2d 44, 53, 236 P.2d 396, 402, it was held not prejudicial error to light matches and throw them toward the back of the courtroom to illustrate that matches so thrown would continue to burn. "The experiment was made for illustrative purposes, no claim was made that the conditions were the same, and no prejudicial error appears." In *People v. Glenn*, 96 Cal.App.2d 859, 867, 216 P.2d 457, the court held it was proper to use a chart of the 12 alleged thefts for purposes of illustration in the argument. (The court relies on the following language from *People v. Kynette*, 15 Cal.2d 731, 757, 104 P.2d 794, 808: "Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents." The language is not actually in point, for "illustrations" in *People v. Kynette* referred to similes and verbal illustrations, not pictures.)

It appears that it was proper to use the inspector as an illustration, and less expensive than a mannequin or a series of pictures.

#### IV. Were Errors Committed In the Giving and Refusing of Instructions?

[10] Defendant contends that CALJIC No. 28 should have been given: "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

In *People v. Watson*, 46 Cal.2d 818, 831, 299 P.2d 243, where the evidence was all circumstantial, it was held error not to give CALJIC No. 28, but not prejudicial error because the jury was instructed on reasonable doubt (CALJIC No. 21), the applicable law when evidence is susceptible of two constructions (CALJIC No. 26), and the principle that cir-

cumstantial evidence must be inconsistent with any other rational hypothesis (CALJIC No. 27). Here, the jury was given an instruction on reasonable doubt which was substantially the same as CALJIC No. 21, with the additional sentence that the presumption of innocence "attaches at every stage of the case and to every fact essential to a conviction" (CALJIC No. 26 and CALJIC No. 27). If the omission of CALJIC No. 28 is not prejudicial when all the evidence is circumstantial, it would clearly not be prejudicial here where the only evidence that could be characterized as "circumstantial" is whether or not defendant shot while Mahan was lying on the floor.

[11] Defendant objects to the giving of CALJIC No. 625a stating that the privilege of defense ends after the danger ends and CALJIC No. 626 (a person is not justified in using a deadly weapon in self-defense "if he is assaulted with fists, but without intent to kill or do great bodily harm, and if the assault is not likely to produce great bodily injury and if the one thus attacked is not deceived as to the character of the assault"). These instructions embodied the prosecution's theory of the case, and find support in the evidence. No error appears in giving them.

[12] Defendant contends that CALJIC No. 626a should have been given: "However, although an assault may be made with only hands or fists, yet the force used may be such as is likely to produce great bodily injury, and in such a case the person attacked may resist the attack with whatever force would be deemed necessary by a reasonable person in the same or a similar situation. A person who thus resists such an attack is not guilty of assault in so doing." The jury was given the following instruction before they began their deliberations: "You are instructed that for a man to avail himself of his right of self-defense, it is not necessary that he shall be in actual danger of death or of receiving great bodily harm. It is sufficient that appearances on the part of his adversary were such as to arouse in

his mind, as a reasonable man, that he was about to suffer death or great bodily harm. He may act upon such appearances with safety, and if without fault or carelessness he is misled concerning them, and defends himself correctly, according to what he supposes the facts to be, he is justified, although they were in truth otherwise, and though you should further find or believe from the evidence that he was mistaken in his judgment as to such actual necessity at such time and really had no occasion for the use of extreme measures. If you believe from the evidence here that the defendant acted in self-defense from real and honest conviction as to the character of the danger induced by the existence or reasonable circumstances, or if you have a reasonable doubt as to his [sic] whether he did or did not, then it will be your duty to find that his said act was justifiable, even though you might further believe from the evidence that he was mistaken as to the extent of the danger, and it would then be your duty to find him not guilty." The jurors returned for further instructions and CALJIC No. 626a was given to them.

[13] Defendant also contends that CALJIC No. 601, the definition of assault, should have been given as applied to Mahan. This would appear to be unnecessary.

[14] Defendant complains of the failure to give an instruction that oral admissions of a party should be viewed with caution. The court did not instruct on admissions and the jury could have given effect to defendant's prior statements only as impeachment. Moreover, it was stipulated that the "questions asked of the witness Caldaralla by myself [the prosecutor], and the answers given as read by myself [the prosecutor], were questions asked by Inspector Asdrubale of Mr. Caldaralla, and those were the answers that he gave on the night of June 22nd and the morning of June 23rd at Southern Police Station, with the various people present."

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

163 Cal.App.2d 157

**BY-BUK COMPANY**, a partnership comprised of Homer G. Buck, Carmel Buck, Byron Buck, and Carol Buck, Plaintiff and Respondent,

v.

**PRINTED CELLOPHANE TAPE COMPANY**, a partnership comprised of Sydney Gevirtz and Don Gevirtz; Sydney Gevirtz, Don Gevirtz and Robert Black, Defendants and Appellants.

No. 21708.

District Court of Appeal, Second District,  
Division 3, California.

Aug. 26, 1958.

As Modified on Denial of Rehearing  
Sept. 12, 1958.

Hearing Denied Oct. 22, 1958.

Action by manufacturer to enjoin former employee, presently working for competitor and competitor, from using certain machinery which was a trade secret of manufacturer and for damages. The Superior Court of Los Angeles County, Harold C. Shepherd, J., entered judgment enjoining former employee and competitor and they appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence sustained finding that former employee, a disabled veteran who was being given on job training by manufacturer, upon termination of employment disclosed to competitor, manufacturer's trade secrets, but judgment would be modified to limit provisions of injunction.

Judgment as modified, affirmed.

#### I. Injunction ¶128

In proceedings to enjoin former employee and plaintiff's competitor from using trade secret of plaintiff, evidence sustained finding that former employee, a disabled war veteran undergoing on-job training at plaintiff's plant under contract with Veterans Administration, did, upon leaving employment, become employed by competitor to which he disclosed plaintiff's trade secret. 38 U.S.C.A. § 701; Veterans' Regulation No. 1(a), pt. 7, 38 U.S.C.A. following section 745.

**2. Master and Servant ⇨60**

Where disabled employee was given on-job training with manufacturer under terms of contract with Veterans Administration, irrespective of whether there was an express agreement upon employee's part, duty was implied in contract of employment not to disclose trade secrets of manufacturer. 38 U.S.C.A. § 701; Veterans' Regulation No. 1(a), pt. 7, 38 U.S.C.A. following section 745.

**3. Master and Servant ⇨60**

Every employee is under implied obligation not to divulge or use confidential information which he acquires by reason of his employment as such information is property of employer, and employee holds that property in trust for employer and cannot use it in violation of his trust.

**4. Trusts ⇨101**

Where employee, upon termination of employment with manufacturer, entered into employment with manufacturer's competitor and disclosed manufacturer's trade secrets, since former employee could not use or divulge trade secrets of manufacturer without violating his trust, competitor could not with knowledge of that trust, make use of manufacturer's secrets and when it attempted to do so it became a constructive trustee of that property.

**5. Master and Servant ⇨60**

Employee procuring on-job training from employer having contract with Veterans Administration, upon completion of training, may use in his trade all of the skills that have been taught to him but may not so use those skills as to violate his trust with respect to employer's trade secrets. 38 U.S.C.A. § 701; Veterans' Regulation No. 1(a), pt. 7, 38 U.S.C.A. following section 745.

**6. Master and Servant ⇨60**

It is not necessary in order that a process of manufacture be a trade secret that it be patentable or be something that could not be discovered by others by their own labor and ingenuity.

**7. Master and Servant ⇨60**

Character of trade secret, if important to business, is not material but it must, as term implies, be kept secret by one who claims it.

**8. Master and Servant ⇨60**

Where employer before commencing development of certain machines attempted to learn of any machine which would produce the results he desired and which were being accomplished by a competitor, but was unable to find any machine or plans for them to guide him, and thereafter by system of trial and error was able by combining various parts to produce results desired, and means of producing results were embodied in machines which he developed, and these means he kept secret, such machines clearly constituted trade secrets which employee was bound not to divulge.

**9. Injunction ⇨109**

Where manufacturer brought action to enjoin competitor from using trade secrets embodied in machines which manufacturer's former employee disclosed to competitor, fact that manufacturer might have infringed upon a certain patent was a matter between manufacturer and patentee as was matter of whether manufacturer had appropriated another's trade name, and did not present matters of affirmative defense on behalf of competitor.

**10. Injunction ⇨189**

Where manufacturer's trade secrets embodied in machines for producing certain types of tape were disclosed to competitor by manufacturer's former employee, manufacturer's sole right was to a decree which would protect it against wrongful use of its trade secrets and it had no right to enjoin competitor from production through proper means of the articles which manufacturer's machines were designed to produce, and since evidence disclosed that others had assembled machines producing the same results as manufacturer's, competitors were free to acquire such machines and to use them in production in order to obtain same results as procured by manu-



facturer. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

**11. Trade-Marks and Trade-Names and Unfair Competition** ⇨93(3)

In manufacturer's action to enjoin competitor from using trade secrets embodied in manufacturer's machines and for other relief, evidence failed to sustain finding that picture used by competitor in brochure advertising product had acquired a secondary meaning in the minds of public indicating and designating manufacturer as source of products in connection with picture with which it was used.

**12. Trade-Marks and Trade-Names and Unfair Competition** ⇨71

In order that a name or symbol may be said to have acquired a "secondary meaning" and as such become property of person using it, it is necessary that it shall have been so used as to identify the articles, in connection with which it is used, in minds of purchasers thereof as product of person using the name or symbol.

See publication Words and Phrases, for other judicial constructions and definitions of "Secondary Meaning".

**13. Trade-Marks and Trade-Names and Unfair Competition** ⇨93(3)

In manufacturer's action to enjoin competitor from using trade secrets embodied in machines and for other relief in connection with competitor's sale of products, evidence failed to disclose that competitor had sold their products under representation that they were the same as manufacturer's. West's Ann.Code Civ.Proc. § 956a.

Harry J. Miller, Beverly Hills, for appellants.

Fulwider, Mattingly & Huntley and Henry Grivi, Los Angeles, for respondent.

Laughlin E. Waters, U. S. Atty., Richard A. Lavine, Asst. U. S. Atty., Chief, Civil Division, Hiram W. Kwan, Asst. U. S. Atty., Los Angeles, amicus curiae.

NOURSE, Justice pro tem.

Defendants appeal from a judgment enjoining them from using, assembling, or

manufacturing certain machinery which was a trade secret of the plaintiff; ordering them to dismantle the machines assembled by them that embodied plaintiff's trade secret and decreeing that the plaintiff is entitled to damages, both compensatory and punitive, to be fixed upon an accounting hereinafter to be had.

Prior to June of 1954 both the plaintiff and the defendants Gevirtz, doing business as copartners under the name of Printed Cellophane Tape Company, hereinafter called "Tape Company," had engaged in the business of manufacturing and selling pressure-sensitive adhesive tape for industrial uses.

In the spring of 1954 Homer G. Buck, one of the partners of plaintiff partnership, hereinafter called "Buck," learned that a competitor, whose manufacturing operations were conducted in the eastern United States, was manufacturing and selling overlapping masking discs and die-cut masks of pressure-sensitive tape for use by manufacturers in masking certain parts of apparatus which they desired to shield from abrasives or paint. Desiring to produce a similar product Buck commenced experiments for the purpose of constructing machines or apparatus which would produce die-cut masks and overlapping masking discs. While Buck was in the process of developing these machines the defendant Robert Black, hereinafter called "Black," entered plaintiff's employ as a part-time employee and rendered some aid to Buck in the assembly of the machines upon which Buck was working.

Black was a disabled veteran of World War II and was entitled to the benefits of Public Law 16, 78th Congress. 38 U.S.C.A. § 701; Veterans' Regulation No. 1(a), pt. 7, 38 U.S.C.A. following section 745. On May 1st plaintiff, hereinafter called "By-Buk," entered into a contract with the Veterans Administration under which it undertook to accept "from time to time and within its own discretion in each case, disabled veterans of World War II for a course of training on the job" which would render each employable as a "Die Maker (Steel Rule)."

By the contract it agreed to provide competent instruction to each trainee accepted. The agreement further provided that it might be terminated by the establishment or the Veterans Administration on 15 days' notice and that each veteran accepted for training would be under the control and supervision of By-Buk and subject to the same rules and regulations "governing the conduct of *other* comparable *employees*." (*Italics ours.*) On the same date Black entered plaintiff's employ to be trained as a die maker.

At about that time there was prepared on a form of the Veterans Administration a schedule of the skills in which Black was to be trained, the time allotted to instruction in each skill and a statement of the wages to be paid; the starting wage being \$1.50 an hour and increasing in 6-month steps of \$.25 an hour.<sup>1</sup> After May 1st Black continued to work with Buck on the assembling of the two machines and after their completion he operated the machines at times for the purpose of producing die-cut masks and overlapping discs. Buck, on several occasions both before and after May 1st, told Black that the processes of die-cutting masks and overlapping discs which were embodied in the machines were not to be disclosed to others and plaintiff at all times endeavored to prevent others from examining the machines and to keep its processes of producing the die-cut masks and overlapping discs secret.

Black continued in his employment with By-Buk until June 1954 and during the period of his employment By-Buk gave him training in the various skills which it had undertaken to teach him.

On June 30, 1954, Black terminated his employment with the plaintiff and in August entered the employ of defendant Tape Company. Upon entering the employ of Tape Company Black disclosed to Tape Company and defendants Gevirtz plaintiff's methods of producing die-cut masks and

overlapping discs and, under their instructions, constructed two machines which were substantially copies of plaintiff's machines.

Upon the completion of these machines defendant Tape Company commenced the production of die-cut masks and overlapping discs and sold these articles to the trade in competition with the die-cut masks and overlapping discs produced by plaintiff. In producing these it used materials similar to those used by plaintiff. In its brochures sent to the trade in soliciting the sale of overlapping discs plaintiff had used a picture showing a roll of overlapping discs and the hands of a person removing the discs from the carrier tape. It advertised its overlapping discs under the name of Kwiky Dots. In its brochures defendant Tape Company used substantially the same picture of the hands removing the overlapping dots from the carrier as did the plaintiff<sup>2</sup> but gave its product the name of Pee-Cee Tapes.

[1] The court found the facts in substantial accordance with the facts we have stated. Each of the facts we have stated is supported by substantial evidence. Other findings of the trial court which are attacked by appellant will be noted later in our discussion of the case.

Under numerous headings defendants and amicus curiae attack the judgment of the trial court as impairing the purposes of the Veterans Administration training statutes and regulations (Public Law 16, and regulations adopted thereunder) and as being in contravention of the contract entered into by plaintiff with the Veterans Administration.

Boiled down, it is apparently defendants' contention that Black was not an employee of the plaintiff but that plaintiff had sought to teach him as a student its business and that therefore upon terminating his relationship with plaintiff he was entitled to put to use any knowledge that he had acquired of plaintiff's business and processes

1. By agreement this wage schedule was not strictly adhered to.

2. Defendants ceased the use of this picture prior to the commencement of the action.

of manufacturing. We see no merit in these contentions.

[2,3] Plaintiff's undertaking with the Veterans Administration was to train Black, as its employee, in certain skills in order that he might be qualified for employment as a die maker. By the express terms of the contract between plaintiff and the Veterans Administration any person employed by plaintiff and whom it agreed to train was subject to the same obligations, rules and regulations as any other employee. Irrespective of whether there was an express agreement on Black's part (which defendants and their amicus curiae in their brief choose to term a "secret agreement") not to divulge the means by which plaintiff was able to produce its die-cut masks and overlapping discs, that duty was implied in the contract of employment. Every employee is under the implied obligation not to divulge or use confidential information which he acquires by reason of his employment. Such information is the property of the employer and the employee holds that property in trust for the employer and cannot use it in violation of his trust. *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 100-102, 130 P. 1180, 44 L.R.A., N.S., 1159; *Riess v. Sanford*, 47 Cal.App. 2d 244, 246-247, 117 P.2d 694; *Stone v. Goss*, 65 N.J.Eq. 756, 55 A. 736, 63 L.R.A. 344; *Irving Iron Works v. Kerlaw Steel Flooring Co.*, 96 N.J.Eq. 702, 126 A. 291; 28 Am.Jur. § 111, p. 304. The proposition is well stated in the work last cited, as follows: "The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a breach of trust, and it is well settled that a court of equity will restrain any threatened disclosure or use thereof to the detriment of the employer. The character of the secrets, if peculiar and important to the business, is not material. They may be secrets of trade, secrets of title, secrets of process of manufacture, or any other secrets of the employer important to his business. \* \* \*

"Injunctive relief against disclosures of trade secrets and other confidential infor-

mation obtained by an employee is undoubtedly available to the employer, where the employee has expressly agreed not to disclose the trade or business secrets. Such an agreement is not an unlawful restraint of trade unless it is more extensive than is reasonably required to protect the master's interests. But an express negative covenant not to make use of trade secrets or processes is not indispensable to the granting of the relief. It is sufficient if from the circumstances of the case and the relation of the parties as employer and employee an agreement to that effect may be implied from the confidential relation. In fact, it is said that in the case of an employee such an obligation exists in the absence of any stipulation to the contrary."

[4,5] The obligation not to violate the duty of confidence, being implied by law, there was nothing secret about it. Knowledge of it was imputed to the Veterans Administration and if they desired to exempt a trainee from such obligation they undoubtedly would have expressed it in the contract. To express it, however, would be to defeat the very object of the contract for it is impossible to envision an employer who would accept an employee who was, in effect, licensed to steal its secrets. As Black could not use or divulge the secrets of plaintiff without violating his trust, Tape Company could not with knowledge of that trust make use of plaintiff's property (its secrets), and when it attempted so to do, it became a constructive trustee of that property. *Irving Iron Works v. Kerlaw Steel Flooring Co.*, supra, Civ. Code, § 2243. There is no conflict between the federal statute providing for the training of disabled veterans in a trade and the law of this State which makes it the duty of an employee not to divulge the secrets of his employer. The employee under training may upon completing his training use, in his trade, all of the skills that have been taught him but may not so use those skills as to violate his trust.

The judgment here does not enjoin the defendant Black from using all of the skills which he learned under the training of By-



Buk. It only enjoins him from divulging the secrets of plaintiff which he acquired while being trained in the skills necessary to his contemplated trade.

Of the numerous cases cited by defendants and amicus curiae only two are even remotely in point. *Young v. Hampton*, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R.2d 830, cited by counsel is not controlling here. There the contract sought to be enforced by the plaintiff was one entered into in direct violation of a federal statute and if enforced would have defeated the very purposes of the statute. That is not the case here as we have heretofore pointed out.

In *Orkin Exterminating Co. of South Ga. v. Dewberry*, 204 Ga. 784, 51 S.E.2d 669, the plaintiff-employer sought to enforce, against an employee whom it accepted for on-the-job training, a contract by which the employee agreed not to engage in the trade or business as to which the plaintiff had undertaken to train him at any place in the State of Georgia excepting a very small portion thereof for a period of one year after the termination of his employment. The Supreme Court of Georgia properly held, not only that the contract was void as in restraint of trade, but, that its effect was to defeat the very purposes of the training contract. Such is not the case here. In the present case Black was free to, and under the express terms of the decree here, is permitted to, use all of the skills as to which he was trained by plaintiff. Plaintiff did not undertake to train Black to enter into the business of manufacturing and selling the articles which it was engaged in manufacturing and selling, but only to train him as a die maker. This trade he is free to follow.

[6] It was stipulated at the trial that all of the component parts of the machines developed by plaintiff were standard parts which could be procured by anyone in the open market and defendants therefore contend that the finding of the trial court that the machines were

unique or unusual is unsupported by the evidence. In making this assertion defendants misconceive what constitutes a trade secret. It is not necessary in order that a process of manufacture be a trade secret that it be patentable or be something that could not be discovered by others by their own labor and ingenuity. *Restatement, Torts*, Vol. 4, section 757, Comment b, page 5, defines the term as follows: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. \* \* \* Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article."

[7] The character of the secret if important to the business is not material but it must, as the term implies, be kept secret by the one who claims it. *Riess v. Sanford*, supra, 47 Cal.App.2d 244, 246, 117 P.2d 694; *Restatement, Torts*, Vol. 4, § 757, Comment b, pp. 5, 6.

[8] Under the evidence here plaintiff's machines clearly were trade secrets within the definition above quoted. The evidence shows that Buck, before commencing the development of the machines in question, attempted to learn of any machines which would produce the results which he desired, i. e., the same results which had been accomplished by an eastern competitor, but was unable to find any machines or plans for machines to guide him and that thereafter he, by a system of trial and error, was able, by combining various parts, to produce the results which he desired. The means of producing this result were embodied in the machines which he developed and these means he kept secret.

The evidence further shows without conflict that the defendant Tape Company did not and was unable to produce the products in question until, through the information divulged to it by Black, it copied plaintiff's machines. It is undoubtedly true

that if Tape Company had used the same thought, labor and ingenuity which were used by plaintiff it might have been able to secure the same results that plaintiff did. But this fact does not destroy plaintiff's right not to have its processes wrongfully disclosed to others and used to its detriment. As said by the court in *Herold v. Herold China & Pottery Co.*, 6 Cir., 257 F. 911, 913: "[S]ecret formulas and processes \* \* \* are property rights which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts express or implied, but as against those who are participating in such attempt with knowledge of such confidential relations or contract, though they might in time have reached the same result by their own independent experiments or efforts." Or, as said by Mr. Justice Holmes in *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 25 S.Ct. 637, 639, 49 L.Ed. 1031: "The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's."

There is likewise no merit in defendant's claim that the trial court erred in permitting Buck to answer the question: "Were all these features that you have just testified to novel with you; in other words, were they new as far as you knew?" Defendants claim that the question of novelty was one to be determined upon the testimony of experts only and that the question called for expert testimony which the witness was unqualified to give.

We have not been cited to any authorities which hold that, in cases of this character, novelty can only be proven by expert testimony and in our opinion that is not the fact. It is further our opinion that novelty, in the sense that plaintiff's process was conceived by him and was unknown to others, was proven by the testimony of Buck as to his research and his trial and

error methods of developing the machines in question. Further, the question did not call for any opinion of the witness as to whether or not the machines were novel, but only as to his knowledge as to the existence of like machines.

As an affirmative defense defendants pleaded in general terms that the plaintiff came into court with unclean hands and was therefore not entitled to equitable relief. The trial court found that the allegations of this affirmative defense were untrue. Defendants now assert that this finding is contrary to the evidence. They assert that the evidence established that plaintiff breached the contract between it and the Veterans Administration in failing, on May 1, 1954, to increase Black's pay to \$2.00 per hour and that the evidence further showed without conflict that plaintiff had copied from the patent of a competitor, Hulslander, in producing and selling die-cut masks and overlapping discs and in that he had, by using the word "Kwiky" in connection with his product, appropriated a trade mark of another manufacturer (one Brady) who had for many years been using the registered name "Quik." Insofar as the breach by plaintiff of his contract with the Veterans Administration is concerned, it is sufficient to say: first, that the trial court found on conflicting evidence that the relationship between Black and the plaintiff was terminated by Black for the purpose of entering into another occupation; second, that under the contract with the government, Black was not obligated to stay in plaintiff's employ and that plaintiff was not obligated to continue with his training but might terminate his training at any time on 15 days' notice to the government. Further, plaintiff is not seeking to enforce the contract with the government or the contract of employment made with Black but is seeking only to restrain a tortious act of Black in wrongfully using plaintiff's property.

[9] As to the other acts which it is alleged render plaintiff's hands unclean, it is sufficient to say that they are entirely

disconnected with the subject matter of this action or the injury which the decree of the trial court seeks to remedy. Whether plaintiff has infringed upon the patent of Hulslander (this patent does not cover any process or machinery for the production of die-cut masks or overlapping discs but only the products themselves) is a matter between plaintiff and Hulslander and the same is true as to the question of whether plaintiff has appropriated Brady's trade name. Any wrong done in either case was done to the owner of the patent or the trade mark and with these wrongs defendants have no concern. *Bradley Co. v. Bradley*, 165 Cal. 237, 131 P. 750; *Germo Mfg. Co. of Missouri v. McClellan*, 107 Cal.App. 532, 290 P. 534.

The defendants assert that the trial court erred in excluding evidence offered by the defendants that as of the time of trial defendants had made certain improvements and changes in the machines as originally built by them and which copied plaintiff's machines. They base their claim of error upon the proposition that equity acts upon conditions as they exist at the time of trial and not necessarily at the commencement of the action. There can be no doubt of the truth of the proposition stated but it is not applicable here for defendants cannot escape responsibility by showing that they have improved upon or modified plaintiff's process. Even though they may have modified or improved the plaintiff's process they are still wrongfully using its property. (See *Restatement, Torts*, Vol. 4, § 757, Comment c, p. 9.)

[10] Defendants assert that certain provisions of the decree are uncertain and so broad as to render the decree invalid as in restraint of trade in contravention of the Sherman Anti-trust Act (15 U.S.C.A. §§ 1, 2) and of the statutes of this State against contracts in restraint of trade. With this contention we are in agreement. Plaintiff's sole right was to a decree which would protect it against the wrongful use of its trade secrets. It had no right to enjoin the defendants from the production through proper means of the articles which its ma-

chines were designed to produce. It is clear from the evidence that others than the plaintiff had assembled machines which would produce the same results as plaintiff's and defendants were free to acquire such machines and to use them in the production of die-cut masks and overlapping discs and the court could not by decree limit this right. The decree here, however, enjoins plaintiffs from acquiring and using any machine which is similar to the machines manufactured and used by plaintiff irrespective of whether such machines may have been solely the product of the ingenuity of some third person and irrespective of the fact that such machines may have been manufactured and in use prior to the time plaintiff conceived his method of producing the articles in question.

The fact that the decree is too broad in its terms does not require a reversal of the judgment but only a modification of the injunctive provisions of the decree. What these modifications should be we will hereinafter indicate.

All of the assignments of error with which we have heretofore dealt concern the injunctive relief given by the decree. While there are other assignments of error addressed to the injunctive features of the decree which have not been discussed by us in detail, they are either covered by the assignments which we have disposed of or contain so little substance as not to require discussion.

The remaining assignments of error pertain only to those portions of the judgment which decree that the plaintiff is entitled to an accounting and to both compensatory and punitive damages.

We now address ourselves to these assignments of error.

The trial court found that the picture showing a roll of tape being unwound and discs detached therefrom by two hands, had acquired a secondary meaning in the minds of the buying public indicating and designating plaintiff as the source of the products in connection with which said picture appears. It further found that the defend-



ants had sold substantially large quantities of die-cut masks and overlapping discs to customers and prospective customers of plaintiff as the same as plaintiff's product under a different name, and that the defendants patterned their entire scheme of doing business after that of plaintiff. As the court did not, by its decree, enjoin the defendants from the use of said picture or from the sale of any products other than those produced by the machines which defendants had wrongfully constructed as copies of plaintiff's, and as it did not enjoin the defendants from continuing their scheme of business, we assume that these findings were made as a basis for later assessing damages.

Asserting that none of these findings are supported by the evidence, defendants have, in conformance with the rules on appeal, directed our attention to the evidence bearing upon the issues thus found by the court. Plaintiff does not assert that there is other evidence than that specified by defendants except that it directs attention to excerpts from the testimony of the witness Jenkins and to plaintiff's Exhibit No. 14, the brochure adopted by the defendants, a copy of which is attached to the amended complaint as Exhibit No. 3. A careful study of the evidence to which our attention has been directed as well as our independent examination of the transcript of oral proceedings and the exhibits, fails to disclose any evidence which would support any of these findings.

[11, 12] The finding that the picture in question had acquired a "secondary meaning" finds no support in the evidence. In order that a name or a symbol may be said to have acquired a "secondary meaning" and as such become the property of the person using it, it is necessary that it shall have been so used as to identify the articles, in connection with which it is used, in the mind of the purchasers thereof as the product of the person using the name or symbol. *Morse-Starrett Products Co. v. Steccone*, D.C., 86 F.Supp. 796; *Selchow & Righter Co. v. Western Printing & Lithographing*

*Co.*, 7 Cir., 142 F.2d 707; *Restatement, Torts*, Vol. 3, § 716, Comment b, p. 560.

Here the evidence shows without conflict that pictures of human hands being used to detach one material from another, had been used not only by defendants but others long prior to the use of such a device or symbol by the plaintiff. There was an entire lack of evidence that any members of the buying public associated the symbol with overlapping discs produced by the plaintiff or that the symbol was used for any other purpose than to show the facility with which the overlapping discs could be removed from the carrier tape and this would apply to such articles manufactured by other persons. The evidence shows, without conflict, that such discs had been manufactured by others than the plaintiff prior to his production and in fact that he developed the machines in question in order to produce overlapping discs similar to those that had theretofore been manufactured by another.

[13] The finding that defendants had sold their products under the representation that they were the same as plaintiff's has no foundation in the evidence. The defendants offered their goods as that of their own manufacture and under an entirely different name from that used by the plaintiff and the fact that defendants' goods were of the same design and to be used for the same purpose as plaintiff's does not, under the facts here, constitute any basis for an award of damages. The finding is, however, for practical purposes, immaterial for the defendants remain liable in damages for the sale of die-cut masks and overlapping discs produced by them by means of the machines which they constructed through the use of plaintiff's trade secrets.

The finding that the defendants "patterned their entire scheme of doing business after that of plaintiff" is without support in the evidence. The only evidence plaintiff points to is the brochure published by the defendants, but a comparison of this brochure with that of the plaintiff convincingly demonstrates that

there was no copying by defendants and nothing in defendants' brochure that would enable them to palm off their goods as those of the plaintiff or which would lead any member of the buying public to believe that defendants' goods were the goods of, or the same as those of, the plaintiff.

It may be said in passing that the defendants have the right to produce die-cut masks and overlapping discs and to use in that production the same materials as used by the plaintiff so long as their production is by proper means and without the use of plaintiff's trade secrets and so long as they are not offered to the public in such a manner as to lead the buying public to believe that defendants' goods are those of the plaintiff. Die-cut masks and overlapping discs were not trade secrets of the plaintiff and the plaintiff had no property right in them as such.

The fact that the findings above mentioned are unsupported by the evidence does not require a reversal of the judgment inasmuch as the issue of damages is yet to be adjudicated.

Pursuant to the provisions of section 956a of the Code of Civil Procedure, we substitute the following findings of fact for those made by the trial court:

Paragraph 8 of the findings is deleted and in lieu thereof we find:

"VIII. That on or about the 24th day of August, 1954, and in spite of such knowledge and in derogation of plaintiff's said rights, the defendants and each of them, acting in concert and for the benefit of defendants and not plaintiff, wrongfully, improperly and unlawfully copied and appropriated plaintiff's secrets pertaining to said machinery and equipment processes as included in all of the machines particularly described in Paragraph II hereof and in connection therewith defendant Black disclosed all of the details as to the methods of building and operating said machines.

"That during said period and thereafter defendants, through the use of the ma-

chines assembled by and containing the trade secrets of the plaintiff, produced and sold substantial quantities of die-cut masks and overlapping discs to customers and prospective customers of the plaintiff."

Paragraph 9 of the findings is deleted and in lieu thereof we find:

"IX. That it is untrue that the defendants have patterned their entire scheme of doing business after that of the plaintiff. That it is true that the defendants have used and distributed a sales brochure, a true and correct copy of which is attached to plaintiff's first amended complaint, marked Exhibit 3, but it is further true that the said brochure does not copy or simulate the brochure of the plaintiff and that the defendants did not thereby mislead the buying public or any member thereof."

Paragraph 10 of the findings is deleted and in lieu thereof we find:

"X. That the defendants and each of them will, unless enjoined, without the permission or consent of plaintiff and against plaintiff's will, appropriate to their own uses and purposes the machines and processes of manufacture described in Paragraph II of these findings, and plaintiff will suffer great and irreparable damage for which there is no adequate or speedy remedy at law."

The judgment appealed from is modified to read as follows:

"It is Now Ordered, Adjudged and Decreed

"1. Defendant Printed Cellophane Tape Company, a partnership, Sydney Gevirtz, Don Gevirtz and Robert Black, and each of them are ordered to dismantle the two machines constructed by them for the manufacture of overlapping discs and die-cutting masks and they, and each of them, are enjoined together with their agents, servants and employees, from rebuilding said machines or from disposing of any of said machines or machinery, or any machinery or equipment embodying the combination of ideas, structures, techniques or originalities of plaintiff or modification thereof

or substitute therefor, except that the punch press units without the other features added thereto by defendants may be disposed of if defendants so desire; and, each of the defendants is forever enjoined from revealing to others the inventions and processes of plaintiff as contained in the machines so dismantled.

"2. The defendants Cellophane Tape Company, a partnership, Sydney Gevirtz, Don Gevirtz and Robert Black, and each of them is hereby permanently enjoined from manufacturing, using or placing in use, directly or indirectly, any and all machines substantially similar to the machines which they are, by Paragraph 1 of this decree, ordered to dismantle.

"3. Defendants Printed Cellophane Tape Company, a partnership, Sydney Gevirtz, Don Gevirtz and Robert Black, and each of them, are enjoined permanently from selling or disposing of any and all overlapping discs or die-cut discs heretofore manufactured and produced by the overlapping machine and die-cutting machine hereinbefore referred to.

"4. Defendants and each of them are ordered to give an account of all of the sales made by defendants of the products made on the overlapping machine and die-cutting machine heretofore described so that damages relating thereto may be determined.

"5. Plaintiff is entitled to a judgment awarding damages against the defendants and each of them, the total amount thereof to be determined following the accounting hereinbefore ordered.

"6. Plaintiff is entitled to a judgment awarding punitive damages against the defendants and each of them, the amount thereof to be determined following the accounting heretofore ordered.

"7. The defendant Robert Black is not enjoined from using any of the skill, knowledge or information obtained by him as to the making of dies, the use thereof, the operation of a punch press or other machine, which skill, knowledge or information was obtained by him while under

training by the plaintiff, so long as his use thereof does not involve the use of the trade secrets of the plaintiff as to the manufacture or assembly of machines or devices for the production of overlapping discs or die-cut discs.

"8. Plaintiff is awarded its costs of suit incurred herein against the defendants and each of them in the amount of \$596.85."

The judgment as above modified is affirmed. Each party to bear his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 184

**The PEOPLE of the State of California,  
Plaintiff and Respondent,**

**v.**

**Albert TEITELBAUM et al., Defendants,  
Albert Teitelbaum, Defendant and  
Appellant.  
Cr. 5926.**

District Court of Appeal, Second District,  
Division 3, California.

Aug. 26, 1958.

Rehearing Denied Sept. 15, 1958.

Hearing Denied Oct. 22, 1958.

Prosecution for conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim, and for presentation of a false and fraudulent insurance claim. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment of conviction and denied defendants motion for a new trial, and defendant appealed. The District Court of Appeal, Nourse, J. pro tempore, held that fact that during trial, conferences were held between court and counsel at the bench, and in chambers, did not mean that defendant was denied a public trial, since the term "public trial" as



used in section of constitution guaranteeing right thereto, consists of proceedings for impanelment of the jury, opening statements of counsel, presentation of evidence, arguments, instructions to the jury, and return of the verdict, and not to questions of law which do not involve matters for consideration of the jury.

Order denying appellant's motion for new trial and judgment affirmed.

### 1. Grand Jury ☞8

Rule of Superior Court of County of Los Angeles pertaining to how the grand jury shall be drawn, was not in violation of the Code of Civil Procedure merely because it did not provide for the preparation of a list of qualified competent persons by a jury commissioner, or because the rule requires that a person nominated by a judge shall be personally known to him, in view of fact that the Code of Civil Procedure does not require preparation of a list of persons by a jury commissioner, but merely permits use of his services, and in view of fact that the Code of Civil Procedure does not require a prospective grand juror to be selected at random from the body of the county. West's Ann.Code Civ.Proc. §§ 198, 199, 204, 204a, 204b, 204d.

### 2. Grand Jury ☞40

Where during time grand jury was in session and considering evidence produced before it, as result of which it returned indictment against defendant, one of the grand jurors, during recess in the proceedings requested and secured certain documents, failure to include such documents in the record of the grand jury proceedings did not deprive defendant of his right to a full and complete transcript of all the proceedings before the grand jury in view of fact there is no proof that such document was a part of the record. West's Ann.Penal Code, § 995.

### 3. Indictment and Information ☞10.1(4)

If grand jurors examined a document requested by one of them outside of formal

proceedings, and without such document being introduced into evidence, that fact would not affect validity of indictment returned by the grand jury, or the jurisdiction of the court to proceed under it, where evidence received before the grand jury and contained in the record of its proceedings was sufficient to uphold the indictment.

### 4. Indictment and Information ☞10.1(4)

Where a member of a grand jury requested and received a certain document outside of the formal proceedings of the grand jury, perusal of such document by such member only could not void indictment returned by the grand jury by more than twelve jurors.

### 5. Indictment and Information ☞196(5, 6)

Any uncertainty in an indictment charging defendant with presentation of a false and fraudulent insurance claim, in failing to name the insurers, or to set forth claim allegedly made, would be deemed waived by defendant by his failure to demur.

### 6. Criminal Law ☞635

Fact that during criminal prosecution, conferences were held between court and counsel at the bench, and in chambers, did not mean that defendant was denied a public trial, since the term "public trial" as used in section of constitution guaranteeing right thereto, consists of proceedings for impanelment of the jury, opening statements of counsel, presentation of evidence, arguments, instructions to the jury, and return of the verdict, and not to questions of law which do not involve matters for consideration of the jury. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 1043.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Trial".

### 7. Criminal Law ☞635

Where neither defendant in criminal prosecution, nor his counsel, had any objection to conferences at the bench between court and counsel, or to similar conferences in chambers, defendant would be deemed to have waived right to have the public

present at such conferences. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 1043.

**8. Criminal Law** Ⓒ636(1)

Right of a defendant in a criminal prosecution, under statute and the constitution, to appear in person with his counsel is not violated unless defendant is prevented from being present during the presentation of matters before the triers of fact or such other times as his absence would not afford a fair and just hearing, and absence of a defendant from conferences held between court and counsel at the bench and in chambers would not be deemed to have deprived defendant of any of such constitutional or statutory rights. West's Ann.Const. art. 1, § 13; West's Ann.Pen. Code, § 1043.

**9. Criminal Law** Ⓒ636(2)

Where defendant in criminal prosecution was, at time of trial, on bail, and not under restraint, and was free to, of his own volition, attend any conferences which occurred between court and counsel at the bench, or in chambers, but defendant made no attempt to do so, and his absence from such conferences was of his own volition, and not by reason of any action of court, defendant, by failing to personally assert, or to assert through his counsel, his desire to be present, waived his right to be present at such conferences.

**10. Criminal Law** Ⓒ531, 736(2)

In criminal prosecution, admission into evidence of a statement of another, as to a confession made by defendant, was not improper even though there was no direct testimony that defendant's statement was free and voluntary, but in view of the evidence, question of whether the confession was voluntary was one for the court and the jury.

**11. Criminal Law** Ⓒ519(3)

Fact that a defendant in a criminal prosecution was under arrest and that his confession was made in response to a question asked by officers while he was under restraint, did not, in and of itself, prove

that defendant's confession was not free and voluntary, but was merely a circumstance to be taken into consideration by the trial court and jury in determining that question.

**12. Criminal Law** Ⓒ519(3), 522(1)

Where a confession is coerced either through threats, force, violence or psychological coercion through constant and prolonged questioning, the defendant is deprived by his constitutional rights if the confession is received in evidence, but the fact that a confession was received while a defendant was under arrest and prior to the time he had been taken before the committing magistrate did not, in and of itself, establish such coercion. U.S.C.A.Const. Amend. 14.

**13. Courts** Ⓒ97(1)

Rules laid down by the Supreme Court in certain federal cases are applicable only in a federal court and do not purport to establish any constitutional limitations upon the right of state courts to receive voluntary confessions made during the time that a defendant may be illegally detained.

**14. Criminal Law** Ⓒ519(3, 8)

In a criminal prosecution, testimony of a witness that defendant admitted the truth of certain incriminating statements, was properly received as evidence of a confession of crime charged, even though defendant made such admission while under arrest, and prior to the time he had been taken before a committing magistrate.

**15. Criminal Law** Ⓒ1170½(5)

**Witnesses** Ⓒ277(4)

In criminal prosecution, where defendant on direct examination testified he was present and listened to a person's recitation in police chief's office as to certain actions of defendant upon which prosecution was based, question asked defendant on cross-examination concerning a certain person was proper cross-examination inasmuch as another witness testified that during conference in the chief's office such person's name was mentioned, and in any event, defendant was not prejudiced by the ques-

tion or answer thereto, since evidence offered by defendant showed that he had business connections with the person named in the cross-examination question.

**16. Insurance**  $\S$ 31

Statute providing that it is unlawful to present or cause to be presented any false or fraudulent claim for the payment of loss under a contract of insurance, does not proscribe only the filing of a false written proof of loss, but proscribes the presentment of any false demand under a policy of insurance irrespective of the form of that demand. West's Ann.Insurance Code,  $\S$  554, 556(b).

**17. Insurance**  $\S$ 555

Provisions of a policy of insurance requiring the insured to present proof of loss are for the benefit of the insurer and may be waived. West's Ann.Insurance Code,  $\S$  554.

**18. Criminal Law**  $\S$ 800(2), 824(2)

In prosecution for conspiracy to file a false and fraudulent insurance claim, and for presentation of a false and fraudulent claim for the payment of a loss under a contract of insurance, trial court did not err in failing to instruct jury as to the meaning of the word "claim" in view of fact the word "claim" is one of common meaning, and defendant did not request any instruction defining that meaning. West's Ann.Insurance Code,  $\S$  556.

**19. Conspiracy**  $\S$ 47

Direct evidence is not necessary to establish a conspiracy, for a conspiracy may be, and often must be, established by circumstantial evidence, and an express agreement need not be proved, but the conspiracy may be supplied from the acts of the conspirators in carrying out a common purpose to an unlawful end.

**20. Criminal Law**  $\S$ 511(1), 517(4)

In prosecution for conspiracy to commit, among other things, filing of a false and fraudulent insurance claim, and for presentation of such a claim, uncorroborated testimony of an accomplice as to activities of defendant in furtherance of such

conspiracy, together with filing of a false claim by defendant, was sufficient to establish the corpus delicti, and the corpus delicti being established, confession of defendant was admissible in evidence and constituted sufficient corroboration of accomplice's testimony to sustain defendant's conviction.

**21. Criminal Law**  $\S$ 412(3), 1186(4)

In prosecution for presenting a false and fraudulent insurance claim, and for conspiracy to file such a claim, trial court erred in denying offer of counsel for defendant to prove by a witness that when defendant handed a list of allegedly stolen furs to a witness he told the witness that it was a list for the police and that an insurance adjuster had asked for it and he was to give it to him as soon as possible, since defendant was entitled to show absence of intent to make a claim and such statements were verbal acts within exception to rule against hearsay, although, in view of evidence showing defendant furnished other lists of furs lost in alleged robbery directly to the police, and made no offer to prove that list in question was delivered to the insurance company for use of the police, error would not be deemed prejudicial. West's Ann.Insurance Code,  $\S$  556; West's Ann.Const. art. 6,  $\S$  4½.

**22. Criminal Law**  $\S$ 656(1)

In criminal prosecution, action of the court in describing a gesture demonstrated by a witness which defendant had allegedly made, by stating that the witness placed his fourth finger of his right hand across his lips, a sign usually indicating "keep quiet," did not invade the province of the jury, since court did not instruct the jury as to what interpretation they should place upon the testimony of the witness as to the gesture he demonstrated, but only that the gesture had a common meaning.

**23. Criminal Law**  $\S$ 781(2)

In criminal prosecution, instruction to the effect that if jury should find that there was an occasion when defendant, under conditions which fairly afforded him an opportunity to reply, failed to make a de-



nial in the face of an accusation directed to him, that the circumstances of his silence and conduct might be considered against him, as indicating an admission that the accusation made was true, was not improper in view of evidence of defendant's admission of certain incriminatory statements made in his presence.

#### 24. Criminal Law §516

In order for a statement to be a "confession" it must admit all the elements of the crime charged.

See publication Words and Phrases, for other judicial constructions and definitions of "Confession".

#### 25. Criminal Law §781(4)

Where defendant was charged with conspiracy to, among other things, file a false and fraudulent insurance claim, and with the presentation of a false and fraudulent claim, and statements made by a person in presence of defendant while in custody of the police, and allegedly admitted by defendant, contained nothing as to a filing of any claim by defendant, or the preparation of any paper in support of a claim, but related only to conspiracy count of indictment, defendant's alleged admission of the truth of such person's statement could not constitute a confession as to the crime charged in such count, and court therefore properly charged the jury as to the distinction between confessions and admissions and that an admission might be considered by them even though not voluntary. West's Ann. Insurance Code, § 556.

#### 26. Criminal Law §810

In prosecution for conspiracy to, among other things, file a false and fraudulent insurance claim, and for presenting a false insurance claim, charge on necessity of corroboration of testimony of an accomplice, and charge that if conspiracy or substantive crime charged were committed by anyone, then a witness who testified as to his participation therein was an accomplice as a matter of law, were not error on theory that such instructions were contradictory, or compelled jury to find witness in question was an accomplice, in view of fact

such instructions read together did not compel a finding that witness in question was an accomplice, and therefore they were not confusing in such regard.

#### 27. Criminal Law §772(2)

Where defendant was charged with conspiracy to commit grand theft, and attempted grand theft, and evidence showed object or subject of conspiracy was to wrongfully and fraudulently obtain money from defendant's insurers by staging a fake robbery, and then making a false claim, if the conspirators had accomplished their purpose, they would have been guilty of grand theft, and therefore, trial court did not err in instructing on meaning of terms theft, and grand theft.

#### 28. Conspiracy §48

##### Criminal Law §772(2)

Conspiracy to attempt grand theft is a crime, and in prosecution for conspiracy to commit grand theft, and attempted grand theft, trial court did not err in defining attempt and instructing that a person who conspires to commit grand theft is guilty of a crime, and that a person who conspires to attempt grand theft is guilty of a crime.

#### 29. Criminal Law §770(1)

In criminal prosecution, all that is required is that instructions given by the court properly instruct on all phases of the law applicable in the case and fully, fairly and correctly advise as to the kind, quality and degree of proof required for a defendant to be convicted under the indictment.

#### 30. Criminal Law §829(11)

In prosecution for conspiracy to file a false and fraudulent insurance claim, and for presenting a false insurance claim, trial court did not err in failing to instruct on effect jury should give testimony of a witness who allegedly made an accusatory statement in defendant's presence, in view of fact an instruction was given by the court which fully stated the law as to the rules which should guide the jury in determining the effect of defendant's conduct in rela-

tion to an accusatory statement made to him or in his presence.

### 31. Criminal Law §829(15)

In criminal prosecution, trial court did not err in refusing requested instruction to the effect that if certain circumstantial evidence was susceptible of two interpretations, each of which appeared to be reasonable, it was duty of jury to reject interpretation pointing to guilt, and adopt that which pointed to innocence, in view of fact court instructed jury that they were not permitted on circumstantial evidence alone to find defendant guilty unless the proved circumstances not only were consistent with the hypothesis that defendant was guilty, but were irreconcilable with any other rational conclusion.

### 32. Criminal Law §829(10)

In criminal prosecution, trial court did not err in refusing to instruct jury that unless they found beyond a reasonable doubt that defendant admitted the truth of certain statements made by an alleged accomplice in a conference before chief of police, jury was required to return a verdict for acquittal, even though such instruction contained a correct statement of the law, in view of fact court instructed jury that a conviction could not be had upon testimony of an accomplice unless such testimony was corroborated by other evidence, and in view of fact jury was instructed as to when corroboration of an accomplice was sufficient, and as to how they were to determine whether corroborative evidence was sufficient, and that testimony of an accomplice was to be viewed with distrust.

### 33. Criminal Law §1171(1)

In prosecution for conspiracy to file a false and fraudulent insurance claim, and for presenting a false insurance claim, although district attorney was guilty of misconduct in asking a witness as to whether he was aware of the fact that a New York store advertised entire stock of defendant's store as being for sale, so that jury would draw inference that allegedly stolen furs had been placed in hands of New York

store without the transaction having been entered on defendant's books, error was not prejudicial in view of fact defendant offered no direct evidence to controvert testimony of a witness as corroborated by confession of defendant that alleged fur robbery was fake and no furs were stolen, and in view of fact jury found that claimed robbery did not occur, since it therefore was immaterial whether furs claimed to have been stolen were in the hands of the New York store or otherwise had been disposed of.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Herschel T. Elkins, Deputy Atty. Gen., for respondent.

NOURSE, Justice pro tem.

Appellant having been convicted on both counts of an indictment charging him in count I with conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim in violation of section 556, Insurance Code; and in the second count with the violation of section 556 of the Insurance Code (the presentation of a false and fraudulent claim for the payment of a loss under a contract of insurance and the preparation and making of a writing with intent to present the same in support of such claim) appeals from the judgment and an order denying his motion for a new trial.

In the indictment Clifford Vanderwyst also known as Weiss, and one Claude Wilson were named as coconspirators. At the opening of the trial, appellant's motion that he and Wilson be tried separately, was granted and after the jury was impaneled the People dismissed the action as against Weiss pursuant to the provisions of section 1099 of the Penal Code. The indictment was not dismissed against Wilson until after appellant's motion for a new trial was denied.

The facts as shown by the evidence offered by the People are: About 7:00 p. m.

on December 27, 1955, the police were called to appellant's place of business as a result of an A.D.T. alarm. After appellant had related the details of a robbery<sup>1</sup> Captain Huff of the Beverly Hills Police Department asked the appellant:

"Al, besides the furs, was there anything else taken, either your money or Stan's money, or some of the company's money?" And the appellant replied: "No, nothing else. They seemed to know exactly where to go and what to do."

On the 28th of December, and prior to an inventory being taken of the furs in the fur vault, the appellant reiterated the fact that nothing but furs had been taken.

Appellant was insured against theft in three companies, the total amount of insurance being the sum of \$350,000.

A Mr. Gaebel was an insurance adjustor representing the three insurers.

Following the alleged robbery there were prepared under the appellant's direction, two lists of the furs alleged to have been missing. These did not purport to be accurate but were subject to correction; they were furnished to the Beverly Hills Police Department. In the first week of February, 1956, the appellant stated to Gaebel that he had finally completed a list of the furs stolen in the robbery. The appellant offered this list to Gaebel. Gaebel asked that it be mailed to him together with a number of copies. A few days later Gaebel received by messenger, 10 copies of this list. This list (People's exhibit No. 10) contained a description of in excess of 280 fur garments with a statement after each, of its value. It was not signed. On February 8th, officers of the Beverly Hills Police Department stated to appellant that they had been advised that Gaebel had the final list and asked appellant if that was the "whole works" and stated to him that inasmuch as it did not have the manufacturer's numbers of the garments on it, it was of no use to the police. The appellant stated that the list, exhibit No. 10 was

the final list for the insurance company and was not for the police department, and if they wanted a copy of it they could get it from one of the insurance companies.

About February 10th, Weiss surrendered himself to the Beverly Hills Police. Prior to 9:00 a. m. on February 14th, an officer of the Beverly Hills Police Department picked up the appellant and an employee of appellant's by the name of Somper, at appellant's place of business in Beverly Hills, telling them that they had under arrest a man they were informed had "pulled your robbery" and that they would like to have the appellant look at him and see if he could be the man. On arrival at the police station, appellant and Somper were separated and Somper was placed under arrest. The appellant was taken into a corridor, at the end of which was a cell in which Weiss was seated. The officer accompanying appellant, asked appellant if he could identify Weiss. Appellant answered that Weiss was of the general build and description but he was not positive. By prearranged plan, the officer then left the area, leaving appellant and Weiss alone. They were, however, in the view of another officer who was peering through an aperture in the wall. As soon as appellant and Weiss were alone, Weiss motioned the appellant to approach him. Appellant made no verbal reply but made a motion, placing the forefinger of his right hand vertically against his lips and then held his right arm against his body and moved it away from his body, making this motion several times.

Appellant then left the corridor and rejoined the officer who had accompanied him (Lt. Borders.) At this time he was placed under arrest and was immediately taken to the office of the chief of police where there were present, in addition to appellant, Weiss, Chief of Police Anderson, Lt. Borders and Captain Huff. Appellant was again asked if he was positive he had not seen Weiss and appellant replied: "I told you upstairs I never seen him. \* \* \* It looks like the man. They are general in

1. What he related in this regard was not testified to.



build but he is not the man." Weiss was then asked if he had seen appellant before. He replied that he had at appellant's fur store on the night of the alleged robbery when he talked to appellant in his office.

In response to questions by Lt. Borders, Weiss in the presence of appellant, stated that he had met one Woody Wilson in the first part of November through a person known as Billy Layton; Layton had told him that he had a friend who was looking for someone to pull a phoney robbery; Wilson told him that he had a furrier friend who wanted to pull a phoney insurance bit, that it was a walk-in walk-out proposition where no one would get hurt; on November 30th he (Weiss) and Wilson had, pursuant to a prearranged plan made by Layton, gone to appellant's fur store with the understanding that there would be but one employee present, who would be expecting to receive some packages; they carried with them two suit boxes and they were admitted to the store by a colored employee; it was Weiss's job to hold this colored employee while Wilson went into the vault to move the furs from one part to another; they were not successful because when they arrived at the store a colored woman was also there, who started to scream and the colored man ran for the alarm button, whereupon Wilson and Weiss fled; Wilson had contacted him after Christmas stated that the date would be December 27th and that the colored man had been sent out of town; Wilson told him he should go to appellant's store at 10 minutes to 6:00 where he would be met by appellant in the front of the store and that appellant would carry the ball from there on; he was instructed to represent himself as an insurance agent and to talk about insurance policies when he went into the store; he did go to appellant's store at 10 minutes to 6:00 p. m. and pretended to identify himself and appellant took him into his office; there he and appellant talked about fur auctions and appellant left the office and came back with a large mink coat stating that "They can't close the vault until I get this back;"

appellant again left the office and came back and whispered: "The office help is leaving;" thereafter a woman stuck her head in the door and stated that she was leaving for the day; he pointed to his watch and remarked that it was 6:25 and said: "It's too late to take it now;" appellant replied: "No, I had the A.D.T. set up from 6:30 to 7:00 o'clock;" immediately thereafter, appellant called to a man by the name of Stan and asked if everybody had gone; Stan answered: "Yes;" appellant said to Weiss: "Get ready;" he, Weiss, then removed from the briefcase that he carried, some gloves and a toy pistol; appellant then told Stan to come in and when Stan came to the door of the office, appellant said: "Stan this is a hold-up. We are insured. Don't start anything;" thereafter he directed Teitelbaum to tape Stan's arms behind him and appellant did; they marched Stan to a closet where he was left on the floor; they then went into a corridor on the south side of the building and appellant directed him to go back and close the door to the closet where they had left Stan; after doing this, he proceeded to the fur vault where appellant was arranging furs "vacating racks and moving them to another position;" he asked appellant if he could help but was told to go and look out the back window; he did and shortly thereafter appellant came to where he was standing and took him to the rear door and opened it, told him to go out that way when he left; they then proceeded to a closet and that appellant gave him a secretary containing some money; he asked appellant how much it contained and he said "\$2,500.00" in \$100 bills; appellant also gave him a watch and told him to put it in his pocket; he then took appellant to a closet on the south side of the building and taped him and then left the premises by the rear door.

Borders then said to appellant: "Al, that's the story. Is it true or not?" Appellant answered: "Yes, it was a stupid thing." Borders then asked appellant if he would like to tell his side of the story

and he said: "No, I will wait until my attorney gets here."

Appellant was not advised that he was entitled to a lawyer or that he had a right not to be present when Weiss was questioned, or that anything he said might be used against him.

The People did not offer any direct testimony that no promise of immunity was made to appellant prior to the occurrence in the office of the chief and that no threats had been made against him or any force or violence used upon him, but the evidence did disclose, without contradiction by appellant, each act and occurrence which took place between the time the appellant was picked up at his store and the interrogation of Weiss in appellant's presence in the office of the chief.

At the trial, the accomplice Weiss testified that at 5:50 p. m. on December 27th, 1955, he entered the appellant's fur shop carrying a tan briefcase; he was dressed in a blue shadow-striped suit, and wore horn rimmed spectacles and a gray hat; the brim of the hat was turned down in front and he kept his head down so that his face could not be seen so well; when he entered the store there were some girls there and the appellant; he was stopped by one of the girls and he asked to see Mr. Albert Teitelbaum; he showed them a secretary and said he was from an insurance company; the appellant jumped up and came over to him and he gave appellant a name which he could not remember; he and appellant went into appellant's office and sat there until 6:25 or 6:30 p. m. During the time they were there, they discussed fur auctions and appellant talked in an average voice; while he and appellant were sitting in the office, appellant left the room and came back with a full-length black mink coat which he showed him and stated that they would have to leave the vault open; he asked the appellant how long he should stay there; the appellant answered that the A.D.T. would not come on until 7:00 o'clock that night; he took gloves and a toy pistol out of his

briefcase, put on the gloves and held the pistol pointed at the appellant; at that time all of the employees except Al Stan had left the premises; appellant called Stan into the office. When Stan came in, he (Weiss) had the pistol pointed at Teitelbaum and told Stan if he did not follow Mr. Teitelbaum's instructions that they would both get hurt; Teitelbaum taped up Stan and they walked him into a little cubby hole on the north side of the building and made him lie down; he and appellant then walked back to the office and toward the fur vault and appellant told him to go back and close the door on Al Stan, which he did; he then went over to the fur vault and stepped inside and asked appellant if he wanted him to help to rearrange the furs; that appellant replied that he did not, and so he walked back to near the office; when he went into the vault, appellant was rearranging the furs; while waiting for appellant to come out of the fur vault, he looked out of the back window into the alley and saw somebody walking from the parking lot toward the back end of the store; this person turned down the alley and out of sight, but the same party came back and went into the parking lot and got into a car and pulled out; appellant came back from the fur vault and gave him a brown secretary with \$2,500 in it and a wrist watch. This took place in the back end of the store; the appellant then said that he, Weiss, was to tie him up and they went into an alcove on the south side of the store where there was a big rack and appellant sat down on the floor and straddled his legs around the steel bar of the rack; he taped appellant's feet around the bar and appellant then put his hands around the bar and he, Weiss, taped his hands; he asked appellant how he was going to get loose and he said he would get loose when the A.D.T. came when no buzzer rang; he then went out of the back door carrying the briefcase which contained the remainder of the adhesive tape and the toy pistol; he threw his gloves in the trash can at the edge of the building; he took nothing with him

from this store that he had not brought in except the watch and the wallet with the money in it; at the time appellant handed him the \$2,500 and the wrist watch, he asked appellant if all the money was there and appellant answered: "See Woody;" he knew a person who had the nickname of "Woody" and that that person was Claude "Woody" Wilson; he threw the wrist watch that the appellant gave him, away at about Olympic and La Cienega, someplace in that district; that was about 6:45 p. m.; after leaving the fur shop he met Woody and gave him \$1,000 to give to William Layton.<sup>2</sup>

Weiss further testified that he voluntarily surrendered himself to the Beverly Hills Police station and was placed in a cell there; on the third or fourth day after he surrendered he saw the appellant at the station; at that time he was in a cell; there was a hallway or corridor leading to this cell; when he first saw appellant, Lt. Borders was with him; the Lieutenant asked appellant if he could identify the witness; that appellant said that the witness was of the general build and description but he was not positive; Lt. Borders walked out of the area and that he, the witness, motioned the appellant to come over to his cell; after he had made this motion, the appellant placed his fourth finger of the right hand across his lips; appellant also twice made the motion with his hand commencing near his person and then extending it away from his person;<sup>3</sup> after this occurrence he was taken to Chief Anderson's office. On cross-examination the witness admitted having been convicted of a number of felonies.

The witness Walge testified: that on December 27, 1955, he was employed as a chauffeur by Mario Lanza and that on the early evening of that day, he drove Lanza

into the alley in the rear of appellant's fur store. It was then between 6:30 and 7:00 o'clock, and dark. He parked his car in the lot to the rear of appellant's store and that there were two other cars there, a station wagon and a white Oldsmobile. These he knew to be the property of appellant. He saw no other vehicles; after parking he got out of the car and knocked on the rear door of Teitelbaum's store. He knocked several times and that Lanza got out and they both knocked. There were lights inside the store but there was no response to their knocking; Lanza pounded upon the metal rain cover of the door with a palm frond; the witness then walked around to the front of the store and although the lights were on, he could not see anyone in the store; he knocked upon the window; he then returned to the parking lot and drove the car with Mr. Lanza and one Esther Collins, around to the front of the store; he then got out of the car and walked to the front of the store and knocked on the window but there still was no response; he returned to the car and while waiting in the car, he was facing the front of the store and saw several faces in a three-way mirror; the car was parked diagonally, facing the front of the store; on seeing these faces, he got out of the car and walked back to the window and knocked again and at that time appellant and Al Stan were walking toward him. They came within 10 feet of where he was standing outside of the window; appellant was in the lead as he and Stan came down a narrow passage and that as appellant came toward him he made "this motion like this, which I assume was, Get out of here, or—Go away." (This gesture was described by the court as follows: "the witness placed both palms shoulder height near his body and moved them away from his body two

2. The People attempted to question the witness relative to the occurrence on November 30, 1955, which the witness had described in the statement made in the presence of the appellant in the office of Chief Anderson, but objections of the appellant to this testimony were sustained on the grounds that there was

no proof of the existence of a conspiracy at that time.

3. Weiss's testimony as to the gesture made by himself and appellant was corroborated by the witness Cork, who observed this occurrence through an aperture in the wall of Weiss's cell.



or three times;") that after this happened Lanza got out of the car and Stan opened the door and admitted Lanza and locked it again. The witness returned to the car and sat down and shortly after, Stan came back and opened the door and admitted Lanza and Collins.

The People further proved that after the return of the indictment here, the appellant made a claim against an insurance company other than one of those that covered the furs in his store, for the loss in the alleged robbery of a wrist watch of a claimed value of \$500.

On behalf of the defense, Al Stan testified that he is the appellant's uncle, having been employed by the appellant for many years; a little after 6:00 o'clock on December 27 he was called into appellant's office and was met by a man with a .45 automatic; he knew it was a .45 automatic because he had had experience with them while in the police reserve; the man with the gun told him to put his hands behind his back and told appellant to bind them with adhesive tape; the tape broke a couple of times and when it would the man with the gun poked appellant with it; he then told him to walk forward and the appellant to follow him; they took him into a closet where the man with the gun told him to lie down and then told appellant to bind his legs with adhesive tape, which appellant did; he was not bound to anything; he was unable to state how long he was in the closet<sup>4</sup> but that he did get into a sitting position and freed himself from the tape; while in the closet he heard nothing going on outside until he heard a pounding upon the back door; he then opened the closet door and found the appellant standing on the other side of the door; he was positive Weiss was not the man with the gun; the man with the gun was about as tall as Weiss but a little heavier, probably 15 pounds heavier; the man with the gun looked like Orson Welles did 20 years ago. He further testified that

the man with the gun was wearing horn rimmed glasses.

Eleanor Eldridge testified that she had been employed by the appellant for 8½ years; between 5:30 and 6:00 o'clock on the evening of December 27, 1955, she was sitting on the sofa in the appellant's place of business next to appellant, and that there was also present another employee named Treitler and a customer named Hebard; a few minutes before 6:00 a man came in the front door of the store; she could not remember whether or not he had on a hat. Her recollection was that he wore a dark suit, she thought it was brown; the man said he wanted to discuss insurance with Mr. Teitelbaum and Mr. Teitelbaum invited him into his office; she left the premises about 6:15 by the rear door; her car was parked in the parking lot; she backed out and it was very dark; as she backed out she saw a truck which was parked on the wrong side of the alley; it was a van type truck, parked without lights; she related seeing this truck on being questioned by the police. She further testified that she was in the fur vault many times on December 27th, the last time about 5:30 on that day; at that time none of the racks was empty; she next entered the fur vault in the early afternoon of December 28th and at that time there were several empty racks; about half the racks were empty; that it was customary to keep the furs about two to three inches apart on the racks.

She testified that Weiss was not the man whom she saw enter the store at about 6:00 o'clock on the 27th; the first time she ever saw Weiss was in the Beverly Hills police station on the 14th of February; she went there with police officer Cork and Mrs. Brodkin; she and Mrs. Brodkin were taken to a room where Weiss was sitting; Weiss was then handcuffed in front and was asked by the officer to pull his hat down; Weiss was then wearing a blue pin-striped suit; the officer then asked Weiss to identify the women but he was un-

4. On cross-examination he admitted testifying before the grand jury that he was

in the closet 15-20 minutes and that he then believed that estimate was correct.

able to do so except on direct questioning as to their identity.

The witness Brodtkin testified that she was employed by appellant as a bookkeeper; that sometime after 6:00 on the evening of December 27, 1955, she left her place of employment and at that time saw a man sitting with Mr. Teitelbaum in his office. She did not get a good look at him, only the back of his head. She said she was taken to the station on the 14th of February by officer Cork. She there saw Weiss who had his hat on, and was asked to pull his hat down in front, which he did; but neither she nor Mrs. Eldridge was asked to identify Weiss; it was officer Cork and not Lt. Borders who took her in to see Weiss.<sup>5</sup>

A number of other witnesses testified that on the 27th day of December 1955, there were no empty racks, but on the 28th there were many empty racks; their estimation as to the number of furs missing being from 50 per cent to 90 per cent.

The appellant also introduced the testimony of accountants, whose testimony, based upon the records of the appellant, showed that a large number of furs which had been purchased by, or consigned to appellant prior to December 27th, were unaccounted for and missing on December 28th.

The appellant took the stand on his own behalf but was not examined as to any matters other than the occurrences in the office of the chief of police on February 14th. He testified that at the beginning of the conversation in which Weiss related his story under the questioning of Lt. Borders, he interrupted with the statement that Weiss was a "damned liar" and interrupted them on several other occasions during the course of Vanderwyst's interrogation and was told by the chief of police to keep quiet. That on one occasion he stated Weiss' story was "a lot of hokum." He denied that at the end of the interrogation of Weiss, Borders said to him: "Al, that's the story. What about it?" and

denied that he said "Yes, it was a stupid thing."

[1] Appellant asserts that the grand jury which returned the indictment against him was not legally constituted and that therefore the indictment was void, and the superior court was within jurisdiction to try him under it.

The grand jury which returned the indictment here was selected through a procedure provided by Rule 16 of Rules of Superior Court of the County of Los Angeles. (See McKinney New California Digest, volume 1A, pages 175, 176.)

Appellant's contention that the jury was illegally constituted, is premised upon the invalidity of this rule as being in violation of the provisions of the Code of Civil Procedure as to the qualifications of grand jurors and as to the mode of their selection. Appellant does not contend that any of the grand jurors was an unqualified person, nor does he assert that there was any exclusion from the panel from which the grand jury was selected of persons of his race, religion, area of residence, political persuasion or any other condition which conceivably would be of detriment to him.

In substance, Rule 16 provides as follows:

The grand jury shall be drawn and impaneled each calendar year in the Master Calendar Department of the Criminal Division of the court. On or before the first Monday in November of each year, each judge shall place in the hands of the presiding judge as *nominees*<sup>6</sup> for the grand jury for the ensuing year, the names of two persons whose age, residence and occupation shall be stated and who are personally known to the judge submitting such names, and who have no affiliations known to the nominating judge which would preclude them from serving with complete impartiality if chosen, and who are legally qualified to act as grand jurors. The presiding judge shall cause a copy of the entire list of nominees to be placed in the

5. Both Cork and Borders testified to the contrary.

6. All emphasis herein is ours unless otherwise noted.

hands of each judge of the court and copies furnished to the press, and shall cause the list to be filed with the secretary of the court and open to public inspection. That the presiding judge shall appoint a "committee on grand jurors" to whom objection to any nominee may be communicated by any judge or other person. The names of the members of this committee shall be published with the list of nominees. Each judge shall make an investigation of the prospective grand jurors and may communicate to the committee on grand jurors his objections to any nominee. Any judge nominating a person as a prospective grand juror may withdraw the name of his nominee.

On or before December 31st, the committee on grand jurors shall present the presiding judge with a written report concerning each nominee. It shall set forth therein all objections received from any judge to any nominee. Before the 10th of January the presiding judge shall call a meeting of the judges. At that meeting the report of the committee on grand jurors shall be presented to and considered by the judges, and those nominees who are approved by a majority of the judges shall constitute the grand jury list, and this list shall be filed with the county clerk and made a public record.

Appellant attacks this rule upon the following grounds: (1) That the rule violates sections 204b and 204c of the Code of Civil Procedure in that it does not provide for the preparation of a list of qualified and competent persons by the jury commissioner and (2) that the rule violates the provisions of sections 198 and 199 of the Code of Civil Procedure in that it requires grand jurors nominated to be personally known to the nominating judge. (3) That the requirement of the rule that a person nominated by a judge shall be personally known to him, constitutes a systematic and illegal exclusion of a large segment of the people of the county as grand jurors. These contentions cannot be sustained.

The power and the duty of the superior court as to the selection of grand jurors is set forth in section 204 of the Code of Civil Procedure. So far as pertinent here, that section reads: "In the month of January in each year it shall be the duty of the superior court in each of the counties of this State to make an order designating the estimated number of grand jurors \* \* \*; and immediately after said order designating the estimated number of grand jurors shall be made, *the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, \* \* \** and said selections and listings shall be made of men and women suitable and competent to serve as jurors, as set forth and required in Sections 205 and 206 of this code, \* \* \*"

"In counties and cities and counties having a population of 80,000 inhabitants or over, such selection shall be made by a majority of the judges of the superior court; \* \* \*"

By section 204a, the majority of judges of a superior court in counties having a population of over 60,000 *may* appoint a jury commissioner "*to assist the judges thereof in making selections of \* \* \* grand jurors.*" By section 204b it is made the duty of the jury commissioner "pursuant to written rules or instructions adopted by a majority of the judges of such court" to furnish the judges of the court a list of persons qualified to serve as grand jurors. Section 204d provides that pursuant to the rules and instructions adopted by a majority of judges of the court, the jury commissioner shall return to the judges a list of persons recommended by him for jury duty, but further provides that the judges shall not be bound to select any names from said list, but may, if in their judgment "the due administration of justice requires, make all or any selections from among the body of persons in the county \* \* \* suitable and competent to serve as jurors regardless of the lists returned by the jury commissioner."



Sections 204a and 204b and 204d in no wise affect or limit the duty of judges of the superior court to select and list the persons from which grand jurors shall be drawn pursuant to the provisions of sections 209 and 211 of the Code of Civil Procedure. They do not require, but merely authorize the appointment of a jury commissioner. They do not require that a jury commissioner, if appointed, must take any part in the selection of the list of persons to serve as grand jurors, but merely authorize the judges of the court to request his assistance if they are so advised and to adopt rules to guide him in the performance of this duty if it be required of him.

The Superior Court of Los Angeles County did appoint a jury commissioner but it did not require of him any assistance in the selection of the grand jury list, but chose to perform these duties without the assistance of the jury commissioner.

Rule 16 constitutes merely the procedure adopted by a majority of the judges of the court to govern them in carrying out, in an orderly manner, the duties imposed on them by section 204, and the power to adopt such a rule cannot be doubted.

The provisions of the rule that a judge shall only nominate a person personally known to him, for consideration by a majority of the judges, is not mandatory but must be construed as advisory only, as the judges could not by rule control the action of any individual judge upon a matter addressed to his discretion. But assuming that it is mandatory and that no judge could legally submit for consideration the name of a person not personally known to him, it still does not contravene any statutory provisions as to the selection of grand jurors, for the persons selected must not only be personally known to the judge, but must, by the provisions of the rule, be legally qualified to act as grand jurors and therefore must be persons who meet the requirements of sections 198 and 199 and 205 of the Code of Civil Procedure. There is nothing in section 204 that requires that the prospective grand juror be selected at random from the body of the county. Further, the

list of nominees does not constitute the grand jury list. That list is only constituted when a majority of all of the judges have approved the names to be contained upon the list.

Appellant places great reliance upon the case of *Bruner v. Superior Court*, 92 Cal. 239, 28 P. 341. It has no application here. In that case the person who summoned the jury to act on a special venire from which the grand jurors were to be selected, had no power to act, the order appointing him *elisor* being void. Here there is no question of the power of the judges to act, but to the contrary, they were the only persons who could act.

[2] During the examination of the witness Gaebel it was developed that during the time the grand jury was in session and considering the evidence produced before it, as the result of which it returned the indictment here, one of the grand jurors, during a recess in the grand jury proceedings, requested certain information from the witness Gaebel; Gaebel procured a certain document, handed it to a secretary at the rooms where the grand jury was in session and she in turn handed it to the juror. It was stipulated that such a document is not one of those incorporated in the transcript of the grand jury proceedings which was furnished to the appellant. It was further stipulated, at the proceedings had upon the appellant's motion under section 995 of the Penal Code, that more than 12 of the grand jurors voted for the return of the indictment.

It is appellant's contention that the failure to include the document furnished to the grand juror in the record of the grand jury proceedings deprived him of the right given him by section 995 of the Penal Code, to a full and complete transcript of all the proceedings before the grand jury. There is no merit in this contention.

There was no evidence that any of the grand jury, other than the one to whom it was furnished by the witness Gaebel, ever viewed the document, or that it was considered by the grand jury in returning its

indictment. There was no proof that it was a part of the record. It is presumed that the law was obeyed and that all evidence received before the grand jury was incorporated in its record. Code Civ.Proc. § 1963, subds. 15 and 33.

[3] Assuming that all of the grand jurors examined the document outside of the formal proceedings and without it being introduced in evidence, still that fact would not affect the validity of the indictment or the jurisdiction of the court to proceed under it, for the evidence received before the grand jury and contained in the record of its proceedings was sufficient to uphold it. *McFarland v. Superior Court*, 88 Cal.App. 2d 153, at pages 158-159, 198 P.2d 318, at pages 321-322.

[4] There was, however, no proof that any grand juror, other than the one to whom the document was handed, examined it, and as it was stipulated that more than 12 jurors voted to return the indictment, the perusal of the document by one could in no event void the indictment.

There is no showing made and in fact no claim made by appellant, that failure to incorporate the document in question in the record of the proceedings of the grand jury, adversely affected him in preparing for trial. The document was not produced at the trial and the appellant was therefore not called upon to meet any probative force that it might have had.

[5] Appellant further asserts that count I of the indictment was insufficient to state an offense against the laws of the State of California in that it failed to set forth the name of the person upon whom the theft was conspired to be committed and the amount involved, or set forth the false and fraudulent claims filed or the amount alleged to have been claimed.

He further asserts that count II of the indictment fails to state a public offense in that it failed to name the insurers or to set forth the claims made.

Both counts of the indictment fully meet the requirements of section 950 of the Penal Code. If there was any uncertainty

in either count or if the second count as claimed, charged two crimes without separately stating them, which it did not, any such deficiency was waived by the appellant by failing to demur to the indictment. *People v. Pierce*, 14 Cal.2d 639, at pages 643-646, 96 P.2d 784, at pages 785-787; *People v. Yant*, 26 Cal.App.2d 725, at pages 729-730, 80 P.2d 506, at pages 507-508; *People v. Brac*, 73 Cal.App.2d 629, at pages 634-635, 167 P.2d 535, at pages 537-538.

[6] During the trial of this action which consumed nearly three weeks, conferences were held at the bench, out of the hearing of the jury on 26 occasions, and eight conferences were held between court and counsel in chambers. In addition, other off-record conferences were held at the bench. As no affidavits were filed on the motion for new trial that these concerned matters involved in the trial of the action, we assume they did not. Appellant, though in the courtroom, was not present at any of the conferences between court and counsel at the bench, nor was he present in chambers during the proceedings there.

Appellant asserts that by reason of the fact that the conferences between counsel and the court, out of the presence of the jury, were not heard by the members of the public who attended the trial, he was denied a public trial as guaranteed by section 686 of the Penal Code and by article I, section 13 of the Constitution of this State. He further contends that proceedings had at the bench and in chambers, when he was not personally present were in violation of his right to appear and defend the action in person as guaranteed by section 1043 of the Penal Code and by the article of the Constitution of this State last mentioned.

We find no merit whatsoever in the contention that the trial was not a public one. No member of the public was barred from the court room or from the proceedings had during the time the jury was entitled to be present and to itself hear the proceedings. We have carefully scrutinized the tran-

script as to each of the occurrences of the 34 conferences which we have mentioned above and find that in each instance the matters as to which the conferences were had between court and counsel, were matters which could not have been properly heard in the presence of the jury. In each instance the subject matter of the conferences between court and counsel was a question or questions of law, and not matters advanced for consideration of the triers of fact.

The trial of the action, so far as the term "public trial" is concerned, consists in the proceedings for the impanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and the return of the verdict, and from none of these proceedings was the public excluded. Thus appellant was not denied a public trial.

[7] Neither appellant nor counsel made any objection to the conferences at the bench or those in chambers and many of them were held at the request of appellant's counsel. Appellant thus waived the right he now claims, to have the public present at those conferences. *People v. Tugwell*, 32 Cal.App. 520, at pages 525, 526, 163 P. 508, at page 510.

[8] Appellant's contention that his absence from the conferences at the bench and in chambers deprived him of his right to be present at the trial and to defend, cannot be sustained. The absence of the appellant from the conferences held between court and counsel at the bench and in chambers did not, under the circumstances here, deprive him of any rights given him by the provisions of article I, section 13 of the Constitution "to appear and defend, in person and with counsel," or his right given him by section 1043 of the Penal Code to be personally present at the trial. In none of the instances of conferences at the bench or in chambers, were any matters presented to the court as to which appel-

lant could have been of any aid to his counsel. Each of them concerned questions of law as to the admissibility of evidence and any knowledge appellant may have had of the facts which his counsel did not have, would have been of no aid to his counsel in the presentation of these questions of law.

In our opinion the rights of an appellant under section 1043 of the Penal Code or under article I of section 13 of the Constitution are not violated unless he is prevented from being present during the presentation of matters before the triers of fact or such other times as his absence would thwart a fair and just hearing.

In considering the appellant's right to be present at a trial under the provision of the Fourteenth Amendment to the Constitution, Mr. Justice Cardozo in *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575; said in part: "Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. \* \* \* So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."<sup>7</sup> In *United States v. Johnson*, 3 Cir., 129 F.2d 954, at page 959, the court said: "The test, therefore, the jury, the triers of fact being absent from the courtroom, must be whether or not the appellant was damaged by not being present. \* \* \* The question which was argued was purely one of law. \* \* \* the trial court correctly resolved it. \* \* \* As we have previously indicated, the right of a defendant to be present when the triers of fact are absent is not an absolute right, but one qualified by a condition that nothing occurs when he is not present which could put him in jeopardy. Only thus would his presence bear a relation

7. Quoted with approval *People v. Isby*, 30 Cal.2d 879, at page 894, 186 P.2d 405, at page 414.



'reasonably substantial, to his opportunity to defend.'"

There is no reason why any different interpretation should be placed upon the statutes or provisions of our Constitution above mentioned than is placed by the Supreme Court of the United States upon the Fourteenth Amendment.

[9] Appellant has failed to point out any occurrences had out of his presence which in any way affected him adversely and our own study of the record convinces us that his rights were not substantially impaired. As a matter of fact the appellant was not excluded from conferences held at the bench or in chambers. No order was made excluding him. He was, at the time of the trial, on bail and not under restraint and was free to, of his own volition, attend any of such conferences. He made no attempt so to do. His absence was of his own volition and not by reason of any action of the court and by failing to personally assert, or to assert through his counsel, his desire to be present, he waived his right to be present. *People v. Tugwell*, 32 Cal.App. 520, 525, 526, 163 P. 508; *People v. Searle*, 33 Cal. App. 228, at page 232, 164 P. 819, at page 821; *People v. White*, 20 Cal.App. 156, 128 P. 417; *People v. Rogers*, 150 Cal.App.2d 403, at pages 413, 415, 309 P.2d 949, at pages 955, 957; *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, at pages 106, 107, 54 S.Ct. 330, at pages 332, 333, 78 L.Ed. 674, at page 678, 90 A.L.R. 575; *Deschenes v. United States*, 10 Cir., 224 F.2d 688.

[10] Appellant asserts that the trial court erred in denying his motions to strike the testimony of the witness Borders, wherein that witness testified as to the statements made on the 14th day of February 1956, in the office of the chief of police, by Weiss in the presence of the appellant and wherein he related that appellant had, at the end of the interrogation of Weiss by Borders, stated in answer to the witness Border's question as to whether the statements of Weiss were true: "Yes, it was a stupid thing."

They first assert that this adoptive confession was received without any foundation being laid for it, in that, so they assert, there was no evidence offered that the statement was free and voluntary. It is seemingly appellant's position that because no witness was asked as to whether any force or violence was used, or promise of immunity or reward made, that a proper foundation was not laid for the receipt into evidence of the alleged confession. Appellant, however, has not cited any authority to uphold this contention nor have we, in our research been able to discover any cases which require such direct testimony in order that a proper foundation may be laid for the receipt of a confession, although we recognize that it is the common and probably the better practice to produce such testimony before offering the confession. We are satisfied that the evidence was sufficient to make it a question of fact for determination, first by the trial court and then by the jury, as to whether or not the confession was voluntarily given and to uphold the finding that it was voluntary.

The evidence discloses everything that occurred from the time the appellant was picked up at his place of business on the morning of the 14th of February, 1956, until the time appellant admitted the truth of Weiss' statements, and nowhere in the evidence is there any indication of any threats, force or violence or promises of immunity or reward. The appellant, when he took the stand did not assert that any violence had been used upon him or threats made to him or promises of immunity or reward given him. Under the evidence here, the question of whether the confession was voluntary was one to be determined by the trial court and the jury. *People v. Chan Chaun*, 41 Cal.App.2d 586, 590-591, 107 P.2d 455; *People v. Burwell*, 44 Cal.2d 16, at pages 30-32, 279 P.2d 744, at pages 751-753.

[11] The fact that the appellant was under arrest and that his confession was made in response to questions asked by the officers while he was under restraint,

does not, in and of itself, prove that his confession was not free and voluntary, but was merely a circumstance to be taken into consideration by the trial court and jury in determining that question. *People v. Rogers*, 22 Cal.2d 787, 805, 141 P.2d 722; *People v. Bigelow*, 104 Cal.App.2d 380, at page 390, 231 P.2d 881, at page 888; *People v. Chan Chaun*, *supra*; *Rogers v. Superior Court*, 46 Cal.2d 3, 9-11, 291 P.2d 929.

Appellant asserts that the admission into evidence of the confession deprived him of his rights under the Fourteenth Amendment to the Constitution of the United States. He bases this contention upon the fact that the confession was made after his arrest and before he had been taken before a committing magistrate, there being opportunity so to do, and without his being advised of his right to counsel, and that his statements might be used against him.

[12] There can be no doubt that where a confession is coerced either through threats, force, violence or psychological coercion through constant and prolonged questioning, the defendant is deprived of his constitutional rights, if the confession is received in evidence, but the fact that the confession was received while the defendant was under arrest and prior to the time he had been taken before the committing magistrate, does not, in and of itself, establish coercion. *Lisenba v. People of State of California*, 314 U.S. 219, at pages 234-238, 62 S.Ct. 280, at pages 289-290, 86 L.Ed. 166, at pages 179-180; *Rogers v. Superior Court*, 46 Cal.2d 3, at pages 9-11, 291 P.2d 929, at pages 932-934; *People v. Bashor*, 48 Cal.2d 763, at page 765, 312 P.2d 255, at page 256.

There is nothing in the evidence here to show that appellant's confession was coerced, and as a matter of fact, appellant did not so assert, but to the contrary, denied the confession. We do not have here any evidence of any threats against the appellant, any force or violence used upon him, any prolonged questioning of him. We do not have a defendant weakened by prolonged confinement or constant questioning or one of impaired mentality, but on

the contrary, a man of high intelligence, experienced in the affairs of life, whose confession was made within 30 minutes after his arrest and without any questions being propounded to him, other than whether the statements made by another which established his guilt, were true. It cannot be said, as a matter of law, that his confession was coerced, and while, as we have said, the fact that he was under restraint at the time of the confession is a fact to be considered in determining whether it was voluntary, his confinement does not establish the fact that it was not.

[13] Appellant asserts, however, that the mere fact that his confession was obtained before he had been arraigned or advised of his constitutional rights, in and of itself makes the confession inadmissible irrespective of whether his constitutional rights were invaded. He bases this contention upon the rule laid down by the Supreme Court of the United States in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; *Upshaw v. United States*, 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100; *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. The rules laid down by these cases are applicable only in a federal court and they do not purport to establish any constitutional limitation upon the right of the state courts to receive voluntary confessions made during the time that a defendant may be illegally detained. The Supreme Court of this State has expressly refused to adopt the rule laid down by the United States Supreme Court as an exclusionary rule in this State. See *Rogers v. Superior Court*, 46 Cal.2d 3, at page 10, 291 P.2d 929, at page 933; *People v. Bashor*, 48 Cal.2d 763, at page 765, 312 P.2d 255, at page 256.

[14] We hold, therefore, that the court did not err in denying the motion to strike the testimony of the witness Borders. His testimony that the appellant admitted the truth of the statements made by Weiss, was properly received as evidence of a confession of the crime of conspiracy charged by the first count of the indictment, and as an admission of the facts stated by Weiss inso-

far as they were pertinent to the proof of the crime charged in the second count of the indictment.

[15] Appellant asserts that he was compelled to be a witness against himself. He bases this assertion upon the fact that during cross-examination he was asked if the name "Claude Wilson, known as Woody Wilson" had been mentioned in his presence during the relation by Weiss in the chief's office, to which the appellant over his objection answered: "I'm not sure."

The appellant on direct examination had testified that he was present and listened to Weiss' recitation in the chief's office; and that he had at several times interrupted to deny Weiss' statements and had denied that he was asked if Weiss' statement was true or that he replied: "Yes, it was a stupid thing." The question asked concerning Woody Wilson was proper cross-examination inasmuch as the witness Borders had testified that during the conference in the chief of police's office that Weiss had related Wilson's connection with the conspiracy. But in any event, appellant was not prejudiced by the question or his answer thereto, as the evidence offered by him showed that appellant had had business connections with Claude Wilson.

It is asserted that the evidence fails to show that any claim was filed by appellant against the insurers under the policies of insurance issued by them, and that, therefore, there was no proof of the commission of the offense charged in either count of the indictment. This contention is based upon the claim that the itemized inventory delivered by appellant to Gaebel, the adjustor for all insurers, did not constitute a claim within the meaning of section 556 of the Insurance Code, and that in order for a claim to have been made it was necessary that a sworn proof of loss be filed.

Section 556 of the Insurance Code reads in part as follows:

"It is unlawful to:

"(a) Present or cause to be presented any false or fraudulent claim for the pay-

ment of a loss under a contract of insurance.

"(b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim."

[16] The word "claim" is one of common meaning and is defined by Webster's International Dictionary, Second Edition, unabridged, as follows: "To ask for, or seek to obtain, by \* \* \* right, or supposed right; to demand as due." It is to be assumed that the Legislature in using the word "claim" intended it to have its common meaning and intended to proscribe the presentment of any false demand under a policy of insurance irrespective of the form of that demand. Certainly it was not the intent of the Legislature to only proscribe the filing of a false written proof of loss for proofs of loss are made, not as a claim, but in support of a claim, and it is the making of the false proofs of loss which is in part the subject matter of paragraph (b) of section 556.

The purpose of the two paragraphs of the section is apparent. A claim of loss under a policy of insurance might not be false, yet the proof of loss presented in support of the claim be false. For example: Under a policy of fire insurance, the risk insured against, a loss by fire, might have occurred and a claim for some loss and the amount thereof be true, but the proof of loss might assert the loss of property which was not in fact destroyed or damaged by the fire, or falsely state the quality, character or value of the property destroyed.

[17] The provisions of a policy of insurance requiring the insured to present sworn proofs of loss, are for the benefit of the insurer and may be waived. Ins. Code, § 554; *Hutchings v. Southwestern Automobile Ins. Co.*, 96 Cal.App. 318, 274 P. 79; *Ruffino v. Queen Ins. Co.*, 138 Cal.App. 528, 33 P.2d 26, 883. It certainly would not be asserted that if an inventory, such as exhibit 10, had been filed with an



insurer and the amount of the loss paid without any written proof of loss being filed, the insured could not be charged with grand theft and a violation of section 556 of the Insurance Code, if no loss had in fact occurred. Yet that would be the logical result of holding that the jury could not here find that by the presentment to the insurer of exhibit 10, the insured intended to make a claim of loss.

That there was ample proof from which the jury might find that a false claim of loss was made is clear. The witness Weiss testified that there was no robbery or theft of furs from appellant's premises on the night of December 27th. Appellant caused to be presented to the insurance companies, People's exhibit 10, which is an itemized list of more than 280 fur garments, with the value of each, and their total value set forth, and stated to the police that that list was the final list for the insurance company. It is evident that the jury might well find from this evidence that by presenting this itemized list, containing the value of each item of the property described, appellant intended it to be a claim for the payment of a loss under the policies, irrespective of the fact that in order to fix the liability of the insurers under the policies, it would be necessary for him to file a formal and sworn proof of loss in support of the claim.

[18] Appellant also complains that the court did not instruct the jury as to the meaning of the word "claim." A sufficient answer to this claim of error is that the word "claim" is one of common meaning and that the appellant did not request any instruction defining that meaning. *People v. Allen*, 138 Cal.App. 652, at page 659, 33 P.2d 77, at page 80; *In re Estate of Nutt*, 181 Cal. 522, at page 529, 185 P. 393 at page 396; *Lawrence v. Pickwick Stages, Northern Division, Inc.*, 68 Cal.App. 494, at page 501, 229 P. 885, at page 887; *People v.*

*Whitson*, 25 Cal.2d 593, 154 P.2d 867; *People v. Klor*, 32 Cal.2d 658, at page 662, 197 P.2d 705, at page 707.

[19,20] Appellant asserts that the evidence is insufficient to sustain the verdict of guilty on the first count. The basis of his claim as we understand his brief, is that the corpus delicti was not established, that therefore his confession was inadmissible, and that without the confession there was no corroboration of the testimony of the accomplice which was relied upon by the People to establish the fact that there was in fact no theft of appellant's furs. The corpus delicti of count I of the indictment was the conspiracy to commit any one of the three counts mentioned in the indictment: (a) Grand theft, (b) Attempted grand theft, and (c) Filing of false and fraudulent insurance claims. Appellant asserts that there was no proof of any agreement to commit grand theft or of any agreement between appellant and any of the named conspirators, to file a claim for insurance.<sup>8</sup> It is true that there was no direct evidence of an express agreement between appellant and any of the named conspirators, but direct evidence is not necessary for a conspiracy may be, and often must be established by circumstantial evidence and an express agreement need not be proved, but the conspiracy may be implied from the acts of the conspirators in carrying out a common purpose to an unlawful end. *People v. Daener*, 96 Cal.App. 2d 827, 831, 216 P.2d 511; *People v. Curtis*, 105 Cal.App.2d 321, 327, 235 P.2d 51; *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193. In the present case, the evidence produced by the People was sufficient to sustain a finding that a robbery was faked by appellant and Weiss on December 27th; that no furs or other property were stolen from appellant; that the appellant called the police through the A.D.T. alarm and notified the insurers of the alleged theft; that appellant thereafter

8. It was also claimed that there is no such crime as conspiracy to attempt grand theft. There is no substance in

this claim, for an agreement to commit grand theft necessarily includes conspiracy to attempt the theft.

filed a claim against these insurers for his alleged loss in the alleged robbery and that each of these acts was done pursuant to a plan to illegally obtain money from appellant's insurers.

The uncorroborated testimony of the accomplice Weiss, together with the filing of the false claim, were sufficient to establish the corpus delicti. *People v. Goldstein*, 136 Cal.App.2d 778, at page 789, 289 P.2d 581, at page 587; *People v. Briley*, 9 Cal.App.2d 84, at page 86, 48 P.2d 734, at page 735.

The corpus delicti being established, the confession was admissible in evidence and constituted sufficient corroboration of the accomplice's testimony.<sup>9</sup> *People v. Rokes*, 18 Cal.App.2d 689, at page 691, 64 P.2d 746, at page 747; *People v. Earl*, 10 Cal.App.2d 163, at page 165, 51 P.2d 147, at page 148. The testimony of the accomplice, the confession and the evidence as to the filing of the claim against the insurers established not only the conspiracy as charged in the first count of the indictment, but at least two of the overt acts charged by that count, and this evidence amply supports the verdict of guilt upon both counts.

[21] Appellant makes numerous assignments of error in relation to the rulings of the court upon the admissibility of evidence. We have examined all of these assignments of alleged errors and find only one that has substance.

As a part of the People's case it was proved that exhibit No. 10 (the list of the furs hereinbefore described) had been delivered to Gaebel, the adjustor for the insurance companies, and that the appellant stated that that was the final list for the insurance company, and had refused to give the police a copy of it. The People had also shown that this list was received by Gaebel in an envelope which was received into evidence and marked "exhibit No. 11." The appellant called as a witness one of his

employees, a Mr. Behar. This witness testified that he had received exhibit No. 10; that when he received it, it was sealed and was addressed to C. A. Gaebel. When asked what he did with it he replied: "I was instructed to give it to Mr. Gaebel for the police to check." The district attorney then moved to strike the answer as not responsive and as containing hearsay, whereupon counsel for the appellant offered to prove by the witness that exhibit No. 11 was handed to the witness by the appellant who told the witness to deliver it to Mr. Gaebel, "that it was a list for the police and that Mr. Gaebel had asked for it and he was to give it to him as soon as possible." The district attorney's objection to this offer was sustained and the answer of the witness was stricken.

While the motion to strike the answer was proper, as the answer was not responsive to the question asked, the court's ruling on the offer of proof was clearly erroneous. The gist of the crime charged by the second count of the indictment was the filing of a false claim. It was the claim of the prosecution that exhibit No. 10 constituted the false claim. It did not, however, contain any expressed demand for the payment of the loss and unless the appellant intended it as a demand or an assertion of a right to payment, there would be a failure of proof under count II of the indictment. His intent to make a demand might, as the People claim, be inferred from the filing of the claim and other evidence which we will later advert to. The appellant, however, was entitled to show a different intent and to offer proof of any statements made by him in connection with the delivery of the document which might tend to prove the absence of the intent to make a claim. Such statements were verbal acts within the exception to the rule, against hearsay. *People v. Weatherford*, 27 Cal.2d 401, at pages 421-422, 164 P.2d 753, at page 764;

communication between appellant and Weiss by manual signs at the city jail, was also a fact tending to corroborate Weiss' testimony.

9. It was conceded by appellant at oral argument that if the confession was properly received in evidence, it constituted sufficient corroboration of the testimony given by Weiss at the trial. The

People v. Chenault, 74 Cal.App.2d 487, 169 P.2d 29; Wigmore VI, §§ 1725, 1732, 1772-1777, 1785.

In view of the record here, however, we are convinced that this error does not justify a reversal of the judgment. The evidence showed without conflict that appellant caused to be prepared and furnished directly to the police, two other lists of the furs lost in the alleged robbery (exhibits Nos. 6a and 6b); that he had stated to the police that exhibit No. 10, which did not contain the manufacturer's numbers as to each of the listed furs, as did exhibits Nos. 6a and 6b, was the final list for the insurance company and that if the police wanted a copy of it they should obtain it from the insurance company. Further, there was no offer to prove that appellant himself or through the witness Behar, informed the insurance adjustor that exhibit No. 10 was delivered to the insurance company for the use of the police. In the light of these facts it does not seem probable that if the evidence offered through this witness had been received, the jury would have found that no claim was filed by appellant against his insurers. We are satisfied that the error complained of did not result in a miscarriage of justice and is one that falls within section 4½ of article VI of the Constitution.

[22] During the direct examination of the witness Weiss, he testified as to certain gestures made by appellant while he and appellant were alone in the city jail. The district attorney requested the court to describe the gesture demonstrated by the witness, whereupon the following occurred:

"The Court: The witness placed his fourth finger of his right hand across his lips, the sign usually indicating 'Keep quiet.'

"Mr. Carr: Well, your Honor, may I interrupt? I object to that; that is a question for the jury to determine. That would indicate many things and I certainly don't think—

"The Court: Placing the index finger perpendicularly across the lips, the Court

states, has a common meaning, this motion that the witness made.

"Mr. Carr: I respectfully assign that as error and ask you to instruct the jury to disregard your remark.

"The Court: That assignment is denied."

Appellant urges that the court erred in this ruling and by its statements invaded the province of the jury. We do not agree. The court did not instruct the jury what interpretation they should place upon the testimony of the witness as to the gesture he demonstrated, but only that the gesture had a common meaning and the truth of that statement is undisputed by appellant.

The lack of substance in this claim of error is demonstrated by the fact that the appellant's own counsel gave to the gesture the same meaning assigned to it by the court.

In cross-examination of the prosecution's witness Borders, the following occurred:

Question by Mr. Carr: "How many times have you seen Mr. Teitelbaum stand up in your presence with his finger to his mouth in this fashion, (indicating)? \* \* I had my finger over my mouth in a 'shushing' fashion."

[23] The court instructed the jury in accordance with CALJIC No. 30 to the effect that if the jury should find that there was an occasion when the appellant, under conditions which fairly afforded him an opportunity to reply, *failed to make a denial* in the face of an accusation directed to him, charging him with the crime or his connection with its commission; that "the circumstance of his silence and *conduct*" might be considered against him as indicating an admission that the accusation thus made was true, and that evidence of such an accusatory statement was not received for the purpose of proving its truth but only to explain the conduct of the accused in the face of it; and unless they should find that his *conduct* at the time indicated an admission that the accusatory statement was true, they should entirely disregard the statement. (Emphasis added.)



Appellant argues that the court erred in giving this instruction because under the evidence given by the prosecution, appellant did not remain silent but expressly admitted the truth of the statements made by Weiss in his presence. We find no merit in this contention. The appellant's admission of the truth of Weiss' statements was certainly a failure to deny its truth and was *conduct* indicating an admission that the accusatory statement was true. It is impossible to see how the appellant could have been, in anywise, prejudiced by the instruction.

The appellant asserts that the court erred in instructing the jury in accordance with CALJIC instruction No. 29 (defining confessions and admissions), No. 29-A (that only a voluntary confession may be considered but that that rule does not apply to an admission) and 29-B (when a confession is voluntary).

Appellant asserts that these instructions were erroneous in that if the jury believed that appellant admitted the truth of the statements made by Weiss in his presence, his admission constituted a confession and that therefore no question of admission was involved, and it was therefore error for the court to instruct the jury that an admission might be considered even though not voluntarily made. In making this assertion, appellant overlooks the fact that as to count II of the indictment, the admission by the appellant of the truth of Weiss' statement was not a confession but only an admission.

[24] In order for a statement to be a confession, it must admit all of the elements of the crime charged. *People v. Ferdinand*, 194 Cal. 555, at pages 568-569, 229 P. 341, at pages 345-346; *People v. Hall*, 105 Cal.App. 359, 287 P. 533. The gist of the crime charged by count II was the filing of a false claim or the preparation of a paper to support a false claim. The statements made by Weiss, the truth of which were admitted by appellant, contained nothing as to a filing of any claim by the appellant, or the preparation of any

paper in support of a claim and therefore appellant's admission of the truth of Weiss' statement could not constitute a confession as to the crime charged in this count. The court therefore properly charged the jury as to the distinction between confessions and admissions and that an admission might be considered by them even though not voluntary.

[25,26] The court instructed the jury in accordance with Caljic No. 821 and No. 826. By the first instruction, the court told the jury a conviction might not be had on the testimony of an accomplice unless it be corroborated by such other evidence as would tend to connect the appellant with the commission of the offense. It defined an accomplice and then stated: "If you should find that any witness in this case so conducted himself in respect to the crime charged, you must find that he was an accomplice." By the second instruction, the court charged the jury that *if* the crime of conspiracy or the crime in violation of section 556 of the Insurance Code charged in the indictment, were committed by any one, that then Weiss was an accomplice as a matter of law.

Appellant attacks these instructions upon two grounds. First he claims they were contradictory. There is no substance in this claim. The first instruction only defined an accomplice and told the jury that a conviction could not be had upon the testimony of an accomplice unless his testimony was corroborated. The second told them that they must find Weiss to be an accomplice. Read together, they do not leave the question of whether or not Weiss was an accomplice to the determination of the jury and then in conflict therewith, instruct that he was an accomplice, but only tell them that if either crime was committed they must find that he was an accomplice whose testimony must be corroborated.

The second attack made upon the instructions is that by the second instruction the court compelled the jury to find that Weiss was an accomplice and that inasmuch as Weiss was not an accomplice unless he was in appellant's store on De-

cember 27, 1955, as to which fact the evidence was in conflict, the court by this instruction invaded the province of the jury. This assertion of error is fanciful to say the least. By no stretch of the imagination can the second instruction be construed as instructing the jury that Weiss was in the appellant's store on December 27, 1955. The court told the jury that if either of the crimes charged in the indictment was committed, then Weiss was an accomplice. Unless Weiss was in the store on December 27, 1955, neither crime was committed and the instruction left it for the jury to determine whether Weiss was in the store and the truth of his testimony as to what there occurred. The instructions were proper and for the benefit of the appellant, not his detriment.

[27] Appellant further claims that the court erred in defining to the jury the terms "theft" and "grand theft." If we properly interpret appellant's brief, his claim is that these instructions had no application to either of the crimes charged in the indictment or any basis in the evidence produced. This assignment of error is totally without merit. The first count of the indictment charged the appellant with conspiracy to commit grand theft. It was necessary, therefore, for the court to define grand theft to the jury and in so doing, to define theft. The evidence offered by the People, and believed by the jury, showed that the object or subject of the conspiracy was to wrongfully and fraudulently obtain money from appellant's insurers by staging a fake robbery and then making a false claim. If the conspirators had accomplished their purposes, they would have been guilty of grand theft.

[28] Appellant further charges that the court erred in defining "attempt" and instructing the jury that a person who conspires to commit grand theft is guilty of a crime, and that a person who conspires to attempt grand theft, is guilty of a crime. Appellant asserts that there is no such crime as conspiracy to attempt

grand theft. We do not agree. A conspiracy to commit grand theft is inherently one to attempt that crime. If the conspirators are successful in accomplishing the object of the conspiracy, they have committed grand theft. If they are not successful, they have committed the crime of attempted grand theft.

[29] Appellant makes nine assignments of error based upon the refusal of the court to give instructions requested by him. We have carefully examined the instructions given by the court and are satisfied that the jury was properly instructed on all phases of the law applicable in the case and was fully, fairly and correctly advised as to the kind, quality and degree of proof required for appellant to be convicted on either count of the indictment. This is all that is required. *People v. Steccone*, 36 Cal.2d 234, at pages 240-241, 223 P.2d 17, at pages 20-21; *People v. Hill*, 76 Cal.App.2d 330, at pages 343, 344, 173 P.2d 26, at pages 33, 34. Only three of these assigned errors merit further comment by us.

[30] Appellant requested the court to give the following instruction:

"The only purpose for which you may consider the alleged statements of Clifford Weiss, on the occasion of the meeting in Chief Anderson's office on the morning of February 14, 1956, in the presence of Chief Anderson, Captain Huff, Lt. Borders and Teitelbaum is for the effect of said recital on the defendant Teitelbaum and his reaction thereto. It does not constitute evidence of the truth of said statements. If you find from all the evidence that Teitelbaum did not admit the truth of the statements then made by Weiss but instead said 'It was a lot of Hokum', or that Teitelbaum denied their truth either by words or conduct or both, then and in such event you must completely and wholly disregard whatever was allegedly said by Weiss on that occasion and the testimony of the witnesses Borders and Huff wherein they recite what Weiss said upon said occasion." This in-

struction is but explanatory of CALJIC instruction 30 which was given by the court and which fully stated the law as to the rules which guide the jury in determining the affect of appellant's conduct in relation to an accusatory statement made to him or in his presence. It was not necessary for the court to further state the law to the jury in different language from that contained in the instruction given. It was not error for the court to deny the requested instruction. *People v. McKenna*, 11 Cal.2d 327, at page 337, 79 P.2d 1065, at page 1070; *People v. Stewart*, 109 Cal.App.2d 334, at page 343, 240 P.2d 704, at page 709; *People v. Walker*, 99 Cal.App.2d 238, at page 244, 221 P.2d 287, at page 291; *People v. Syed Shah*, 91 Cal.App.2d 722, at page 725, 205 P.2d 1077, at page 1079.

[31] The appellant requested three instructions to the effect that if circumstantial evidence was susceptible of two interpretations, each of which appeared to be reasonable, and one of which pointed to the guilt of the appellant and the other to his innocence, that it was the duty of the jury to reject the interpretation which pointed to guilt and adopt that which pointed to innocence. While one of the instructions requested by appellant might well have been given, we believe under the circumstances here that the instruction given by the court<sup>10</sup> adequately advised the jury as to the law and that the appellant suffered no prejudice by reason of the denial of his requested instruction. The evidence as to all elements of the crimes charged by the indictment, other than the element of specific intent, were proven by direct rather than circumstantial evidence. If the jury believed, as they evidently did, the testimony of Weiss, there could be no doubt as to the wrongfulness of appellant's intent in staging the faked robbery depicted by Weiss'

testimony, and the only evidence bearing upon intent which might be subject to different interpretations, was that having to do with the presentation to the insurers of exhibit No. 10. The instruction given by the court above noted, sufficiently advised the jury as to their duty in interpreting this evidence and in resolving any conflicting inferences that might be drawn from it. *People v. Yrigoyen*, 45 Cal.2d 46, at page 49, 286 P.2d 1, at page 3; *People v. Bletson*, 117 Cal.App.2d 731, at page 734, 256 P.2d 614, at page 616.

[32] Appellant requested that the jury be instructed that unless they found beyond a reasonable doubt that appellant admitted the truth of the statements made by Weiss in the conference in the office of the chief of police on February 14th, the jury must return a verdict for acquittal. This instruction contained a correct statement of the law, for the only corroboration of Weiss' testimony was the confession and admission contained in appellant's admission that Weiss' statements, made in the office of the chief, were true. The appellant, however, was not prejudiced by the denial of the requested instruction. The court instructed the jury in accordance with CalJIC No. 821, that a conviction could not be had upon the testimony of an accomplice unless such testimony be corroborated by other evidence which tended to connect the appellant with the commission of the offense; and it instructed the jury in accordance with CalJIC No. 822 as to when the corroboration of an accomplice was sufficient. It instructed them how they were to determine whether corroborative evidence was sufficient, the instruction given being CalJIC No. 830. The court also instructed the jury that the testimony of the accomplice was to be viewed with distrust. Inasmuch as the only evidence offered by the prosecution to corroborate

10. "I instruct you further, that you are not permitted on circumstantial evidence alone, to find the defendant Teitelbaum guilty of any crime charged against him unless the proved circumstances not only

are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."



the testimony of Weiss was the admission by the appellant of the truth of Weiss' extrajudicial statements, the jury must have understood from the instructions given that unless they found that appellant made the admission in question, they could not find Weiss' testimony to have been corroborated, and could not convict the appellant.

Appellant urges that the trial court abused its discretion in denying his motion for a new trial. We have carefully examined all of the numerous questions argued under this assignment of error. Most of them have been raised and argued on the appeal from the judgment and have been heretofore dealt with, and the questions not so raised all concern matters which were addressed to the discretion of the trial court. An examination of the record convinces us that the trial court did not abuse its discretion.

The manager and vice president of Teitlebaum Furs, Inc., one Somper, was called as a witness for the appellant. On direct examination he testified among other things to the so-called promotion put on by a New York furrier named Franklin Simon. In connection with this promotion, furs of the value of \$14,800 had been taken from the company's Beverly Hills inventory and shipped to Simon and furs of the value of \$222,000 had been consigned from the company's New York store to Simon but that these furs had never been carried on the Beverly Hills inventory. On cross-examination he was asked: "Q. Mr. Somper, are you aware that the Franklin Simon promotion was advertised as the entire stock of Teitelbaum of California, \$603,000 \* \* \*" While propounding this question the deputy district attorney had before him on the counsel table a newspaper. Defense counsel objected to the question on the grounds that it called for hearsay and that it was incompetent to prove any issue as against appellant. They also assigned the asking of the question as misconduct and requested the court to di-

rect the jury to disregard it and not to draw any inference from it. The court overruled the objection and the witness answered: "I have seen the add [sic]. I am not certain of the figures, of course."

The court erred in overruling the objection and in refusing the requested admonition to the jury. The district attorney was clearly guilty of misconduct in propounding the question. The answer called for by the question was clearly incompetent for any purpose. An affirmative answer would not serve to impeach any testimony given by the witness and was wholly incompetent to prove that furs of the value stated or any furs had been delivered by the Teitelbaum company to Simon. The district attorney did not claim that he had any evidence of the fact that furs other than those testified to by the witness on direct examination had been delivered or consigned to Simon. His only purpose in asking the question must have been to get before the jury the fact that a New York dealer was offering all of the company's Beverly Hills stock for sale with the hope that they would draw the inference that the allegedly stolen furs had been placed in the hands of Simon without the transaction having been entered on the company's books.

The crux of the entire case was whether the furs for which appellant made claim against his insurance carrier were stolen on the night in question, i. e., did a robbery take place on that night or was there merely a fake robbery. Appellant offered no direct evidence to controvert the testimony of Weiss as corroborated by the confession of the appellant that the alleged robbery was faked and that no furs were stolen. The only witness called by the defense as to the event was the witness Stan. His testimony practically dovetailed with that of Weiss. While the evidence produced by the appellant showed that it was possible for four men to remove 280 fur garments from the vault to a vehicle in the alley within the short period of time that elapsed before the wit-

nesses Lanza and Walge arrived at appellant's place of business, there was not an iota of evidence that more than one alleged robber was in the store.<sup>11</sup>

From the testimony of the various witnesses who testified as to the racks in the vault being substantially full on December 27, but more than half empty on the 28th, the inference might be drawn that the furs were removed on the night of December 27, but in view of the testimony of Weiss that no furs were removed, whether that inference should be drawn was a question for the jury and if the jury found from the evidence, as they did, that the claimed robbery did not occur then it was entirely immaterial whether the furs claimed to have been

stolen were in the hands of Simon or had been otherwise disposed of. Any inference that the jury might have drawn from the question and the answer thereto could not therefore have affected their ultimate verdict.

Other assignments of misconduct are made by appellant. An examination of the record convinces us that there was no misconduct other than that mentioned above; further comment than this would serve no useful purpose.

The order denying appellant's motion for a new trial and the judgment are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

11. Counsel for the appellant, in introducing the evidence of Somper as to the time it would require to remove the furs from the vault to the vehicle in the alley and in making a demonstration be-

fore the jury, stated in the presence of the jury that the defense would prove that appellant admitted four men into the vault at the time of the robbery. Such evidence was not offered.





50 Cal.2d 713

Cite as 329 P.2d 289

**SOUTHERN CALIFORNIA GAS COMPANY**, a corporation, Plaintiff and Respondent,

v.

**CITY OF LOS ANGELES**, a municipal corporation, Defendant and Appellant.

L. A. 24909.

Supreme Court of California,  
In Bank.

Aug. 29, 1958.

Rehearing Denied Sept. 24, 1958.

Action by gas company to recover cost incurred in relocating certain of its lines in a county as a result of sewer construction by the city in an unincorporated county area. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment against city and it appealed. The Supreme Court, Traynor, J., held that where there was no provision in utility company's franchise abrogating its common-law obligation to relocate its pipes at its own expense, utility company did not have the right to recover costs of such a relocation, even though its franchise was from the county and relocation was necessitated by a sewer project undertaken by a city in an unincorporated portion of county.

Judgment reversed with directions.

McComb and Schauer, JJ., dissented.

Opinion, 318 P.2d 735, vacated.

# **1. Constitutional Law** ⇨134

## **Eminent Domain** ⇨86

Franchise granted a public utility to locate its lines under city streets constitutes a contract secured by the Federal Constitution against impairment by subsequent state legislation, and utility company's rights thereunder cannot be taken or damaged for public use without making just compensation. West's Ann.Const. art. 1, § 14; U.S. C.A.Const. Amend. 14, § 1.

## **2. Municipal Corporations** ⇨688

In absence of a provision to the contrary, generally, a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facil-

ities therein at its own expense when necessary to make way for a proper governmental use of the streets.

## **3. Municipal Corporations** ⇨688

Obligation of a public utility, under its county franchise, to relocate its pipes at its own expense, rests on the paramount right of the people as a whole to use the public streets wherever located, and fact that franchise was granted by a county as an agent of a state did not defeat right of city, as another such agent, acting in its governmental capacity, to invoke such public right for the public benefit.

## **4. Municipal Corporations** ⇨277

Power of a city to construct sewers is a power so important that city may exercise it outside of its territorial limits without express authorization.

## **5. Municipal Corporations** ⇨685

A utility's rights in the public streets are taken subject to the paramount right of public travel, and the same rule applies between public utilities and municipal corporations using the streets for sewer purposes.

## **6. Municipal Corporations** ⇨684

As a public grant, a franchise for use of streets granted to a public utility is to be construed in favor of the public interest. West's Ann.Civ.Code, § 1069.

## **7. Municipal Corporations** ⇨688

Where there was no provision in utility company's franchise abrogating its common-law obligation to relocate its pipes, at its own expense, utility company did not have the right to recover costs of such a relocation, even though utilities' franchise was from the county and relocation was necessitated by a sewer project undertaken by a city in an unincorporated portion of county.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Claude E. Hilker, Deputy City Atty., Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, amici curiæ on behalf of appellant.

T. J. Reynolds, L. T. Rice, Allen L. Cleveland, Los Angeles, C. R. Salter, Whittier, Bates Booth, Orville A. Armstrong, Jr., and Gertrude Greengard, Los Angeles, for respondent.

Gibson, Dunn & Crutcher, Norman S. Sterry, Ira C. Powers, Martin E. Whelan, Jr., Los Angeles, F. T. Searls, P. E. Sloane, W. E. Johns and R. A. Clarke, San Francisco, amici curiæ on behalf of respondent.

TRAYNOR, Justice.

The City of Los Angeles constructed the La Cienaga and San Fernando Relief Sewer as part of a sewer construction program. A short section of this sewer line passes under a narrow strip of land known as the County Strip located outside the city limits in an unincorporated area of the county of Los Angeles. To construct the sewer it was necessary to relocate gas lines of the Southern California Gas Company. The company agreed to relocate its gas lines in the County Strip subject to a later determination of its obligation to do so at its own expense. It conceded its obligation to relocate its lines at its own expense within the city limits but denied that it had the same obligation with respect to its lines located in the County Strip. After the work was completed it brought this action against the city to recover the costs incurred in relocating its County Strip lines and recovered judgment for \$12,003.92 plus interest. The City appeals.

[1] The company located its lines in the county pursuant to a county franchise. It is not disputed that this franchise constitutes a contract secured by the United States Constitution against impairment by subsequent state legislation (see *County of Los Angeles v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 382, 196 P.2d 773) and that the company's rights thereunder can not be taken or damaged for public use without making just compensation. Cal.Const. art. I, § 14; U.S.Const. Amend. 14, § 1; Russell

*v. Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912; *United States v. Brooklyn Union Gas Co.*, 2 Cir., 168 F.2d 391, 394; *City of Petaluma v. Pac. Tel. & Tel. Co.*, 44 Cal.2d 284, 288, 282 P.2d 43. Accordingly it is necessary to determine what those rights are.

[2] In the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets. *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U.S. 453, 461-462, 25 S.Ct. 471, 49 L.Ed. 831; *Chicago, B. & Q. Railway Co. v. State of Illinois ex rel. Drainage Com'rs*, 200 U.S. 561, 586, 26 S.Ct. 341, 50 L.Ed. 596; *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565, 566; *Southern Bell Tel. & Tel. Co. v. Commonwealth, Ky.*, 266 S.W.2d 308, 310; *Southern Bell Telephone & Telegraph Co. v. State ex rel. Ervin, Fla.*, 75 So.2d 796, 800; *Western Gas Co. of Washington v. City of Bremerton*, 21 Wash.2d 907, 153 P.2d 846, 847; *In re Delaware River Joint Commission*, 342 Pa. 119, 19 A.2d 278, 280; *Natick Gas Light Co. v. Inhabitants of Natick*, 175 Mass. 246, 56 N.E. 292, 293; *Opinion of the Justices*, 152 Me. 449, 132 A.2d 440, 443; *Opinion of the Justices, N.H.*, 132 A.2d 613, 614. The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule. *Detroit Edison Co. v. City of Detroit*, 332 Mich. 348, 51 N.W.2d 245, 247-248; *Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville*, 236 Ky. 376, 33 S.W.2d 344, 344-345; *Nicholas Di Menna & Sons v. City of New York, Sup.*, 114 N.Y.S.2d 347, 350; *Portland Gas & Coke Co. v. Giebisch*, 84 Or. 632, 165 P. 1004, L.R.A. 1917E, 1092; *City of San Antonio v. San Antonio St. R. Co.*, 15 Tex.Civ.App. 1, 39 S.W. 136, 138; *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684, 688, 6 L.R.A., N.S., 1026; *National Water Works Co. v. City of Kansas*, C.C. 28 F. 921, 922-923; cf., *City of Los Angeles v.*

Los Angeles Gas & Electric Corp., 251 U.S. 32, 39-40, 40 S.Ct. 76, 64 L.Ed. 121; State ex rel. Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449, 460; Postal-Telegraph-Cable Co. v. City and County of San Francisco, 53 Cal.App. 188, 192-193, 199 P. 1108. Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090, is not to the contrary, for in that case the utility's private right of way was involved, not its right to use the public streets.

[3-5] The company contends, however, that any implied obligations in its county franchise to relocate its pipes cannot be invoked for the benefit of the city operating outside its territorial limits. We cannot agree with this contention. Such obligations rest on the paramount right of the people as a whole to use the public streets wherever located, and the fact that a franchise is granted by one political subdivision as an agent of the state (see, San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 83, 225 P. 304; Belfast Water Co. v. City of Belfast, 92 Me. 52, 42 A. 235, 237) does not defeat the right of another such agent acting in its governmental capacity to invoke the public right for the public benefit. First Nat. Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699, 711; City of San Antonio v. Bexar Metropolitan Water Dist., Tex.Civ.App., 309 S.W.2d 491, 493; Cummins v. City of Seymour, 79 Ind. 491, 41 Am.Rep. 618, 623-625; New Orleans Gaslight Co. v. Drainage Commission, 111 La. 838, 35 So. 929, 933; see, Gadd v. McGuire, 69 Cal.App. 347, 358-359, 231 P. 754. The fact that the city's use of county streets for its sewers is authorized by section 10101 of the Public Utilities Code has no bearing on the applicability of the foregoing rule. It is true that the rights granted to municipal corporations by that section have been held to constitute franchises subject to the paramount right of the state to make the streets safe for public travel (State v. Marin Municipal Water Dist., 17 Cal.2d 699, 703-704, 111 P.2d 651), but it does not follow

that a franchise exercised by a city in its governmental capacity under that section is subordinate to a prior franchise granted to a public utility. The utility involved in the Marin case was a municipal water district operating in a proprietary capacity. See City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 592-593, 93 P. 490. In the present case, on the other hand, the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization. Harden v. Superior Court, 44 Cal.2d 630, 638-639, 284 P.2d 9; Mulville v. City of San Diego, 183 Cal. 734, 737, 192 P. 702; McBean v. City of Fresno, 112 Cal. 159, 163, 44 P. 358, 31 L.R.A. 794; see also, National City v. Fritz, 33 Cal.2d 635, 637, 204 P.2d 7; City of Madera v. Black, 181 Cal. 306, 312-313, 184 P. 397. The Marin case itself recognized and applied the established rule that a utility's rights in the public streets are taken subject to the paramount right of public travel, and as stated above, the same rule applies between public utilities and municipal corporations using the streets for sewer purposes.

The company contends, however, that the express terms of its county franchise define its obligation to relocate its lines at its own expense and that by clear implication any other similar obligations are excluded. Section 8 of its franchise provides that "the County of Los Angeles reserves the right to change the grade of any highway over which this franchise is granted, and the grantee of said franchise, its successors or assigns, shall at once change the location of all pipes and other appliances laid hereunder to conform to such change of grade." The city contends that the recital of the obligation to relocate the gas lines for changes of grade does not exclude other implied obligations to relocate lines and that any attempt to relieve the company of such obligations would be invalid.

The right of municipal corporations to require utilities to relocate their lines to make way for governmental uses of the streets



has usually been described as resting in the police power, and it has frequently been stated in this context that the police power cannot be bargained away. *National Waterworks Co. v. City of Kansas*, C.C., 28 F. 921, 922-923; *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga.App. 252, 79 S.E.2d 265, 275; *Belfast Water Co. v. City of Belfast*, 92 Me. 52, 42 A. 235, 237; *Louisville City Railway Company v. City of Louisville*, 71 Ky. 415, 422-423; *Scranton Gas & Water Co. v. City of Scranton*, 214 Pa. 586, 64 A. 84, 85, 6 L.R.A.,N.S., 1033; *Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville*, 236 Ky. 376, 33 S.W.2d 344, 344-345; see, *New Orleans Gas Light Co. v. Drainage Commission*, 197 U.S. 453, 460, 25 S.Ct. 471, 49 L.Ed. 831. Given, however, the municipal power to vacate streets or acquire a lesser interest in them in the first instance than is usually obtained by the public (see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322; *Detroit Edison Co. v. City of Detroit*, 332 Mich. 348, 51 N.W.2d 245, 247-248), there would appear to be no basic principle that would prohibit granting a utility a right to compensation for relocating its lines as part of its franchise although such right would not otherwise pass. This view finds support in cases holding that the legislature may provide for such compensation. In *re Gillen Place*, Borough of Brooklyn, etc., 304 N.Y. 215, 106 N.E.2d 897, 900; *Baltimore Gas & Electric Co. v. State Road Commission*, 214 Md. 266, 134 A.2d 312, 315; *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 168 Pa.Super. 360, 78 A.2d 46, 51-52; *Opinion of the Justices*, 152 Me. 449, 132 A.2d 440, 443; *Opinion of the Justices*, N.H., 132 A.2d 613, 614-615; see, *Columbus Gaslight & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N.E. 292, 293, 19 L.R.A. 510.<sup>1</sup> Perhaps this apparent conflict can be reconciled on the theory that a state legislature may authorize franchises granting the

utility the right to compensation for relocating its lines to make way for governmental uses, but that it will not be held to have delegated such power to a political subdivision in the absence of express language to that effect. It is unnecessary to determine, however, whether the county was empowered to grant a franchise including the right to the compensation here sought, for we have concluded that properly interpreted the company's franchise included no such right.

[6, 7] As a public grant the franchise is to be construed in favor of the public interest. *Knoxville Water Company v. City of Knoxville*, 200 U.S. 22, 33-34, 26 S.Ct. 224, 50 L.Ed. 353; *County of Los Angeles v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 384, 196 P.2d 773; *City of Sacramento v. Pacific Gas & Electric Co.*, 173 Cal. 787, 791, 161 P. 978; Civ.Code, § 1069. Its own terms provide that it "is hereby granted upon each and every condition herein contained, and shall ever be strictly construed against the grantee and its successors and assigns. Nothing shall pass hereby unless it be granted in plain and unambiguous terms." The maxim *expressio unius exclusio alterius est* cannot be invoked to make plain and unambiguous the right to compensation that the company seeks. Given the parties' express recognition of the rule of strict construction against the grantee, paragraph 8 cannot reasonably be interpreted as being more than a partial expression of the parties' common-law rights and obligations (*City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 77, 142 P.2d 289; *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 772-773, 161 P. 975) inserted out of an abundance of caution or by way of example only. *City of Lexington ex rel. Menefee v. Commercial Bank*, 130 Mo.App. 687, 108 S.W. 1095, 1096; *Georgia Power Co. v. Leonard*, 187 Ga. 608, 1 S.E.2d 579, 581; see also, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 206, 48 S.Ct. 480, 72 L.Ed. 845;

1. It should be noted that we are not here concerned with the question of the power of the Legislature to grant additional rights under a franchise after it has been

accepted by the utility and the problem that would be raised thereby of a possible gift of public funds:

Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 811, 151 P.2d 505, 157 A.L.R. 324. Thus, the New York Court of Appeals has pointed out that despite the existence of express provisions dealing with the utility's obligations with respect to the streets "The reasonable construction \* \* \* is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that to relieve the public service corporations having franchises in the streets of their common-law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the Legislature." *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565, 568; see, also, *New York City Tunnel Authority v. Consolidated Edison Co.*, 295 N.Y. 467, 68 N.E.2d 445, 448-449. *City of Chicago v. Sheldon*, 9 Wall. 50, 76 U.S. 50, 19 L.Ed. 594; *State ex rel. City of Kansas City v. Corrigan Consol. Street Ry. Co.*, 85 Mo. 263; *City of Kansas City v. Corrigan*, 86 Mo. 67, and *Western Union Tel. Co. v. Police Jury, etc.*, 225 La. 531, 73 So.2d 450, are not to the contrary. The first three of these cases involved, not competing uses of the streets, but the extent of the utility's duty to repair and repave the streets, a matter covered by the express terms of the franchise, and in the Sheldon case the court's interpretation was in accord with the practical construction placed on the franchise by the parties. In the fourth case, the competing public use was so highly unusual that it could not have been contemplated at the time the franchise was accepted. In the present case, on the contrary, the use of the streets for sewers was clearly to be anticipated, the utility's common-law obligation to relocate its pipes to accommodate that use has at all times been clearly recognized by the law, and there is no provision in the company's franchise abrogating that obligation by giving it the right to recover the costs of such relocation.

The judgment is reversed with directions to the trial court to enter judgment for the defendant city.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

CARTER, Justice (concurring).

Although I agree with the conclusion reached in the opinion prepared by Mr. Justice TRAYNOR, for the reasons hereinafter stated, I regret my inability to join in said opinion.

My views with respect to the application of article I, section 14, of the Constitution of California to the ordinary situation in which private property has been taken or damaged for a public use, have been stated many times in both majority, dissenting and concurring opinions which I have written as a member of this court (*Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *Archer v. City of Los Angeles*, 19 Cal.2d 19, 29, 119 P.2d 1; *O'Hara v. Los Angeles County Flood Control Dist.*, 19 Cal.2d 61, 64, 119 P.2d 23; *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 398, 153 P.2d 950; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 646, 220 P.2d 897). It will be noted that in all of the cases above cited it was the position of the public agency which took the property or caused damage thereto, that the taking or damaging was done under the police power reserved to the state and its political subdivisions by article XI, section 11, of the Constitution of California. I did not agree with this contention, and my position in this regard is the same now as it was then. This is the first case since I have been a member of this court, in which, in my opinion, the police power doctrine was applicable to the facts of the case presented. A review of the above-cited cases reveals a state of confusion in the minds of some members of this court with respect to the situations in which the police power doctrine may be invoked by the state or a political subdivision thereof to take, damage or destroy private property without the payment of compensation therefor in contravention of article I, section 14, of the Constitution of California. See *Rose v. State of California*, supra; *Bacich v. Board of Control*, supra; *Archer v. City of Los Angeles*, supra; *O'Hara v. Los Angeles County Flood*



Control Dist., *supra*; House v. Los Angeles County Flood Control Dist., *supra*; Clement v. State Reclamation Board, *supra*; Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839; People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799. A reading of the last-cited cases including the dissenting and concurring opinions therein demonstrates the truth of my statement with respect to the confusion which has existed in the minds of some members of this court in attempting to distinguish cases involving the application of article I, section 14 (eminent domain), of the Constitution and cases involving the application of article XI, section 11 (police power), of the Constitution of California. The opinion prepared by Mr. Justice TRAYNOR in this case adds to that confusion, as he fails to differentiate between the powers granted to the state and its political subdivisions under the last two cited constitutional provisions. Said opinion states: "In the present case, on the other hand, the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization." He then cites *Harden v. Superior Court*, 44 Cal.2d 630, 284 P.2d 9, which is a case involving power of eminent domain. Later in his opinion, he states: "The right of municipal corporations to require utilities to relocate their lines to make way for governmental uses of the streets has usually been described as resting in the police power, and it has frequently been stated in this context that the police power cannot be bargained away." The cases he cites here correctly apply the police power doctrine.

In said opinion, Mr. Justice TRAYNOR also discusses the power of the Legislature to provide for the payment of compensation in cases such as this, but this proposition is not involved here because it is conceded that the Legislature made no such provision. This discussion is therefore obiter dictum.

There is really no need for the confusion which now exists in the decisions of

this court which have had occasion to apply article I, section 14, and article XI, section 11, of the Constitution of California to particular factual situations as there is a clear distinction between the power of eminent domain and the police power granted by said constitutional provisions. It may be true that there is a twilight zone where the line of demarcation between the exercise of the power of eminent domain and the exercise of the police power is difficult to discern, but in view of the very clear pronouncements of the Supreme Court of the United States in this field, this is not such a case. I say this, notwithstanding my predilection to hold otherwise before reading the decisions of the Supreme Court of the United States applicable to the facts of this case. *New Orleans Gas Light Co. v. Drainage Commission*, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831; *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; *Chicago, B. & Q. R. Co. v. State of Illinois ex rel. Drainage Com'rs*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596; *New York & N. E. Railroad Co. v. Town of Bristol*, 151 U.S. 556, 14 S.Ct. 437, 38 L.Ed. 269; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585; *Stone v. State of Mississippi*, 101 U.S. 814, 25 L.Ed. 1079; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U.S. 650, 671, 6 S.Ct. 252, 29 L.Ed. 516. In view of these decisions, we have here a very simple case which should be disposed of by an opinion free from the confusion and dictum which permeates many of the other decisions of this court in this field. For the sake of clarity only, I have prepared an opinion which correctly states and disposes of the issues in this case in accordance with the rules of law as declared by the Supreme Court of the United States to be applicable to the factual situation presented here.

Defendant, city of Los Angeles, a municipal corporation, appeals from a judgment awarding compensation to plaintiff, Southern California Gas Company, a corporation, for its costs in relocating its gas lines. The



case was tried on an agreed statement of facts.

The city of Los Angeles, hereinafter referred to as the city, began a sewer construction program, one of the main parts of which was the construction of the "La Cienaga and San Fernando Valley Relief Sewer." This sewer carries sewage from the San Fernando Valley to a spot near La Cienaga Boulevard where it meets with the Hyperion disposal plant line. A small portion of this sewer line passes under a narrow strip of land known as the County Strip which is located outside the city limits but within an unincorporated area in the county of Los Angeles. A portion of the proposed sewer route underlying public streets in the County Strip was occupied by the gas lines of the Southern California Gas Company, hereinafter called the company. The company agreed to relocate its gas lines in the County Strip to make way for the sewer mains subject to a later determination of its obligation to do so at its own expense. The company conceded its obligation to relocate its lines as its own expense within the city limits but denied that it had the same obligation with respect to its lines located in the County Strip. Judgment was rendered in favor of plaintiff company in the sum of \$12,003.92, together with interest thereon at the rate of 7 per cent from March 25, 1955. The city appeals.

The city argues that a public utility, such as plaintiff, is obligated to relocate at its own expense its facilities underlying public streets within an unincorporated portion of the county to make way for a public improvement being installed therein by the city. The major points here involved are whether the installation and maintenance of sewers by a municipality for the protection of the public health is an exercise of the police power; whether the police power of the *state* is being exercised by a municipality when it constructs connecting sewers beyond its boundaries; and whether the relocation of gas lines, at the company's expense, constitutes a taking of private

property without compensation within the meaning of the constitutional prohibitions.

There can be no doubt at this time but that the installation and maintenance of sewers in the interests of the public health by a municipality is an exercise of the police power. In *Harter v. Barkley*, 158 Cal. 742, 744, 745, 112 P. 556, 557, it was held that "The regulation of the right of laying sewers in public streets is unquestionably a power conferred upon municipalities, partly by virtue of the provisions of section 11 of article XI of the Constitution of California. The proper protection of the public health depends very largely upon the maintenance of a thorough and sanitary sewer system \* \* \*. It has been held, and we think very properly, that ordinances of a municipal corporation providing for the construction, maintenance, and repairs of sewers and drains are to be sustained as a valid exercise of police power." "Regulation by ordinance of methods and devices for the conveyance of sewage from private dwellings in municipalities is recognized as an exercise of that branch of the police power which pertains to the public health \* \* \*." In *re Nicholls*, 74 Cal.App. 504, 507, 241 P. 399, 400; and see, *Sullivan v. City of Los Angeles*, 116 Cal.App.2d 807, 811, 254 P.2d 590.

The city contends that it is exercising the police power of the state when it constructs sewers beyond its boundaries and that it is authorized to do so by section 10101 of the Public Utilities Code and by its city charter. Section 10101, Public Utilities Code, provides: "There is granted to every municipal corporation of the State the right to construct, operate, and maintain water and gas pipes, mains and conduits, electric light and power lines, telephone and telegraph lines, sewers and sewer mains, all with the necessary appurtenances, across, along, in, under, over, or upon any road, street, alley, avenue, or highway, and across, under, or over any railway, canal, ditch, or flume which the route of such works intersects, crosses, or runs along, in such manner as to afford security for life and property."

The Los Angeles City Charter provides (§ 2(6)) that the city shall be empowered "To make and enforce within its limits all such local, police, sanitary, safety, welfare and other regulations as are not in conflict with general laws, and to exercise such jurisdiction *outside its limits* in such manner as may be authorized by law." (Emphasis added.)

In *Mulville v. City of San Diego*, 183 Cal. 734, 737, 192 P. 702, 703, it was said: "In general, a municipality is competent to act beyond its boundaries only in those cases in which it is so empowered by legislative authority, and it is necessary, in passing upon the validity of acts of a municipality performed beyond its boundaries, to look to the general laws and municipal charter for the requisite authority. In certain instances, owing to the urgency of extreme expediency or necessity, express authority is dispensed with and the power of the municipality to perform certain acts beyond its boundary is implied as incidental to the existence of other powers expressly granted. Thus, it has been held that, where a municipality has power to construct sewers, it may, as an implied incident to such power, extend the same beyond its boundaries when necessary or manifestly desirable. *McBean v. City of Fresno*, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; *City of Coldwater v. Tucker*, 36 Mich. 474; *Cochran v. Village of Park Ridge*, 138 Ill. 295, 27 N.E. 939; 4 *McQuillin on Municipal Corporations*, § 1434." *Ebrite v. Crawford*, 215 Cal. 724, 728-729, 12 P.2d 937; *In re Blois*, 179 Cal. 291, 295, 176 P. 449; *Raynor v. City of Arcata*, 11 Cal.2d 113, 120, 77 P.2d 1054. In *In re Blois*, 179 Cal. 291, 296, 176 P. 449, 451, we said that we were "disposed to agree" and "to concede that municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality. As, for example, this court has held that a municipality has power to construct and maintain a system of waterworks outside of its boundaries for the supply of its in-

habitants with water, and that it might even go to the extent of supplying water to persons living without the limits of such municipality. *City of South Pasadena v. Pasadena Land, etc. Co.*, 152 Cal. 579, 93 P. 490."

It clearly appears that the city was exercising the police power of the state by express grant of power as set forth in section 10101 of the Public Utilities Code as augmented by the provisions of its own charter and, that even had there not been such an express grant of power, the authority would be implied from the nature of the work undertaken under the police power. There can be no question but that it was imperative that the city's sewage disposal system connect with the Hyperion disposal plant and that such an exercise of the police power would have carried with it, by necessary implication, the power to act without its boundaries in making the connection. As we said in *McBean v. City of Fresno*, 112 Cal. 159, 163, 44 P. 358, 359, 31 L.R.A. 794, where disposition of the outfall of the sewage system outside the city limits was involved, "Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether by possibility the power had been expressly denied."

The company contends that the city has neither a contractual right, nor the police power, to compel a utility to relocate its pipes without compensating the utility when both the pipes of the utility and the sewage system of the city are without the city limits. The company argues that its franchise from the county vested certain rights in it and contained only one limitation—that of bearing the expense of relocation of its lines if the county changed the grade of any highway. In other words, it is contended that its rights under the franchise from the county are by reason of the contract and are limited only by the terms of the contract. The city, on the other hand,



maintains that the use by a public utility of public streets is subservient to the public use; that if the company's argument had merit it would mean that a city, or county, could impair or surrender its fundamental police power by contract. The city relies upon the case of *New Orleans Gas Light Co. v. Drainage Commission*, 197 U.S. 453, 25 S.Ct. 471, 472, 49 L.Ed. 831, in support of its position. The court there said: "It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the drainage commission, in the exercise of the police power granted to it by the state, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal." The Supreme Court of the United States, speaking of the case of *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U.S. 650, 671, 6 S.Ct. 252, 29 L.Ed. 516, said: "Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the state to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety." And, quoting from the same case, it was said: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for

the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.'" The court further said: "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The drainage commission, in carrying out this important work, it has been held by the supreme court of the state, is engaged in the execution of the police power of the state." And "It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated, nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the drainage commission. The police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away. *New York & N. E. Railroad Co. v. Town of Bristol*, 151 U.S. 556, 567, 14 S.Ct. 437, 38 L.Ed. 269; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 751, 4 S.Ct. 652, 28 L.Ed. 585; *Stone v. State of Mississippi*, 101 U.S. 814, 816, 25 L.Ed. 1079. In a large city like New Orleans, situated as it is, and the entrepôt of an extensive commerce coming from many foreign countries, it is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the



state might require for a necessary public use that changes in location be made. \* \*

"The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage; and every reason of public policy requires that grants of rights in such subsurface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, *even if it could legally be done*, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities." (Emphasis added.) Speaking of *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 254, 17 S.Ct. 581, 41 L.Ed. 831, the court said: "In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

Company argues that its franchise gave it vested rights which cannot be taken away without payment of compensation. In

*Russell v. Sebastian*, 233 U.S. 195, 204, 34 S.Ct. 517, 520, 58 L.Ed. 912, relied upon by company in support of its contention, a gas company operating under a provision of the Constitution of California sought to lay additional pipes in streets not theretofore used by it. The city of Los Angeles, by ordinance, prohibited, in effect, the use by the company of the streets not theretofore used by it. The Supreme Court held that the grant to the gas company which resulted from an acceptance of the state's offer constituted a contract and vested in the company a property right "protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court." The effect of the municipal ordinance in the *Russell* case was to *take away* from the gas company its right to extend its mains and lines into additional streets in order to provide additional service to the people. No such rights are involved in the case at bar. We are here concerned merely with a relocation of existing lines in order to make way for a sewage system being constructed for the benefit of the public. The company's vested property right here is to continue its lines and installations at *some*, rather than a specific, *location* within the public streets. By such a relocation, property "is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law." *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 591, 41 L.Ed. 979. In *Chicago, B. & Q. R. Co. v. State of Illinois ex rel. Grimwood*, 200 U.S. 561, 584, 26 S.Ct. 341, 346, 50 L.Ed. 596, 605 the court said that it had "recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and, as we think, decisive

case of *New Orleans Gas Light Co. v. Drainage Commission* \* \* \*." And, 200 U.S. at pages 593, 594, 26 S.Ct. at page 350, 50 L.Ed. at pages 609, 610, "Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution."

The company in support of its argument that its vested rights cannot be impaired without compensation also cites the case of *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 39, 40 S.Ct. 76, 79, 64 L.Ed. 121, that "A franchise conveys rights and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they came into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation." In the *City of Los Angeles* case, *supra*, a clear distinction exists which was specifically noted by the court: "what the city did was done not in its governmental capacity—an exercise of the police power—but in its 'proprietary or quasi private capacity' and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court. *Vilas v. City of Manila*, 220 U.S. 345, 31 S.Ct. 416, 55 L.Ed. 491; *Russell v. Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912; *State of*

*South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831; *City of Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496, 508, 27 S.Ct. 762, 51 L.Ed. 1155." 251 U.S. at pages 38, 39, 40 S.Ct. at page 78. The city in the instant case was acting in its governmental capacity—in the exercise of police powers granted to it by the state—and in the interests of the public health and welfare. The city, in the *City of Los Angeles* case, *supra*, sought to establish a lighting system of its own. It was noted that the only question was "whether the city may as a matter of public right and without compensation clear a 'space' for the instrumentalities of its system by removing or relocating the instrumentalities of other systems." 251 U.S. at page 37, 40 S.Ct. at page 78. It was specifically held: "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated." 251 U.S. at page 40, 40 S.Ct. at page 79.

Company next argues that the state cannot impair the obligation of its contracts without compensation. From this argument company reasons that because its franchise contained only one condition—the relocation of its installations at its own expense in the event of changes in the highway grade—no other conditions may be imposed. It will be recalled that this point was specifically considered in the case of *New Orleans Gas Light Co. v. Drainage Commission*, 197 U.S. 453, 25 S.Ct. 471, 473, 49 L.Ed. 831, where it was held that "The

police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away" and that "There is nothing in the grant to the gas company, *even if it could legally be done*, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare." Company contends that the rules set forth in the New Orleans Gas Light case have been "disposed of very tersely" by the case of Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090. The Panhandle case involved a Delaware corporation which had obtained, by purchase, rights of ways from owners of property to construct and maintain conduits for transporting natural gas. In 1930 it purchased rights of way for pipes, auxiliary telephone lines, etc. After the pipes were in operation, the Highway Commission of Kansas, in 1933, pursuant to statute adopted plans for new highways across the company's rights of way in several places. The state obtained permission from the owners of the fee to use the land obtained for the highways, but the company refused to permit the use of its right of way. The state court had held that the new highways were being constructed under the police power of the state and that the necessary relocation of the company's installations at company expense did not constitute a taking of private property without due process of law. The Supreme Court of the United States reversed the state court holding (294 U.S. at page 619, 55 S.Ct. at page 566) that "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." It can readily be seen that there are important distinctions between the Panhandle case and the New Orleans Gas Light case and the case at bar. In the

Panhandle case the company had purchased rights of way from private owners of land for its installations. In the New Orleans Gas Light case and the case at bar, the companies were granted permission to use the subsurface of public roads already in existence. In the Panhandle case, the state desired to construct new highways over the private rights of way previously acquired by the company. The acquisition of and construction of public highways does not come within the purview of the police power but is accomplished under the power of eminent domain embraced within section 14 of article I of the Constitution of the State of California. See *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 144 P.2d 839; *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799. The Supreme Court of the United States did not overrule, either directly or indirectly, the New Orleans Gas Light case, but distinguished it as being within the purview of the exercise of the police power as follows: "New Orleans Gas Light Co. v. Drainage Commission, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831, and similar cases concerning pipes in public streets, are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality." (294 U.S. at page 623, 55 S.Ct. at page 567.)

It was specifically pointed out in the New Orleans Gas Light case that the police power of the sovereignty could not be contracted away and that any franchise, such as we have under consideration here, must be considered, insofar as location of gas installations is concerned, to have been acquired subject to such future regulations as might be required in the interest of the public health and welfare. As the Supreme Court said in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 254, 17 S.Ct. 581, 41 L.Ed. 979, uncompensated obedience to a regulation enacted for the public safety under the police power of the state was



not taking property without due compensation. This holding was again stated and approved in *New Orleans Public Service v. City of New Orleans*, 281 U.S. 682, 687, 50 S.Ct. 449, 74 L.Ed. 1115.

Both the city and company rely upon *Merced Falls Gas & Electric Co. v. Turner*, 2 Cal.App. 720, 721, 723, 724, 84 P. 239, 240, in support of their positions. The *Merced* case involved the relocation of some electric light poles on a city street. The company brought an action to enjoin the city and, after declining to amend its complaint, judgment was entered upon defendant city's demurrers. The court noted that "The sole contention of appellant [company] in both appeals involves the power of the city authorities to compel or make the change in question." The court, in holding that the city had the power to compel the relocation of the poles, said: "But the Constitution in providing for the exercise and enjoyment of the franchise owned by appellant [company], did not grant an absolute indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance. \* \* \* and therefore such regulations, or the absence of them, cannot limit or annul the general power granted to the municipality, to direct and control the manner in which the streets shall be used, and the franchise exercised. Courts will not hesitate to stay the arm of municipal power when any attempt to curtail or deny the constitutional right is made manifest or a clear abuse of discretion is shown. But they will as unhesitatingly frown upon the doctrine that the constitutional provision in question must be construed as an abdication or denial of power on the part of cities to widen, straighten, beautify and improve streets and sidewalks, and to compel prop-

erty owners of every class and kind to conform to all reasonable regulations redounding to the general good." Company relies on the following language from the same case: "It may be contended that the averment of irreparable injury sufficiently shows that the regulation is unreasonable and confiscatory. The damage which has already accrued is estimated at \$1,000, and it is difficult to guess why the sum total of damage resulting from the removal of all the poles may not be as easily estimated and compensated." From this company argues that the holding of the case is that the company there was entitled to damages accruing by reason of the relocation of its poles. The case cannot be construed as contended for by company since the question of the cost of relocating the poles was not involved. The only contention made there was that the city did not have the power to compel the company to relocate its poles and any statement which did not bear upon that question is clearly dictum. Company cites many other cases in support of its position, none of which is in point. *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 83 P. 54, 5 L.R.A.,N.S., 174, held that the situs where a franchise was used was where it was to be taxed; *Matter of Russell*, 163 Cal. 668, 126 P. 875, held that a gas company had no vested rights in streets not previously used by it for the laying of gas mains; *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 P. 557, was concerned with the situs of a franchise as taxable property; *City of South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 93 P. 490, involved the sale and transfer of a franchise for the supplying of water by a private corporation to a municipal corporation; *County of Los Angeles County v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 196 P.2d 773, involved an attempt by the county to collect a tax from the defendant which had obtained a franchise from the state under section 536 of the Civil Code.<sup>1</sup> In *Matter of Application of Keppelmann*, 166 Cal. 770, 138 P.

1. Now Public Utilities Code, § 7901.

346, a municipal ordinance provided that written permission had to be obtained from the board of public works before excavations could be made in streets occupied by a gas company for its pipes and conduits. This court held that the company's rights under the constitutional grant were "not absolute" but subject to the direction of those in control of such streets. *Rose v. State of California*, 19 Cal.2d 713, 730, 123 P.2d 505, involved inverse condemnation proceedings; *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1, was erroneously decided under the police power doctrine but in reality involved only inverse condemnation under article I, section 14, of the California Constitution. *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950, involved an action in inverse condemnation for damages sustained by plaintiff because of the negligence of the defendant in the planning and construction of certain flood control channel work in the Los Angeles River. This case in effect overruled the *Archer* case, *supra*. *Hossom v. City of Long Beach*, 83 Cal.App.2d 745, 189 P.2d 787, involved an action to redeem land which had been sold for delinquent taxes. *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148, involved the condemnation of land for public uses and held that the buildings and other fixtures on the land must be considered in determining the owner's compensation. In *Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co.*, 72 Cal.App.2d 638, 165 P.2d 741, a special proceeding in eminent domain under the Public Utilities Act.

Company's arguments concerning *statutory* authority for payment of compensation for utility relocations are of no avail here and it is only necessary to point out that no such statutory authority exists to cover the situation with which we are here concerned.

For the foregoing reasons I am compelled to join with the majority and vote for a reversal of the judgment with directions to the trial court to enter judgment for the defendant city.

McCOMB, Justice.

I dissent. I would affirm the judgment for the reasons stated by the District Court of Appeal in *Southern California Gas Co. v. City of Los Angeles*, 318 P.2d 735 [rehearing granted].

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.



163 Cal.App.2d 324

**CROFOOT LUMBER, Inc.**, a corporation,  
Plaintiff and Respondent,

v.

**Henry THOMPSON and Jack Edsell et al.**,  
Defendants and Appellants,

**Jack Lewis, William Moores, William Smith**,  
Individually and as a copartnership do-  
ing business as **Moores & Smith**, a copart-  
nership, **Hollow Tree Lumber Company**,  
a corporation, and **Don Ford**, Intervenor  
and Appellants.

Civ. 9326.

District Court of Appeal, Third District,  
California.

Sept. 3, 1958.

Rehearing Denied Sept. 30, 1958.

Hearing Denied Oct. 28, 1958.

Action to terminate purchasers' rights and interest under contract for sale of timber, for an accounting, and for restitution, wherein others, claiming an interest in the timber, intervened. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment declaring rescission of contract and that since date of notice of rescission, plaintiff had been the owner in fee simple and entitled to possession of the land and timber standing thereon, and defendants and intervenors appealed. The District Court of Appeal, Van Dyke, P. J., held that the record supported finding that breaches of purchaser's obligations under contract to commence and complete logging operations within reasonable time, account for timber cut and removed, and

pay for such timber promptly and periodically were so material as to constitute a failure of consideration and entitle owner of land to rescind contract and obtain restitution.

Judgment affirmed.

#### 1. Assignments ⇨137

In action to terminate, because of material breach by purchasers, their rights and interest under contract for sale of timber, evidence supported finding that one of purchasers had assigned his interest in contract to copurchaser and that assignor's grantee acquired no interest in timber by virtue of quitclaim deed by which assignor subsequently conveyed his interest in timber to another.

#### 2. Logs and Logging ⇨3(15)

In action to terminate, because of material breach by purchasers, their rights and interest under contract for sale of timber, record supported construction of contract as requiring purchasers to commence and complete logging operations within reasonable time, fixed by court as one and three years respectively.

#### 3. Contracts ⇨324(1)

The purpose of "restitution" as a remedy for breach of contract is to restore injured party to as good a position as he occupied before contract was made by money judgment for value of any performance rendered by plaintiff and received by defendant or by return of specific property, without compensating plaintiff for consequential harm.

See publication Words and Phrases, for other judicial constructions and definitions of "Restitution".

#### 4. Logs and Logging ⇨3(7)

Contract for sale of timber transferred to purchasers a valuable property right, regardless of whether contract conveyed title to the timber or merely the right to cut and remove and thus obtain title to timber as taken.

#### 5. Contracts ⇨261(2)

Right of injured party to terminate contract because of breach thereof by other

party depends upon the gravity of such breach. West's Ann.Civ.Code, §§ 1688, 1689.

#### 6. Contracts ⇨326

Failure to perform some minor part of contractual duty constitutes a breach of contract for which action for damages may be maintained.

#### 7. Contracts ⇨324(1)

Injured party may not maintain action for restitution unless nonperformance of defendant's obligations under contract is so material that it goes to the essence and discharges injured party from any further contractual duty. West's Ann.Civ.Code, §§ 1688, 1689.

#### 8. Logs and Logging ⇨3(15)

Record supported finding that breaches of purchasers' obligations under contract for sale of timber to commence and complete logging operations within reasonable time account for timber cut and removed, and pay for such timber promptly and periodically were so material as to constitute a failure of consideration and entitle owner of land to rescind contract and obtain restitution. West's Ann.Civ.Code, §§ 1688, 1689, 1691.

#### 9. Contracts ⇨270(1, 3)

Whether party seeking to rescind contract because of material breach thereof by other party has exercised due diligence, generally depends upon the particular facts of each case, and lapse of time is not the by other party has exercised due diligence West's Ann.Civ.Code, §§ 1688, 1689, 1691.

#### 10. Logs and Logging ⇨3(5)

In action to terminate, because of material breach by purchasers, their rights and interest under contract for sale of timber, record supported implied finding that owner of land, though overly indulgent of breaches of contract, was not disqualified by lack of diligence to terminate contract and seek restitution. West's Ann.Civ.Code, §§ 1688, 1689, 1691.

#### 11. Logs and Logging ⇨3(15)

Judgment declaring rescission of contract for sale of timber because of material breaches thereof by purchasers and restor-



ing to owner of land possession and ownership of timber thereon was not objectionable as declaring a forfeiture of purchasers' interest in such timber. West's Ann.Civ. Code, §§ 1638, 1639.

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Francis M. Passalacqua, Healdsburg, and McKenzie, Arata & Murphy, Santa Rosa, for appellant Thompson.

Kasch & Cook, Ukiah, for appellants Edsell and Lewis.

Brobeck, Phleger & Harrison, San Francisco, for other appellants.

Spurr & Brunner, Ukiah, and Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment declaring the rescission in fact of a contract whereby the predecessor in interest of plaintiff-respondent agreed to sell to Henry Thompson and Jack Edsell the merchantable timber upon land in Mendocino County.

The contract made August 15, 1949, read as follows:

"This agreement entered into between H. C. Crofoot (Seller) and Henry Thompson and Jack Edsell (Purchasers) this 15th day of August 1949, whereby Purchasers agree to pay \$500.00 at above date, \$5.00 a thousand stumpage (Spalding Scale) for all merchantable timber and \$2.00 per thousand (Spalding Scale) for all timber not classified as merchantable timber. The Tan Oak is to be purchased at the prevailing price at time of cutting. Said timber is located in the County of Mendocino, State of California, and said timber is described as follows:

"Lots 11, 12, 24 of Section 19, W $\frac{1}{2}$  of SW $\frac{1}{4}$ , NE $\frac{1}{2}$  of SW $\frac{1}{4}$ , Section 20, Township 16 North, Range 14 West, Mount Diablo Base and Meridian.

"Seller agrees to furnish all rights of way to remove said timber. Above

stumpage price for said timber to be paid for on the 1st and 15th of each month on all timber removed from premises."

[1] Thompson and Edsell immediately entered the land and began what is referred to as a "split stuff" operation which consists of felling trees sufficiently clear and choice that the logs may be split into such products as pickets, stakes and shakes. The two men worked together about four weeks and made approximately 5,000 grape stakes. Edsell then became ill and left. He never returned. He testified that when he left he turned everything over to Thompson, saying to him, "Henry, you take over. It is yours." Thompson assented to the arrangement and Edsell left. He does not appear in the picture again until six years later when he was located by appellant Lewis who obtained from him for \$250 a quitclaim deed to his interest in the timber. From the testimony of Thompson and Edsell as to Edsell's abandonment of the enterprise and his statement that he was turning his interest over to Thompson and the subsequent conduct of both, indicating mutual understanding that Edsell was no longer interested, and from the minimal consideration paid by Lewis for Edsell's quitclaim deed, the trial court found as a fact that Edsell, when he left, had assigned his interest in the contract to Thompson and that Lewis took no interest in the timber by virtue of the quitclaim. We hold the evidence was amply sufficient to support this finding of assignment.

Thompson continued on the land and continued his split stuff operation, working alone except for a short period when another man worked with him. Although he sold the products of his labor he was quite remiss in accounting therefor. On April 3, 1950, he paid respondent's predecessor \$127.11, stating that from August 15, 1949 to April 3, 1950, he had removed a total of only 25,725 board feet of timber. On December 20, 1951, he paid \$335.94, stating that since his last payment he had removed 67,188 board feet. On October 29, 1952, he paid \$214.58 to cover a claimed

cutting of 42,915 board feet. Shortly thereafter one Banks, a woods boss for Crofoot, was sent to examine the timber. He determined the amount of timber Thompson had cut far exceeded the amounts he had reported. At this time, therefore, Thompson stood in default, both in his duty to pay regularly on the 1st and 15th of each month and in his duty to account and pay for all timber taken. Banks believed him to have been guilty of concealment and false reports and endeavored to ascertain the exact conditions with respect to Thompson's operations. He demanded of Thompson that he bring in his books in order that a proper accounting might be made. Thompson agreed to do this but broke this promise also. Finally, in 1953, he told Banks that he was not obligated to make accountings and suggested that Banks see his lawyer. He continued his spasmodic removal of timber and about mid-1954 Crofoot (who had become the successor in interest to its predecessor) cruised the timber. The cruise indicated that, although reporting a total of only 135,828 board feet of timber, Thompson had actually taken approximately 350,000 board feet.

[2] The trial court construed the written agreement, in connection with evidence introduced as to the circumstances attending its execution, as requiring that Thompson should begin logging the timber land within a reasonable time which the court fixed as one year; and as further requiring that logging, once begun, should be completed within a reasonable time which the court fixed as three years. From the record we hold that the trial court correctly construed the contract. Thompson was in default as to both contractual obligations, and there was substantial evidence that Thompson's operation had resulted and would result in waste if continued since merchantable parts of logs which would not split were being left to rot in the woods. On the 17th of August, 1954, Banks for Crofoot, visited the timber land and told Thompson that for his defaults respondent had rescinded the contract and that Thompson had no further interest in the timber.

On October 1, 1954, Thompson sent in to Crofoot a statement that between October 29, 1952, and October 1, 1954, he had cut 83,925 board feet, and he accompanied his statement with a payment of \$477.83. Crofoot retained the payment, crediting the sum as a past due payment for timber taken prior to rescission.

On October 28, 1954, the present action was instituted. Crofoot joined Thompson, Edsell and several fictitiously named defendants. The first count in the complaint related the making of the timber sale agreement, the succession of Crofoot to the ownership of the real property and the allegation that Thompson and Edsell had breached the agreement by failing to pay for timber taken, by failing to pay in accordance with the rate of payment agreed upon and by failing to log the land. It was further alleged that by reason of the breaches of contract, Crofoot had elected to declare the contract and the interest of said defendants terminated. An accounting for timber taken was requested, and by a separate cause of action Crofoot sought a decree quieting its title against all defendants. Thompson answered, denying that the contract had ever been terminated as to him. He prayed that Crofoot take nothing. Edsell answered, alleging that on October 7, 1955, he had transferred his interest in the contract to Lewis and asserting that Crofoot and its predecessor in interest had waived the contract provisions for periodic payments by repeatedly receiving irregular payments. Lewis, by leave of court, intervened, setting up the transfer of Edsell's interest to himself, asserting the contract still to be in full force and asking that he be adjudged to be the owner of the interest quitclaimed to him. Later Thompson and Lewis amended their answers to allege a waiver by Crofoot and its predecessor of regular payments by receipt of irregular payments.

Upon these pleadings the cause went to trial and just prior to the close of evidence the court permitted Crofoot to amend its complaint to conform to proof. By the amendments there was pleaded breach of

the contract obligation to pay regularly, to pay fully for timber taken, to fully account, and to seasonably begin and complete logging. Crofoot further asserted that by reason of the breaches thereof, the contract had, on August 17, 1954, been terminated and rescinded and that the preexisting rights of the defendants had ended. The trial court gave judgment that since the 17th day of August, 1954, Crofoot had been the owner in fee simple and entitled to the possession of the land and the timber standing thereon; that the claims of Thompson, Edsell and Lewis and of all others claiming under them were without right and enjoining those persons from asserting such claims. The court gave Crofoot a money judgment against Thompson in the sum of \$1,911.63 for timber taken and unpaid for by him. Thereafter a motion for new trial was denied and this appeal followed.

Since the contentions on appeal revolve around the issue of unilateral termination for breach, we will summarize the findings on that issue. The court found that under the terms of the contract Thompson and Edsell agreed to remove the timber through a logging operation and split stuff operation within a reasonable time; that they agreed to commence said operation immediately and to pay for timber so removed on the 1st and 15th of each month at the specified stumpage rates; that the purchasers went into possession for the purpose of logging and removing timber under the contract; that Crofoot had fully performed the contract; that upon entering the property the purchasers commenced the hand manufacture of split stuff; that approximately four weeks after the making of the contract Edsell assigned all his interest to Thompson, after which date his interests were owned by Thompson; that on October 7, 1955, Edsell for \$250 attempted to transfer to Lewis by quitclaim deed such interest as he might have under the contract, but that on said date he had no interest; that on February 21, 1956, Lewis purported to deed a half interest in the alleged rights obtained from Edsell to

one Rawles; that because the quitclaim deed of Edsell to Lewis conveyed no interest, the purported transfer from Lewis to Rawles created no interest in Rawles; that at no time before the commencement of the action by Crofoot against Thompson, Edsell and fictitiously named defendants did Thompson transfer to Lewis or Rawles or Edsell any interest in or under the contract; that neither Lewis nor Rawles ever acquired any interest under the contract; that among the material obligations to be performed by Thompson were the obligations to pay for all timber removed, to pay therefor on the 1st and 15th of each month, to commence the removal of all timber within a reasonable time, and to complete the same within a reasonable time; that Thompson failed to perform every one of the above obligations and breached the contract in respect of each; that each breach constituted a material breach of the agreement; that Thompson manufactured split products continuously from August 15, 1949, removing timber from the subject land and utilizing it; that he failed and refused to make payments on the 1st and 15th of each month although demands had been made therefor; that he made payments on April 3, 1950, December 20, 1951, and October 29, 1952, and between the period August 15, 1949, to August 17, 1954, had sold 412,089 board feet of split products and had removed that amount of timber from the subject property, paying for only 135,530 board feet; that a reasonable time to have commenced logging operations was one year from August 17, 1954; that such operations had not begun by August 17, 1954; that a reasonable time within which the purchasers were obligated to have completed logging operations was the period of three years and that prior to August 17, 1954, Thompson had failed and refused to commence seasonably or complete the same; that on August 17, 1954, Crofoot, as successor in interest to the sellers under the contract, rescinded the contract by notice to Thompson, and that since said date the contract stood as rescinded and termi-



nated, all rights thereunder having ceased by virtue of Crofoot's election to rescind for the breaches found; that the breaches of the contract were each and all material and each and all constituted a material failure of consideration; that on October 1, 1954, after rescission, Thompson paid Crofoot \$477.83; that said sum did not cure the default of Thompson, and Crofoot retained the sum by giving credit therefor to Thompson; that Thompson still owes for timber removed up to the date of rescission the net sum of \$404.97; and that after rescission and during the pendency of this action Thompson continued to remove timber for split products manufactured by him up to February, 1956.

The court further found that during the year 1956 Thompson, Lewis and others had removed substantial quantities of timber from Crofoot's property, but that the removal thereof was the subject matter of another action pending before the court, and that damages accruing for such removal would be determined in that action and not considered in this.

The foregoing reference in the findings to "others" who were found to have acted with Thompson and Lewis in removing substantial quantities of timber during the year 1956 apparently is to William Moores, William Smith, individually and in co-partnership as Moores and Smith, Hollow Tree Lumber Company, a corporation, and Don Ford, who, purporting to act under the rights of Thompson and Lewis, went upon the property in February of 1956 during the pendency of the action and removed about four and one-half million board feet of timber in a few months. These people filed no pleading in this action, but after judgment was rendered purported to move for a new trial along with Thompson, Edsell and Lewis. After denial of their motion they purported to take an appeal, making the same demand for transcript as Thompson, Edsell and Lewis. They have also filed briefs on appeal herein, asking that the judgment be set aside. So far as the record before us is concerned, it shows no right in these parties to ap-

peal. Crofoot, however, has raised no objection to their participation herein, and since all the points raised by them are also raised by the appellants of record, we shall not further comment on their status.

[3] The action brought by Crofoot was essentially one based upon its election to consider itself discharged from further duty of performance on its part because of Thompson's breaches which Crofoot considered to be breaches of such vital importance as to justify its action in declaring the contract at an end. Having done this, Crofoot sought the alternative remedy for breach, resting in a court decree restoring to it its possession and ownership of the timber on its land. At the time the action was brought, Thompson still maintained possession and continued to cut and remove timber. The general subject of restitution as a remedy for breach of contract is treated in Corbin on Contracts, sections 1102-1121, inclusive. There it is stated in section 1102 at page 455:

"\* \* \* The purpose of this remedy is the restoration of the injured party to as good a position as was occupied by him before the contract was made, without attempting to compensate him for consequential harms; the means to this end is a judgment for the equivalent in money of any performance rendered by the plaintiff and received by the defendant (or in some cases for the return of specific property) \* \* \*."

And in section 1104, pages 461-462:

"\* \* \* [W]e are dealing with restitution as a remedy for breach of contract; a judgment for such restitution is as truly a remedy for a 'breach' as is a judgment for damages. It is true that the courts have often said, and a plaintiff has often alleged, that the contract has been 'rescinded' by the injured party because of the defendant's vital breach. Such a 'rescission' as this is essentially different from one that is based on mutual agreement, both in its operative facts and in its

legal effects. Such a 'rescission' is merely an assertion by the injured party that the other has committed a vital breach, that he himself has been discharged from the duty of further performance, and that he asks for a restitutionary remedy. If he desires, he can make identically the same assertions and ask for 'damages' instead of restitution. Also, he may properly ask for damages or restitution in the alternative, leaving his final choice to be made at the actual trial of the case."

Civil Code, section 1688, reads: "A contract is extinguished by its rescission." Section 1689 of that code provides in part as follows:

"A party to a contract may rescind the same in the following cases only:

\* \* \* \* \*

"2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; \* \* \*".

[4-7] By the contract there was transferred to Thompson and Edsell a valuable right to enter upon the land and to remove therefrom all the merchantable timber thereon, which removal when effected would substantially reduce the value of the land. Whether this contract conveyed title to the timber as contended for by appellants or constituted a right to cut and remove and thus obtain title to the timber as taken is not material to the decision of this case. In either event Thompson and Edsell received a valuable property right. In connection with it they assumed material obligations heretofore related. They took possession of the land and retained it up to and after the commencement of the action. The right of the injured party to claim release from obligations to elect to terminate the contract depends upon the gravity of the breach. \* Says Corbin, section 1104, page 464:

"\* \* \* In the case of a breach by non-performance, however, assuming that there has been no repudiation, the injured party's alternative remedy by

way of restitution depends upon the extent of the non-performance by the defendant. The defendant's breach may be nothing but a failure to perform some minor part of his contractual duty. Such a minor non-performance is a breach of contract and an action for damages can be maintained. The injured party, however, can not maintain an action for restitution of what he has given the defendant unless the defendant's non-performance is so material that it is held to go to the 'essence'; it must be such a breach as would discharge the injured party from any further contractual duty on his own part \* \* \*."

[8] In this case the trial court found that Thompson's various breaches of his obligation were material and did constitute a failure of consideration. We think the record supports this. Thompson and Edsell when they entered the land (and after Edsell's assignment, Thompson alone) stood charged with reasonable dispatch in the harvesting of timber on the land and the payment therefor as harvested. From the beginning the purchasers breached not only the obligations to harvest and pay for the timber, but also the implied obligations of honorable, fair conduct towards their seller. The entire course of conduct immediately adopted and continuously sustained was violative of every obligation they had assumed. The trial court, as appears in its memorandum opinion, was much impressed with the complete infidelity of Thompson in respect of his obligations, and we think no one can read the record and not be likewise impressed. Said the trial court:

"\* \* \* Mr. Thompson has not lived up to a single term of the contract, brief as it is. He did not pay for all timber removed by him from the premises; he did not make payments on the 1st and 15th of each month for timber removed; and he did not remove timber within a reasonable time, and did not complete the contract in a reasonable time. Each one of these

breaches went to the very roots of the contract and constituted a material violation thereof and each constituted a ground for rescission."

It is true that plaintiff and its predecessor appear to have been overly indulgent of Thompson's shortcomings, to say the least, and Thompson and those interested under him vigorously insist that therefrom in some manner arise rights of Thompson to continue in his wrongful conduct until and unless the owner of the land and the timber restored a right to have the contract performed. They appear to argue that by reason of long indulgence there arose a hiatus in Thompson's contractual obligations, a sort of license for continued wrongdoing. We cannot read the record in that light. Thompson's disregard of his contractual duties was consistent, persistent and wilful, as is shown by his response to demands that he reveal and account for quantities of timber he was taking. Civil Code, section 1691, contains the following language:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitled him to rescind, \* \* \*

And upon this subject Corbin says:

"Even though the breach by one party is a repudiation of the contract or is otherwise so substantial as to discharge the other party from further duty, it is not necessary for him to seek a judicial remedy at once or to elect immediately among the remedies that may be available. If, however, his own conduct is such as to be operative as a waiver of condition, so that his own duty to continue performance is restored, his right to the remedy of restitution is suspended although he may still have a right of action for damages. Whether his conduct actually operates as a waiver may be a difficult problem. It is often reasonable

for him to hope for a retraction of the repudiation or to expect that a defective performance will be cured by the other party. If his hope and expectation are not realized he may still treat the breach as a vital one and have the same choice of remedies as he had originally." Section 1104, pages 466-467.

[9,10] Generally, the question of diligence depends upon the facts of a particular case. *Spadoni v. Maggenti*, 121 Cal. App. 147, 8 P.2d 874. The lapse of time is not the sole consideration in determining diligence. *Beardsley v. Clem*, 137 Cal. 328, 70 P. 175. We think the trial court is supported by the record in its implied finding that under the facts of this case Crofoot, when it acted to terminate the contract and entitle itself to the remedy of specific restitution, had the right to do so. There is in this record no showing whatever that Thompson changed his position in reliance upon indulgence; that he evinced any intention of performing his contract; that he changed in any degree his habit of violation or that he was not aware at all times of the wrongful nature of his conduct. For instance, when finally Banks became insistent that he account for timber taken, Thompson, having already promised and failed to do so on a number of occasions, referred Banks to Thompson's lawyer, a remark which the trial court aptly characterized as one frequently made by those who know they are in trouble. In this case it was within the power of the trial court to find as a matter of fact that Crofoot was not disqualified to terminate the contract through lack of diligence.

[11] Appellants contend that the judgment appealed from worked a forfeiture of Thompson's interest in the timber on Crofoot's land. This is not so. Thompson's conduct gave to Crofoot the option to consider itself relinquished from all obligations to him and to terminate the contract between them, by the faithful performance of which alone Thompson could maintain and capitalize his right to take



Crofoot's timber. When that had been done which the court declared was rightfully done, the cessation of the rights and interest of Thompson occurred, but occurred because of his own wrongful conduct.

The judgment appealed from, therefore, does not declare a forfeiture.

There are other contentions advanced by appellants. We think that they are not only without merit, but that they do not require specific discussion.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



163 Cal.App.2d 280

**Josephine PERROTTI, Administratrix of the Estate of Robert David Perrotti, Deceased, Plaintiff and Appellant,**

**v.**

**Carl O. SAMPSON, Morgan & Sampson, a copartnership, Defendants and Respondents.**

**Civ. 17837.**

District Court of Appeal, First District,  
Division 2, California.

Sept. 2, 1958.

Rehearing Denied Sept. 22, 1958.

Rehearing Denied Oct. 28, 1958.

Action for wrongful death of one struck by automobile as he was returning to his own automobile after a collision. The District Court, San Mateo County, Edmund Scott, J., entered judgment for defendant, and administratrix of estate of decedent appealed. The District Court of Appeal, Dooling, J., held that instruction that ordinarily the burden rests on defendant to prove contributory negligence, the exception being where such contributory negligence, if any, appears from testimony offered on behalf of plaintiff, exclusive of

any evidence produced by plaintiff from mouth of defendant was misleading.

Reversed.

# **1. Automobiles** $\Rightarrow$ 246(30)

In action for wrongful death of one struck by automobile, plaintiff's requested instruction that defense of contributory negligence is affirmative defense, and if it has not been established by preponderance of evidence, finding must be in plaintiff's favor on that issue, should have been given.

## **2. Negligence** $\Rightarrow$ 135(2)

Burden of proving defense of contributory negligence by preponderance of evidence is constant.

## **3. Negligence** $\Rightarrow$ 135(5)

In order to prove contributory negligence, it must appear from preponderance of whole evidence that party injured by defendant's negligence was himself guilty of negligence which proximately contributed to his injuries.

## **4. Negligence** $\Rightarrow$ 122(2), 141(1)

Burden of proving defense of contributory negligence may be satisfied by evidence produced by plaintiff alone if jury finds from plaintiff's own evidence that probabilities are in favor of such contributory negligence and of its having proximately contributed to injuries; but plaintiff is entitled to have jury instructed that, from whatever source evidence of contributory negligence comes, jury can only find defense established if it finds preponderance of evidence in favor of that defense.

# **5. Automobiles** $\Rightarrow$ 246(4, 22, 30)

In action for wrongful death of one struck by automobile while crossing highway, instruction that, in determining whether negligence, contributory negligence or proximate cause has been proved by preponderance of evidence, jury should consider all evidence on subject regardless of who produced it and if testimony produced by party himself should, in judgment of jury, support finding against him on

issue as to which other party has burden of proof, such evidence will support finding, even if other party produced no evidence on subject, would have been appropriate.

#### 6. Negligence ⇨122(2)

Burden of proof does not shift if there is evidence in plaintiff's case from which his contributory negligence may be found, but whatever source of negligence jury must still find a preponderance of evidence in favor of defense of contributory negligence.

#### 7. Automobiles ⇨246(60)

In action for death of one struck by automobile while crossing highway, instruction that ordinarily burden rests on defendants to prove contributory negligence, the exception being where such contributory negligence, if any, appears from testimony offered on behalf of plaintiff, exclusive of any evidence produced by plaintiff from mouth of defendants was misleading.

#### 8. Automobiles ⇨246(30)

In action for death of one struck by automobile while crossing highway, instruction based on idea that even the slightest degree of negligence of deceased was sufficient to constitute contributory negligence was improper.

#### 9. Appeal and Error ⇨1064(1), 1067

Where court gave misleading instruction on burden of proof of contributory negligence, refused correct instruction on subject requested by plaintiff, and struck from instruction given the sentence which would have clarified fact that burden must be met, whether evidence to satisfy it came from defendant's or plaintiff's witnesses, resolution of issues of contributory negligence and proximate cause was in state of confusion which was prejudicial.

#### 10. Witnesses ⇨387

Although testimony of plaintiff's witness, a police officer, differed in one respect from fact as stated in his written report, where officer had testified to same effect at previous trial and had informed

plaintiff's investigator that fact as stated in report was erroneous, refusal to permit plaintiff's cross-examination of her own witness was not an abuse of discretion.

#### 11. Automobiles ⇨243(5)

In action for death of pedestrian who was crossing highway to return to his own automobile which he had parked on shoulder following collision with another vehicle, admission of evidence of details of the deceased's prior accident was error, but mere fact of the accident and testimony tending to show that decedent was emotionally upset when he started to cross highway would have been relevant on question of contributory negligence.

#### 12. Negligence ⇨125

Evidence of previous accidents is properly excluded, since it has no probative value on question of party's negligence in case at issue.

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Jack H. Werchick, San Francisco, for appellant.

Boyd, Taylor, Nave & Flageollet, San Francisco, for respondents.

DOOLING, Justice.

Plaintiff, administratrix of the estate of Robert Perrotti, appeals from a judgment for defendant in an action for wrongful death.

The evidence shows that at approximately 8:30 p. m. the decedent was struck and killed by an automobile driven by respondent. This accident occurred on Bayshore Highway, a four-lane road, at the intersection of Belle Avenue in Redwood City. At this time the traffic was light, the weather clear, the visibility good and the roadway dry.

Respondent testified that he was driving in the inner (east) lane of the southbound lanes at a rate of speed of approximately 55 miles per hour. He first saw the decedent "trotting" across the highway from east to west at a distance of from 20 to 40 feet in front of his automobile. Respondent immediately applied his brakes and

swerved to the right into the outer (west) lane.

Prior to this fatal accident decedent was involved in another accident, striking the rear of an automobile driven by one Hoffman. Hoffman after the collision parked on the east side of the highway. Decedent parked on the west shoulder and walked across the highway to Hoffman's automobile. He was struck by respondent's car as he was returning to his car.

The skid marks indicated that respondent's automobile stopped 258 feet from the point where there was the first evidence of braking. These marks were entirely in the outer (west) lane and they started from a point approximately 20 feet to the rear of decedent's parked automobile. Appellant's expert witness testified that respondent's automobile must have been in the outer lane for a minimum distance of 200 to 300 feet and traveling at a speed of approximately 70 miles per hour before the brakes were applied.

There was evidence that decedent had been angry and upset after his accident with Hoffman.

The court instructed the jury clearly on the meaning and effect of the burden of proof (BAJI No. 21), and that the burden of proving defendants' negligence and that such negligence was a proximate cause of the accident rested on the plaintiff, with the admonition: "If the plaintiff fails to carry such burden of proof, your verdict must be in favor of the defendants." On the question of burden of proof of contributory negligence the court gave no such clear instruction. The only mention of the burden of proof of contributory negligence was contained in the following instruction given at defendants' request:

"Contributory negligence is the want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with such negligence and proximately contributing to the injuries. Ordinarily, the burden rests upon the defendants to prove contributory negligence, the exception being

where such contributory negligence, if any, appears from the testimony offered on behalf of plaintiff, exclusive of any evidence produced by plaintiff from the mouth of defendants."

[1] Plaintiff requested Instruction No. 103-C from BAJI, Fourth Edition, which the trial court refused to give. This proposed instruction would have correctly informed the jury of the burden of proof of contributory negligence in the following language:

"Have in mind also that the defense of contributory negligence is an affirmative defense, and if it has not been established by a preponderance of the evidence, your finding must be in plaintiff's favor on that issue."

[2-4] The burden of proving contributory negligence by a preponderance of the evidence is constant. It must appear from a preponderance of the whole evidence that the party injured by the defendant's negligence was himself guilty of negligence which proximately contributed to his injuries. That burden of proof may be satisfied by the evidence produced by plaintiff alone if the jury finds from plaintiff's own evidence that the probabilities are in favor of such contributory negligence and of its having proximately contributed to the injuries; but the plaintiff is entitled to have the jury instructed that from whatever source the evidence of contributory negligence comes the jury can only find the defense of contributory negligence established if it finds a preponderance of the evidence in favor of that defense. (See the excellent discussion of this subject in the text of 1 BAJI, 4th Edition, page 296, where it is pointed out that an instruction such as that here given "reveals a failure to distinguish between burden of proof as fixed by the affirmative allegations of the pleadings, and the possible methods of proof." The text adds: "It is important to note the distinction between the burden of proof as an obligation or risk imposed by law, and the *means* by which the burden may be fulfilled. When the burden is yours, it is possible for evidence produced



by your adversary to be the means. But the fact that he so helps you, even to making it unnecessary for you to produce any additional evidence, does not change the obligation or risk that you assumed in making the affirmative allegation." Cf. 1 BAJI, 4th Edition, page 306: "Regardless of how the fact may be shown, the burden of proving contributory negligence by a preponderance of evidence rests on the defendant. True, he may be so aided by plaintiff that he need present no evidence on the point himself, but this fact does not shift the burden of proof.")

[5] The proper form of instruction is set out in BAJI, 4th Edition, Number 133, in which the jury is instructed that in determining whether negligence, contributory negligence or proximate cause has been proved by a preponderance of the evidence the jury should consider all of the evidence on the subject regardless of who produced it and if the testimony produced by a party himself should in the judgment of the jury support a finding against him on the issue as to which the other party has the burden of proof such evidence will support a finding, even if the other party produced no evidence on the subject.

The identical instruction on the burden of proof here given was the subject of criticism in *Hickenbottom v. Jeppesen*, 144 Cal.App.2d 115, 300 P.2d 689. The court in *Hickenbottom* said of this instruction at page 122 of 144 Cal.App.2d, at page 693 of 300 P.2d: "That language was unfortunate but we do not believe it misled the jury, for it was immediately followed by this definitive statement: 'In other words, the burden of proof is met as to contributory negligence if the same is shown by the evidence in the case regardless of by whom the evidence is introduced.'"

[6] This latter sentence makes it clear that the burden of proof does not shift if there is evidence in the plaintiff's case from which his contributory negligence may be found, but that whatever the source of the evidence the jury must still find a preponderance of the evidence in favor

of the defense of contributory negligence. The qualifying language last quoted was offered as a part of defendants' instruction on the burden of proof of contributory negligence but was unfortunately stricken from the instruction as given by the court. In *Hickenbottom* also the court gave other correct instructions on "defendant's duties and his burden of proof." 144 Cal.App.2d at page 123, 300 P.2d at page 693.

[7] In this case the court not only gave the misleading instruction on the burden of proof of contributory negligence, but refused a correct instruction on the subject requested by plaintiff, and struck from the instruction given the sentence which would have clarified the fact that the burden must be met, whether the evidence to satisfy it came from the defendants' or the plaintiff's witnesses.

[8] The court also gave the sturdy indestructible instruction, criticized by our Supreme Court at least as early as 1874 in *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409, 422-423, where that court said: "The formula is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover."

The idea that even the slightest degree of negligence of the plaintiff is sufficient to constitute contributory negligence dies hard. Despite the fact that this form of instruction has for over 80 years been repeatedly disapproved it still raises a sturdy head to plague appellate courts. *Polk v. City of Los Angeles*, 26 Cal.2d 519, 535, 159 P.2d 931, where the court said that it is probably not advisable to give this instruction because of its lack of clarity and probably confusing character; *Clark v. State of California*, 99 Cal.App.2d 616, 222 P.2d 300, where the giving of such instructions was held ground for reversal; *Hickenbottom v. Jeppesen*, *supra*, 144 Cal. App.2d at pages 122-123, 300 P.2d at pages

692-693, where a similar instruction was disapproved but held not prejudicial in view of other correct instructions given.

The court also gave an instruction on unavoidable accident which under the recent decision in *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500, was erroneous and could only further confuse the jury.

[9] The combination of these several instructions and the failure to give a correct instruction on the burden of proof offered by plaintiff left the resolution of the issues of contributory negligence and proximate cause in a state of confusion which we cannot refuse to find prejudicial.

[10] Appellant also complains of the refusal of the court to permit her to cross-examine one of her own witnesses, a police officer whose testimony differed in one respect from the fact as stated in his written report. This officer had testified to the same effect at a previous trial and had informed an investigator employed by plaintiff's attorney that the fact as stated in his report was erroneous. The trial judge did not abuse his discretion in holding that appellant had not shown the surprise required to justify the cross-examination of her own witness. *Sandoval v. Southern Cal. Enterprises, Inc.*, 98 Cal.App.2d 240, 245-246, 219 P.2d 928.

[11, 12] Appellant complains of the admission of evidence of the details of her decedent's prior accident. The details of the other accident, if properly objected to, should not be admitted since such proof might be given weight by the jury in passing on the question of decedent's contributory negligence in this case. Evidence of previous accidents is properly excluded since it has no probative value on the question of the party's negligence in the case at issue. *Lowenthal v. Mortimer*, 125 Cal.App.2d 636, 640, 270 P.2d 942. In contradistinction to such evidence, the mere fact of the accident and the testimony tending to show that decedent was emotionally upset when he started to cross the highway would seem relevant on the

question of contributory negligence. *Cope v. Davison*, 30 Cal.2d 193, 202, 180 P.2d 873, 171 A.L.R. 667.

Other claimed errors need not concern us since they are not apt to recur.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



163 Cal.App.2d 369

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Ronald Clete WATSON, Defendant and  
Appellant.

Cr. 1376.

District Court of Appeal, Fourth District,  
California.

Sept. 5, 1958.

Defendant was convicted in the Superior Court of San Diego County, John A. Hewicker, J., for burglaries of the second degree, and he appealed. The District Court of Appeal, Griffin, P. J., held that convictions must be affirmed.

Affirmed.

Criminal Law ¶1182

Second-degree burglary convictions, entered upon defendant's guilty pleas, were affirmed. West's Ann.Pen.Code, § 182

Albert Tom, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was charged in an information, with one Stiles, in count one

of an information with conspiracy to commit grand theft (Sec. 182, Penal Code) and in four other counts with separate burglaries. Three additional burglaries were charged against Stiles. Appellant was charged with one prior felony conviction and Stiles with two. Appellant was represented by counsel and entered a plea of not guilty to these charges and denied the prior conviction. Subsequently, appellant, appearing with his counsel, changed his plea of not guilty to that of guilty as to counts three and four and admitted the prior conviction. On motion of the district attorney and in furtherance of justice, the court dismissed counts 1, 2 and 5. After a full hearing it was determined that they were burglaries of the second degree and defendant was sentenced to state's prison at Chino (sentences to run consecutively as to each count).

Appellant, in propria persona, filed his own notice of appeal. At defendant's request this court appointed counsel to represent him. In lieu of an original brief, and by consent of this court, he has filed a report. It reflects a statement of the facts as above outlined and also shows that he has fully examined the records and files in the case, which show that the proprietress of a shop at 3960-30th Street in San Diego, caught appellant behind the counter taking objects from her purse. When this occurred appellant attempted to flee. The proprietress' husband and a customer chased appellant, grabbed his coat, and appellant shed it and left. In the coat was found certain identification cards of appellant. He was later apprehended, identified, and after a plea of guilty, admitted the burglary. He also admitted two others charged as well as the prior conviction of a felony. Counsel for appellant concluded there were no grounds for appeal. The attorney general also reached the same conclusion and cited authorities to the effect that appellant has not and apparently could not show good cause why the pleas should be set aside or the judgment reversed; that no abuse of discretion appears; and that there is no valid reason why the judgment should not

be affirmed. We concur in the conclusions reached. *People v. Jackson*, 89 Cal.App.2d 181, 182, 200 P.2d 204; *People v. Ottensstror*, 127 Cal.App.2d 104, 109, 273 P.2d 289.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.



**SACRAMENTO AND SAN JOAQUIN DRAINAGE DISTRICT**, acting by and through **The Reclamation Board of the State of California**, Plaintiff and Respondent,

v.

**Peter J. JARVIS, Beulah Jarvis, et al.**,  
Defendants,

**Peter J. Jarvis and Beulah Jarvis**,  
Appellants.\*

Civ. 9126.

District Court of Appeal, Third District,  
California.

Sept. 4, 1958.

Rehearing Denied Sept. 30, 1958.

Hearing Granted Oct. 28, 1958.

Proceeding by drainage district to condemn land for construction of levee. The Superior Court, Sacramento County, Gordon A. Fleury, J., issued order for immediate possession on day complaint was filed, sum set by court as reasonably adequate compensation for taking of landowner's property was deposited with court, judgment was entered upon jury's verdict and landowners' appealed. The District Court of Appeal, Schottky, J., held that where erroneous ruling of trial court excluding testimony of amount offered for similar property across street was based on decisions which had since been overruled by Supreme Court and neither contract nor property rights had vested in either party by virtue of previous decisions on point involved, decision of trial court must be re-

\* Opinion vacated 336 P.2d 530.



versed, notwithstanding absence of offer of proof.

Reversed.

See also 152 Cal.App.2d 327, 313 P.2d 17.

#### 1. Evidence ⇨142(1)

In condemnation proceedings, evidence of prices paid or amounts offered for similar property in immediate vicinity is admissible on direct examination.

#### 2. Courts ⇨100(1)

Generally, a decision of court of supreme jurisdiction overruling former decision is retrospective in its operation.

#### 3. Eminent Domain ⇨255

In proceedings by drainage district to condemn land for construction of levee, where erroneous ruling of trial court excluding testimony of amount offered for similar property across street was based on decisions which had since been overruled by Supreme Court and neither contract nor property rights had vested in either party by virtue of previous decisions on point involved, decision of trial court must be reversed, notwithstanding absence of offer of proof.

#### 4. Eminent Domain ⇨145(1), 148

In proceedings by drainage district to condemn land for construction of levee, where order for immediate possession was made, landowners were entitled to interest upon amount ultimately awarded from date of order for possession and to compensation without deductions on account of taxes or assessments levied after drainage district took possession of property. West's Ann.Code Civ.Proc. § 1249.

#### 5. Judges ⇨54

Oral stipulation of attorneys for parties in land condemnation proceedings that parties would waive statutory disqualification of judge who lived in county where realty involved was situated was not sufficient to meet provisions of statute which required parties to sign and file stipulation in writing waiving disqualification of judge. West's Ann.Code Civ.Proc. § 170, subd. 6.

#### 6. Estoppel ⇨91(1)

##### Judges ⇨54

In proceedings by drainage district to condemn land for construction of levee, parties did not waive statutory disqualification of judge who resided in county where realty was located where matter was raised at earliest opportunity nor were parties who orally stipulated for waiver of disqualification estopped to raise matter, for equitable estoppel could not be urged as substitute for statutory requirement of written stipulation. West's Ann.Code Civ.Proc. § 170, subd. 6.

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Peter J. Jarvis and Beulah Jarvis in pro. per.

Edmund G. Brown, Atty. Gen., by Raymond H. Williamson and Marcus Vanderlaan, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment entered upon a jury's verdict awarding appellants \$1,500 for 1.062 acres of land condemned by respondent.

The complaint, which was filed on August 18, 1954, alleged that respondent sought to condemn the fee simple title to the land and that the taking of said estate and interest was necessary for the construction of a levee. On the same day the court fixed \$1,500 as the amount reasonably adequate to provide for payment of just compensation for the taking of appellants' property. Upon deposit of that sum with the clerk of the court an *ex parte* order for the taking of immediate possession issued, and, pursuant thereto, respondent entered upon the land and constructed a levee thereon. Thereafter trial was had and on February 3, 1956, the jury returned its verdict which found the fair market value of the condemned property to be \$1,500 as of February 1, 1956. Judgment was entered upon the verdict on April 10, 1956. Appellants' motion for a new trial was denied and they noticed an appeal from the judgment.

On this appeal an opening brief was filed on appellants' behalf by an attorney who did not represent them at the trial. Assign-

ed as error therein is the trial court's sustaining of an objection to testimony of a witness who lived across the street from the appellants. She was called by appellants as a witness on their behalf. She was asked how much frontage she had on the street. Counsel for respondent objected on the ground that the witness' property was not being condemned. The objection was sustained. The record shows the following:

"[Mr. Hibbitt]: Q. So that you still have property that faces on Rio Linda Boulevard. And do you know the Jarvis property? A. Yes, sir, I do.

"Q. With reference to your property, the Jarvis property is directly across the street; isn't that right? A. Yes, it is.

"Q. And about how much frontage do you have on Rio Linda Boulevard at that place?

"Mr. Vanderlaan: I will object to that, your Honor. We are not condemning this lady's property.

"The Court: Objection sustained.

"Mr. Hibbitt: We are trying to establish values, your Honor, and I think probably by comparative values here, I am bringing this lady in to show the value of her adjacent property.

"Mr. Vanderlaan: I am sure that is not admissible, your Honor. She is not an expert.

"The Court: Objection sustained."

Counsel for appellants made no offer of proof that the witness would testify as to what she had recently paid or been offered for her property. However, such offer of proof would have been futile as at the time of trial it was the long established rule that, as declared by our Supreme Court in *People v. La Macchia*, 41 Cal.2d 738, at page 744, 264 P.2d 15, at page 20, "witnesses 'cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and re-

fused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the \* \* [condemning party has] been compelled to pay in other and like cases—notwithstanding these transactions may constitute the source of their knowledge'."

[1] Since the trial of the instant case our Supreme Court, in the case of *County of Los Angeles v. Faus*, 48 Cal.2d 672, 312 P.2d 680, has overruled the line of decisions laying down the above quoted rule, and now evidence of prices paid or amounts offered for similar property in the immediate vicinity is admissible on direct examination.

[2,3] It is apparent that the ruling of the trial judge was based on decisions of the courts of this state which have since been overruled. It is also apparent that neither contract nor property rights have vested in either party by virtue of the previous decisions on the point here involved. Therefore, this case falls within the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. Under such circumstances the decision must be reversed. See *County of Los Angeles v. Faus*, 48 Cal.2d 672, 312 P.2d 680, *supra*. See also *People v. Murata*, 161 Cal.App.2d 369, 326 P.2d 947.

Appellants have filed a closing brief in *propria persona* and make numerous contentions, including the contention that they have been denied their constitutional rights and have been deprived of their property without due process of law. In view of the fact that the judgment must be reversed it is unnecessary to discuss them in detail.

[4] We deem it proper to state, however, that in view of the fact that an order for immediate possession was made, appellants will be entitled to interest upon whatever amount they are ultimately awarded, from the date of the order for possession. Code Civ.Proc. sec. 1249; *Metropolitan Water District of Southern California v. Adams*, 16 Cal.2d 676, 680-681, 107 P.2d

618. Appellants will also be entitled to compensation without deduction on account of any taxes or assessments levied after respondent took possession of the property. *People By and Through Department of Public Works v. Peninsula Title Guaranty Co.*, 47 Cal.2d 29, 35, 301 P.2d 1.

After this cause was orally argued before this court it was discovered that the judge presiding over the cause was a judge of the county in which the real property involved in this action is situated. Furthermore, the record did not disclose that the parties to the action had signed and filed a stipulation in writing waiving the disqualification of the trial judge as required by subdivision 6 of section 170 of the Code of Civil Procedure. This court then ordered the matter reargued for the purpose of determining whether the judgment was invalid because the cause was tried before a judge who was disqualified to act. At the time of oral argument respondent's motion to augment the record by including therein a certified copy of the minutes of the superior court of June 16, 1958, was granted. The record as augmented disclosed that the trial court had amended its minutes to show that prior to the calling of the jury roll the judge and the attorneys for the parties met in the judge's chambers where it was orally stipulated that each party would waive the disqualification.

[5] By subdivision 6 of section 170 of the Code of Civil Procedure the legislature has provided that in an action brought in any court by or against the reclamation board affecting or relating to any real property, a judge of the superior court of the county in which such real property is located shall be disqualified to sit or act unless the parties to the action shall sign and file therein a stipulation in writing waiving such disqualification. The oral stipulation between the attorneys for the parties in the judge's chambers can not be said to meet the requirements of the subdivision.

[6] Nor can it be said that the parties waived the disqualification. The record

discloses that the matter of the judge's disqualification was raised at the earliest opportunity and that a conference in chambers immediately ensued. In this case the only inference that can be drawn from the record is that the parties did raise the matter at the earliest opportunity. Nor can it be said that the parties are estopped to raise the matter for an equitable estoppel can not be urged as a substitute for a statutory requirement of a written stipulation. *Emerson v. Superior Court*, 7 Cal.2d 685, 62 P.2d 363.

In view of the foregoing the judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



163 Cal.App.2d 367

**John G. OPPENHEIMER, Plaintiff and Appellant,**

**v.**

**P. D. ROBINSON, Southern Pacific Company, a corporation, Defendants,  
Southern Pacific Company, a corporation,  
Respondent.  
Civ. 22932.**

District Court of Appeal, Second District,  
Division 3, California.

Sept. 5, 1958.

Proceeding on motion to tax costs in which losing party objected to cost bill respecting printing of brief. The Superior Court, Los Angeles County, William P. Haughton, J., denied motion and movant appealed. The District Court of Appeal, Shinn, P. J., held that there was substantial evidence to support finding that charge of \$100.67 as cost of printing brief comprising 14 pages was not unreasonable.

Affirmed.



1. Appeal and Error ⇨1024(5)

Trial court's action in denying unsuccessful party's motion to tax costs on appeal determined that charge for printing of prevailing party's brief was not unreasonable and this was a factual decision which was binding on District Court of Appeal unless evidence compelled contrary conclusion. West's Ann.Rules on Appeal, rule 26(c).

2. Costs ⇨258

In proceeding on motion to tax costs, evidence sustained finding of trial court that charge of \$100.67 as cost of printing appeal brief which, exclusive of covers and index, comprised 14 pages, was not unreasonable. West's Ann.Rules on Appeal, rule 26(c).

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John G. Oppenheimer, in pro. per.

E. D. Yeomans and Walt A. Steiger, Los Angeles, W. A. Gregory, San Francisco, for respondent.

SHINN, Presiding Justice.

Upon a former appeal by Oppenheimer, 150 Cal.App.2d 420, 309 P.2d 887, respondent Southern Pacific Company filed a printed brief which, exclusive of covers and index, comprised 14 pages. Having prevailed on the appeal the company filed a cost bill claiming \$100.67 as the cost of the brief. Oppenheimer, by motion to tax costs, objected to the charge as excessive. The motion was denied and he appeals.

The appeal does not present a question of law. Rule 26(c), Rules on Appeal, allows as reasonable costs "the reasonable cost of printing or reproduction of briefs by other process of duplication." Prior to amendment of the rule as of January 1, 1951, the amount chargeable for briefs was limited to \$100 to any one party. Since then the only limitation has been that the amount claimed must be reasonable.

[1] By denying the motion the court determined from the evidence before it

that the charge was not unreasonable. That was a factual decision which is binding upon this court unless the evidence compelled a contrary conclusion. Neither the trial court nor this court has judicial knowledge of what would have been a reasonable charge in Los Angeles County for printing the brief in question.

[2] The trial court's ruling has support in the evidence. The motion was heard upon the affidavit of Oppenheimer and an affidavit of Robert M. Parker, Jr., Vice-President of Parker & Son, Inc., the printers. It was averred by Oppenheimer that the brief could have been printed for \$2.65 or less per page, and for a total of about \$50. In Parker's affidavit it was averred: "The firm of Parker & Son, Inc. has been in the business of printing briefs for over 58 years. This firm keeps a very accurate record of costs and production and the price as charged for our services is just and reasonable under the present day wage scale labor market, and is calculated on the same basis as charges made to other customers of Parker & Son, Inc."

The fact, alone, that some printers charge less than others does not necessarily prove that the higher charges are unreasonable. There are other factors to be considered. Not every printer is qualified to print briefs as they should be printed. It requires familiarity with the rules respecting the setup and arrangement of material; the workmen should have familiarity with legal terms and usages and be able to detect obvious errors in manuscripts; the accuracy of the work is an important factor, as well as the ability to get the work done in a limited time. Excellence of workmanship and a reputation for reliability command a price. The evidence that the brief could have been printed for less money did not establish that Parker & Son's charges are unreasonably high. The fact that the firm has been printing briefs for 58 years would tend to prove the contrary. A concern does not carry on an active and successful business for that length of time if its charges are consistently in excess of the value of its

services. We are in full agreement with the conclusion of the trial court.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



William R. WARD and Bert W. Martin,  
Plaintiffs and Respondents,

v.

Marshall W. TAGGART and H. M. Jordan,  
Defendants and Appellants.\*

Civ. 22884.

District Court of Appeal, Second District,  
Division 2, California.

Aug. 19, 1958.

Hearing Granted Oct. 15, 1958.

Action by purchasers against broker and broker's employee for profits allegedly wrongfully acquired by defendants. The Superior Court of Los Angeles County, Joe Raycraft, J., rendered judgment for purchasers, and defendants appealed. The District Court of Appeal, Ashburn, J., held that where purchasers brought action on theory that broker's working of fraud created a confidential relation between them and entitled them to damages for violation of fiduciary obligation, but purchasers disclaimed any intention to recover upon theory of unjust enrichment, evidence was not uncontradicted, and question of right of recovery under unjust enrichment theory presented a factual situation, the consequences of which were open to controversy and were not put in issue or presented at trial, reduction of amount of judgment and affirmance of judgment for purchasers upon theory of unjust enrichment would not be proper and cause would be reversed generally, and that broker's employee who turned over all she received to broker was not liable to purchasers.

\* Opinion vacated 336 P.2d 534.

Reversed with instructions to permit purchasers to amend their complaint.

Fox, P. J., dissented in part.

Opinion, 325 P.2d 502, vacated.

#### 1. Appeal and Error ⇨1140(1)

Where purchasers brought action on theory that broker's working of fraud created a confidential relation between them and entitled them to damages for violation of fiduciary obligation, but purchasers disclaimed any intention to recover upon theory of unjust enrichment, evidence was not uncontradicted, and question of right of recovery under unjust enrichment theory presented a factual situation, the consequences of which were open to controversy and were not put in issue or presented at trial, reduction of amount of judgment and affirmance of judgment for purchasers upon theory of unjust enrichment would not be proper and cause would be reversed generally. West's Ann.Civ.Code, § 3343.

#### 2. Trusts ⇨95

The making by broker of successful false representations to buyer does not create a fiduciary relationship, but result of fraud may be, at election of defrauded party, the imposition upon wrongdoer of obligations of a constructive trustee, however imposition of such obligations does not antedate accomplishment of fraud. West's Ann.Civ.Code, § 2224.

#### 3. Action ⇨28

##### Damages ⇨89(2)

Where real estate broker through fraud received money belonging to buyers and buyers elected to recover in an action based upon contract or trust implied in law, not in fact, and one which rested ultimately upon doctrine of unjust enrichment, tort was thereby waived, action proceeded on contract, and exemplary damages could not be recovered. West's Ann. Civ.Code, §§ 2224, 3343.

#### 4. Money Received ⇨3

Plaintiff who sues in assumpsit growing out of fraud or other tort recovers only such sum or property as belongs to him in equity and good conscience; at that

point the fraud has spent its force and idea of punishment is out. West's Ann.Civ. Code, § 2224.

#### 5. Trusts ⇨236

In determining damages to be awarded purchasers who were defrauded by broker in purchase transaction, broker would be entitled to deduct entire cost to him of transaction except those items which were incurred as means of accomplishing his fraud. West's Ann.Civ.Code, § 2224.

#### 6. Trusts ⇨236

Where broker's action in connection with real estate transaction imposed upon broker the obligations of a constructive trustee, legitimate expenses incurred in acquiring property for purchasers were creditable to broker, but those which were concerned with its maintenance or protection and which were incurred after constructive trust had arisen were not allowable. West's Ann.Civ.Code, § 2224.

#### 7. Trusts ⇨101

Where broker's employee willingly allowed her name to be used in transaction in which broker defrauded purchasers but employee did not share in the illicit profit which broker obtained and in transaction it was indicated that employee was merely acting for broker who was designated as real principal, employee was not liable to purchasers as an involuntary trustee. West's Ann.Civ.Code, § 2224.

#### 8. Trusts ⇨110

In action against broker and broker's employee for illicit profits made by them from purchase transaction, evidence established that employee turned over all she received to broker. West's Ann.Civ.Code, § 2224.

#### 9. Trusts ⇨95

Statute providing that one who gains a thing by fraud or other wrongful act is an involuntary trustee of thing gained for benefit of person who would otherwise have had it applies only to those who have a wrongful acquisition. West's Ann.Civ. Code, § 2224.

James C. Blackstock and Felix H. McGinnis, Los Angeles, for appellants.

Chandler P. Ward, Los Angeles, for respondents.

ASHBURN, Justice.

The facts of this case, now before us on rehearing, are set forth in the former prevailing opinion (325 P.2d 502, 504) as follows:

"This is an appeal by the defendants from a money judgment in favor of the plaintiffs growing out of a real estate transaction. Plaintiffs, William R. Ward and Bert W. Martin, are purchasers of certain real property; defendants are a real estate broker and his employee, both of whom were instrumental in effecting a sale of the property to plaintiffs.

"The essential facts alleged in the complaint and proved at the trial are as follows:

"Prior to the transaction in question plaintiff Ward had asked Leroy Thomsen, a real estate broker, to look for properties which Ward might be interested in purchasing. In February, 1955, Thomsen visited defendant Taggart concerning unrelated matters and during the conversation Taggart informed Thomsen that as exclusive agent for the owner, Sunset Oil Company, he had for sale several acres of real property in Los Angeles County. A general discussion concerning the location and nature of the property ensued, Thomsen stating that he had a client who might be interested in acquiring the property. Thomsen mentioned to Taggart that a broker named Dawson had a 'for sale' sign on the property; Taggart replied that Sunset had taken the listing away from Dawson.

"Thereafter, Thomsen submitted an offer on behalf of Ward to Taggart relating to seven acres in the tract. Taggart promised to submit the offer to Sunset. Taggart later reported that such offer was rejected by Sunset be-



cause of a large blanket mortgage. Ward then directed Thomsen to make an offer of \$4,000 per acre for the entire property. Thomsen submitted this offer to Taggart, who promised to take it up with Sunset and report back. Taggart later told Thomsen that Sunset had refused the offer and that the least it would take for the property was \$5,000 per acre, one-half in cash. Thomsen conveyed the information to Ward and Ward told Thomsen to make an offer on that basis. Thomsen submitted this offer in writing, accompanied by Ward's check for \$2,000, to Taggart on March 18, 1955. At Taggart's direction, Thomsen inserted in the written offer provision for payment by Sunset of a ten per cent commission which Taggart and Thomsen agreed to divide equally. On the following day Thomsen advised Ward of the commission arrangement and he was agreeable.

"Thomsen contacted Taggart respecting the \$5,000 per acre offer three or four times during the following two weeks. On March 31 Taggart informed Thomsen that Sunset had accepted Ward's offer. Thomsen met with Taggart and the latter presented proposed escrow instructions in which defendant Jordan was named as seller acting for Taggart, who was designated as the real principal in the transaction. Taggart then informed Thomsen that he was to be the principal to enable him to 'clear up the Dawson exclusive listing' as well as certain blanket mortgages on the property. Thomsen told Ward of this when he submitted the escrow instructions to him. Ward asked why Jordan was to be the payee of the notes and beneficiary of the trust deeds. Thomsen related that Taggart had said that such was necessary because of certain tax and other problems of Sunset, and that the trust deeds would be turned back to Sunset after the escrow. The property conveyed to plaintiffs consisted of

72.0492 acres. The full purchase price which plaintiffs paid for the property was \$360,246.

"It was not until after they had purchased the property that plaintiffs learned the following facts: Taggart had never been given a listing by Sunset on the property in question. Taggart never presented to Sunset, and never intended to present plaintiffs' offers of \$4,000 per acre and \$5,000 per acre. Instead Taggart presented to Sunset his own offer of \$4,000 per acre, half in cash, and it was accepted. Taggart misrepresented to plaintiffs that the least Sunset would take for the property was \$5,000 per acre; he intended to purchase the property from Sunset himself and resell it to plaintiffs at a profit of \$1,000 per acre. All of Taggart's statements to Thomsen concerning Sunset's reason for handling the sale in so unusual a manner were fabrications. Taggart never disclosed to Sunset that he had an offer from Ward until after the escrow papers had been signed. All of the moneys used by Taggart to pay Sunset the purchase price were derived wholly from the Ward escrow.

"Plaintiffs commenced this action on August 25, 1955. The case was tried without a jury, and the court rendered judgment against both defendants for \$72,049.20 compensatory damages, and awarded exemplary damages of \$36,000 against defendant Taggart individually. The judgment also enjoined defendants from transferring certain notes and trust deeds which plaintiffs had given them, and ordered defendants to discharge said notes and trust deeds, thereby reducing the amount of the judgment. Defendants have appealed."

We ruled that plaintiffs' complaint alleges and the proof supports a finding of fraud in the form of deceit practiced by defendant Taggart upon plaintiffs; but there is no allegation or proof that the land purchased by plaintiffs was worth less than

the amount paid and hence no showing of damage such as required by § 3343, Civil Code; the allegation of fiduciary relationship between plaintiffs and defendants was not sustained by the evidence and plaintiffs' theory of recovery of damages (not measured by § 3343) for violation of such a relationship could not prevail. But we further ruled that, as Taggart was not the agent of Sunset or of plaintiffs and so far as appears did not defraud Sunset, the secret profit he made belonged in equity and good conscience to plaintiffs who had been defrauded, and that they could recover to the extent of defendants' unjust enrichment, in quasi contract but not in tort. Accordingly the majority of the court struck out the award of exemplary damages and affirmed the judgment in a reduced amount. We differed as to the allowance of certain credits to defendant, the majority holding that he was entitled to no deductions whatever except the amount he actually paid for the land, \$4,000 an acre. We agreed that defendant Jordan had not been unjustly enriched and accordingly reversed the judgment as to her.

We granted a rehearing primarily because of the insistence of counsel for both sides that in modifying and affirming the judgment we had adopted and applied a legal theory which was not merely different from that pursued by plaintiffs in the trial court, but was one which plaintiffs had expressly disavowed both in the trial court and in their briefs on appeal. Upon further consideration, we have concluded that there is merit in the contention that this is not a proper case for directing the entry of judgment in a different amount and upon a legal theory which was never canvassed in the court below.

Counsel call our attention to the fact that cases such as *Panopulos v. Maderis*, 47 Cal.2d 337, 303 P.2d 738, and *American Automobile Ins. Co. v. Seaboard Surety Co.*, 155 Cal.App.2d 192, 318 P.2d 84, do not sanction a departure by the reviewing court from the theory pursued below in

cases where the evidence is in substantial conflict.

In *Panopulos* it is said, 47 Cal.2d at page 340, 303 P.2d at page 740: "It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action. [Citations.] There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. [Citation.] But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." In *American Automobile Ins. Co.* at page 200 of 155 Cal.App.2d, at page 89 of 318 P.2d: "If it be said that the views herein expressed depart from the theory upon which the case was tried the answer is that the rule confining the parties upon appeal to the theory pursued below does not apply to a question which is one of law only [citations], and that an appellate court is never bound by concessions of counsel as to the applicable law [citation] or by the interpretation of documents made by the trial court upon the basis of the terms of the written instrument without the aid of other evidence [citations]. There was no evidence at bar except the written indemnity agreement; other matters were covered by admissions of the pleadings or the briefs." *Barrera v. De La Torre*, 48 Cal.2d 166, 172, 308 P.2d 724, 728: "However, the new legal theory in the *Panopulos* case presented only a question of law on undisputed facts, and it was deemed appropriate to pass upon its merits as a further basis for affirmance of the judgment. Here plaintiffs not only dispute defendant's version of the facts but, in addition, they advance this new theory of trespass as ground for reversal of the judgment for defendant. Such change of

theory by an appellant cannot be permitted." See, also, *Townsend v. Wingler*, 114 Cal.App.2d 64, 68, 249 P.2d 613.

[1] This is not a case of uncontradicted evidence. While appellant Taggart's counsel concedes the sufficiency of the evidence to support upon appeal the finding of fraud, he does not concede the fact of fraud. The transcript exceeds 500 pages and the change of theory conceived by this court does not present a question of law only; on the contrary it "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial," and we cannot say in the instant case "that probably no different showing could be made on a new trial." Quoting *Panopulos*, supra.

As we have concluded that this is not a proper case for direction of a new judgment or, what is its equivalent, reduction of amount and affirmance upon a legal theory which was never canvassed below, the cause should be reversed generally, thus affording both parties full opportunity to present all the facts applicable to the theory upon which we find it possible for plaintiffs to recover, assuming the evidence to be the same as shown by the instant record. Though their counsel upon oral argument disclaimed any intention to embrace the theory adopted by this court, plaintiffs should have leave to amend their complaint to rely upon the same if so advised.

We adhere to the view that the judgment at bar is not sustainable as a recovery of damages for a tortious violation of duties arising from a fiduciary relationship. Upon the pleadings as now framed and upon the evidence as presented in the record before us the only sustainable recovery would have to be premised upon the theory of unjust enrichment and its amount would have to be measured in terms of unjust enrichment.

[2] Taggart was not the agent of Sunset Oil Company, the owner of the land. So far as appears, he did not defraud that company. Any secret profit obtained by him did not belong to Sunset. It was plaintiffs who were defrauded and entitled to any ap-

propriate remedy therefor. They elected not to sue for damages on the theory of recovery under § 3343, Civil Code, i. e., the difference between the price paid and the value of the land received for it. They have not advanced the claim at any stage of the case that the land was worth less than they paid for it. Their complaint and their briefs on appeal rest upon the theory that Taggart's working a fraud upon plaintiffs created a confidential relationship between them and entitled plaintiffs to damages for violation of the obligation of a fiduciary. Of course, the making of successful false representations to a buyer does not create a fiduciary relationship; but its result may be, at the election of the defrauded party, the imposition upon the wrongdoer of the obligations of a constructive trustee (Civ. Code, § 2224). This is the result of the fraud; it does not antedate its accomplishment. The Restatement of the Law of Restitution, § 160, comment a, page 641, says: "The term 'constructive trust' is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust. An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation."

[3] Through fraud defendant received money belonging to plaintiffs (not Sunset Oil Company) and plaintiffs have elected to recover in an action which we hold properly to be based upon a contract or trust implied in law, not in fact,—one which rests ultimately upon the doctrine of unjust enrichment. The tort is thereby waived; the action proceeds on contract. *Crogan v. Metz*, 47 Cal.2d 398, 404, 303 P.2d 1029.



McCall v. Superior Court, 1 Cal.2d 527, 532, 36 P.2d 642, 645, 95 A.L.R. 1019: "But in *assumpsit*, where the tort is waived, the sum sued for is the benefit unjustly retained by the defendant; not the damage to the plaintiff, usually more uncertain in amount."

French v. Robbins, 172 Cal. 670, 679, 158 P. 188, 191: "The foundation of the action of *assumpsit*, where property of plaintiff has been wrongfully taken and sold by the defendant, is the unjust enrichment of the wrongdoer. Keener on Quasi Contracts, p. 160. It is well settled that in order to recover in such an action the plaintiff must show that a definite sum, to which he is justly entitled, has been received by the defendant. 'As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant, it will be fatal to this form of action that the amount is not ascertainable.'"

These principles rule out the recovery of exemplary damages. That is the holding of Crogan v. Metz, supra, 47 Cal.2d 398, 405, 303 P.2d 1029. See, also, Steiner v. Rowley, 35 Cal.2d 713, 720, 221 P.2d 9; Squire's Dept. Store, Inc., v. Dudum, 115 Cal.App.2d 320, 325, 252 P.2d 418; Fordson Coal Co. v. Kentucky River Coal Corporation, 6 Cir., 68 F.2d 131; Hilderbrand v. Anderson, Mo. App., 270 S.W.2d 406, 410.

In our opinion it would be unjust and erroneous to allow defendant Taggart only the sum of \$4,000 an acre (a total of \$288,196.72) as the basis for measuring his liability for restitution of unjust enrichment. Restatement of the Law of Restitution, § 160, comment d, page 643: "*Unjust enrichment and unjust deprivation*. In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in

which he was before the defendant acquired the property."

[4] As indicated by the quotations from French v. Robbins, supra, and McCall v. Superior Court, supra, the plaintiff who sues in *assumpsit* growing out of fraud or other tort recovers only such sum or property as belongs to him in equity and good conscience; at this point the fraud has spent its force and the idea of punishment is out. The rule is thus stated in 58 C.J.S. Money Received § 33, page 947: "In an action for money had and received the plaintiff is entitled to recover such sum, and only such sum, as in equity belongs to him, in no event exceeding the sum actually received for his use by the defendant or the amount sued for, with interest."

[5] The cases do not sustain the disallowance of all expenditures made by Taggart regardless of whether they would have been incurred in consummating a legitimate transaction. All of us agree that he should have credit for the \$4,000 per acre paid for the land. In the opinion of the majority the line of demarcation is this: That defendant is entitled to a deduction of the entire cost to him of the transaction except those items which were incurred as a means of accomplishing his fraud.

That the foregoing reasoning is sound is supported by the authorities. Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380, was decided by this court and hearing denied. It was an action to recover a secret profit made by plaintiff's agent. Artel, the agent, had included in an exchange of properties between his principal, Schwarting, and one Hartman, an Inglewood bungalow belonging to himself and thereby had reaped a secret profit. At page 441 of 40 Cal.App.2d, at page 384 of 105 P.2d the court said: "In those cases where an agent has secretly profited, as a matter of course, to the end that equity be done to all parties, he is entitled to be reimbursed for any portion of the purchase money advanced by him and for all expense necessarily incurred by him in protecting and conserving

the property of his principal. 3 C.J.S. Agency § 140, p. 14. Under this hypothesis, Artel is entitled to be reimbursed in the amount of \$2,000, the value of his said Inglewood bungalow, which he utilized in effectuating said exchange for Schwarting."

[6] In *Kinert v. Wright*, 81 Cal.App.2d 919, 185 P.2d 364, also decided by this division, it was said concerning the measure of recovery in a secret profit case: "Respondent received \$1,200 from appellants, asserting that the small tract selected by them could be purchased for that sum and falsely representing that it was free and clear of encumbrances. He paid \$500 for the large parcel of land. The finding is that in his accounting he claimed to have paid \$120 as commission. There is no finding that the commission was not paid, the evidence is not before us, and appellants do not dispute the claim. Allowing respondent his full due he is entitled to credit for \$620 and appellants should recover the difference between that sum and the amount entrusted to him amounting to \$580." 81 Cal.App.2d at pages 927-928, 185 P.2d at page 369. In the same case the agent was disallowed an item of \$160 which had been incurred for costs and attorney fees in an action concerning delinquent taxes upon property purchased by him for his principal because "the expenditures made by him were in pursuance of his 'scheme to obtain a secret profit' at appellants' expense." 81 Cal.App.2d at page 923, 185 P.2d at page 367. At page 926, of 81 Cal.App.2d, at page 368 of 185 P.2d: "Though respondent was appellants' agent when their relationship began he became their trustee when he took title to the property in his own name, using their money with which to make the purchase." At page 927, of 81 Cal.App.2d, at page 369 of 185 P.2d: "The fraud and deception of respondent deprive him of the right to repayment of his expenditures for attorney's fees in the tax suit and for other purposes in connection with the property. Section 2273 of the Civil Code provides that a trustee is entitled to reimbursement out of the trust property of all expenses actually

and properly incurred by him in the performance of his trust. This rule is applicable only when the trustee has conducted the affairs of the trust honestly, has dealt fairly with his beneficiary, and has not attempted to make a secret profit for himself out of the trust property or otherwise to deceive and defraud those who entrusted him with their business. An involuntary trustee who becomes such through his own fault is not entitled to reimbursement. Civ.Code, sec. 2275; *Title Insurance & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 220, 152 P. 542; *Marsh v. Smith*, 46 Cal.App. 692, 699, 189 P. 1037. The beneficiary 'is under absolutely no obligation to repay these outlays.' *McArthur v. Goodwin*, 173 Cal. 499, 505, 160 P. 679, 682." This case seems to recognize an important distinction here applicable, namely, that legitimate expenses incurred in acquiring the property for the principal are credited to the agent, but those concerned with its maintenance or protection which are incurred after the constructive trust has arisen are not allowed. The cases of *McArthur v. Goodwin*, 173 Cal. 499, 504, 160 P. 679, and *Title Insurance & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 220, 152 P. 542 (cited by respondents), fall within the purview of § 2275, Civil Code: "An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this Article." In other words, they have to do with expenses of management or protection of property which has already become the subject of a constructive trust in the hands of defendant. Both cases apply Civil Code, § 2275, and are not controlling here.

Such evidence upon the subject of legitimate expenses of acquiring the property for plaintiffs as is now before us was received incidentally in the canvassing of other issues. We should not attempt now to evaluate it but should leave the subject open for full exploration upon a new trial.

[7-9] Concerning the question of defendant Jordan's liability, we repeat what was said in the previous opinion [325 P.2d

508]: "Even though Jordan willingly allowed her name to be used in the dual escrows, she did not share in the illicit profit which Taggart obtained. In each escrow transaction it was indicated that Jordan was merely acting for Taggart, who was designated as the real principal. The evidence establishes that Jordan turned over all that she received to Taggart, her employer. Under these circumstances it is clear that defendant Jordan cannot be held liable as an involuntary trustee. One cannot be deemed an involuntary trustee of something which he has not acquired. Civil Code section 2224 applies only to those who have made the wrongful acquisition. Since it was Taggart alone who obtained the illicit profit, he alone can be required to hold that profit as an involuntary trustee for the benefit of plaintiffs. Therefore, the judgment must be reversed as to defendant Jordan."

The judgment is reversed as to both defendants with instructions to the lower court to permit plaintiffs to amend their complaint if so advised.

HERNDON, J., concurs.

FOX, Presiding Justice (concurring and dissenting).

While I concur in the majority opinion with respect to the applicable theory of liability, the ruling concerning punitive damages and the reversal of the judgment against the defendant Jordan, I must dissent from the majority's decision that a retrial is necessary. I also disagree with the majority's view that Taggart is entitled to be credited with more than the \$4,000 per acre that he paid Sunset for the property.

In my opinion the judgment against Taggart should be modified by striking the award of punitive damages therefrom, and as so modified the judgment should be affirmed.

In their complaint the plaintiffs set forth in detail the facts on which they based

their right to recover. Their evidence established all these facts except that a fiduciary relationship existed between Taggart and plaintiffs. Although founded upon a tort, the instant case is not truly a tort action even though both counsel may have treated it as such. The facts which plaintiffs pleaded and proved sustain the judgment on the theory of involuntary trust, but not on the theory of tort. The only difference between the theory which this court holds to be applicable and the theory proceeded upon below is the nature of the duty breached and the type of relief flowing therefrom. The trial court found that Taggart assumed and breached a fiduciary duty. We find that Taggart breached a duty different from that of a fiduciary. These duties, however, are similar in many respects. Even excluding the finding of a breach of fiduciary duty, the facts found by the trial court sustain plaintiffs' right to recover the profits which Taggart acquired as a result of his fraudulent conduct. Thus, there is no question as to plaintiffs' right to recover under the facts pleaded and proved; the only question has to do with the precise legal theory upon which such recovery should be founded. Under such circumstances the rule confining a case on appeal to the theory pursued below does not apply. *Panopulos v. Maderis*, 47 Cal.2d 337, 341, 303 P.2d 738; *American Automobile Ins. Co. v. Seaboard Surety Co.*, 155 Cal.App.2d 192, 200, 318 P.2d 84; 3 Cal.Jur.2d, Appeal and Error, § 142, p. 609. In my opinion, the legal theory which this court has applied does not contemplate any factual situation different from that established by the evidence in the trial court. Taggart had a full opportunity, in a trial that lasted several days, to present, and apparently did present, his version of the transaction here involved. He does not suggest any new evidence that he could present upon a new trial. The evidence which Taggart presented below was not sufficient to dissuade the court from concluding that plaintiffs had established facts sufficient to entitle them to recover. Those same facts support plaintiffs' recovery on



the theory here applied. Taggart has had his day in court on these factual issues; hence I feel a retrial is unwarranted. It would simply entail unnecessary delay and additional expense.

I do not believe Taggart is entitled to credit for any expenses he incurred in consummating his fraud. Because of his acts the law deems him an involuntary trustee of the funds wrongfully acquired. "An involuntary trustee who becomes such through his own fault is not entitled to reimbursement." *Kinert v. Wright*, 81 Cal. App.2d 919, 927, 185 P.2d 364, 369; see, also, *McArthur v. Goodwin*, 173 Cal. 499, 504-505, 160 P. 679; *Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 220, 152 P. 542. This is in accord with the principle embodied in Civil Code, section 2275. The expenses which Taggart incurred were a direct result of his fraudulent acts; if he had acted properly, they would not have accrued to him. "No equity is acquired through fraud." *Marsh v. Smith*, 46 Cal.App. 692, 700, 189 P. 1037, 1040. Moreover, assuming that Taggart had committed no fraud and that plaintiffs had purchased the property from Sunset, it is uncertain whether plaintiffs or Sunset would have paid Thomsen's commission. It may well be that Sunset would have been willing to pay this commission even though plaintiffs were purchasing the property for \$4,000 per acre. It is not unreasonable to assume that Taggart would be quick to make concessions in his dealings with Sunset in light of the large profit which he expected to acquire. Since the court could but speculate as to whether plaintiffs would have had to bear this expense in the absence of Taggart's fraud, justice requires that Taggart bear it rather than plaintiffs. The same may be said of the other expenses for which Taggart seeks credit; plaintiffs may well have *not* incurred these expenses even in the absence of Taggart's misconduct. Because of the uncertainty as to whether plaintiffs would have been required to bear any of these expenses in the absence of any fraud, and because this uncertainty was caused by Taggart's

own fraud, it would be unreasonable for the court to allow Taggart to deduct any of these expenses from plaintiffs' recovery.

Thus the judgment against Taggart should be modified simply by eliminating the award of exemplary damages therefrom and affirmed as so modified.



163 Cal.App.2d 371

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Donald Hugh LILYROTH, Defendant and  
Appellant.  
Cr. 1382.

District Court of Appeal, Fourth District,  
California.

Sept. 5, 1958.

Hearing Denied Oct. 28, 1958.

Defendant was convicted of burglary. The Superior Court of San Diego County, William A. Glen, J., entered judgment, and the defendant appealed. The District Court of Appeal, Griffin, P. J., held that evidence sustained conviction.

Judgment affirmed.

#### Burglary §41(1)

Evidence sustained burglary conviction.  
West's Ann.Pen.Code, § 459.

Harold P. Curtis, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and  
William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was charged with burglary (violation of sec. 459, Penal Code)

in addition to three prior felony convictions. He was represented by counsel at the trial, entered a plea of not guilty and not guilty by reason of insanity, and denied the prior convictions. The jury found him guilty of burglary, second degree, the prior convictions to be true, and that he was sane at the time of the commission of the burglary. A motion for new trial was denied. He was committed to state's prison.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Thomas JACKSON, Defendant and  
Appellant.

Cr. 6038.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 4, 1958.

Defendant filed his own notice of appeal in propria persona and later, at defendant's request, this court appointed counsel to represent him. It was the same counsel who represented him at the trial and he now, after a complete examination of the record and by permission of this court, has filed a general report, in lieu of appellant's opening brief, to the effect that after judgment was procured he moved to be relieved from further representing defendant in the trial court, and the motion was granted; that it was his studied opinion that the evidence showed defendant was caught by the police hiding under the desk at the place he was charged with burglarizing, and the exact amount of cash stolen was found on his person; that there was other evidence implicating him; that defendant freely confessed the burglary to the officers; that he was of the opinion that appellant had a fair trial and no prejudicial errors were noted; that this appeal by defendant in propria persona is without merit and appears to be frivolous. Two psychiatrists examined appellant and concluded that he was sane, knew right from wrong, and understood the nature and quality of his acts.

Suffice it to say, we have examined the entire record, including the evidence of defendant's prior convictions and agree with the conclusions reached by his appointed counsel and the attorney general's counsel as to the evidence and law involved. The motion for a new trial was properly denied.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, J.  
pro tem., concur.

Prosecution for selling and furnishing a substance falsely represented to be a narcotic. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., found defendant guilty and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to establish that defendant committed a violation of the Health and Safety Code.

Affirmed.

#### 1. Poisons ☞

Evidence sustained conviction for selling and furnishing a substance falsely represented to be a narcotic. West's Ann. Health & Safety Code, § 11502.

#### 2. Criminal Law ☞1036(1)

In absence of a proper objection in trial court, admissibility of evidence may not be questioned on appeal.

Thomas Jackson, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Thomas Jackson was charged by information in Count I with selling, furnishing and giving away a preparation of heroin on February 25, 1957; In Count II, with selling and furnishing a substance falsely represented to be a narcotic on March 2, 1957; and in Count III, with the commission of a like offense on March 5, 1957. Health and Safety Code, secs. 11500, 11502. It was also alleged that defendant had suffered two previous felony convictions and had served terms of imprisonment therefor in

state prison. Jackson pleaded not guilty and denied the prior convictions. Trial was to the court. As shown by the reporter's transcript the court found defendant guilty as charged in the information. As shown by the clerk's transcript he was found guilty on Count III and the court also found to be true the allegations of the prior convictions. Jackson's application for probation was denied. The court dismissed Counts I and II of the Information and sentenced defendant to state prison on Count III for the term prescribed by law. Jackson appeals from the judgment.

The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Bart Natisin, a Los Angeles County sheriff's deputy assigned to the narcotics detail, was the chief witness for the People. The following is the substance of his testimony. On February 25, 1957, the officer listened to a telephone conversation between defendant and a female informant over the ear piece of the latter's telephone. Natisin stated that he heard the informer tell Jackson that she "had a cat who would like to score and who had \$25.00 to go." In the officer's expert opinion, the word "cat" signified a person familiar with narcotics and the word "score" meant to purchase a narcotic; the phrase "\$25.00 to go" referred to the agreed purchase price. At about 2:30 p. m., Natisin and the informer drove to the corner of Santa Barbara Avenue and Figueroa Street in the City of Los Angeles, where they met defendant. Jackson said to the informant: "Let's take a walk and get the bread [i. e., the money] first." Defendant and the informer walked away; they were gone for a few minutes. Upon their return, they got into the officer's car. Defendant handed a small bundle to the informer, who gave it to Natisin. The bundle was proved to contain heroin.

At about 3:30 p. m. on March 2, 1957, Natisin and the informant drove to the corner of 60th Street and Western Avenue in Los Angeles. Defendant arrived shortly thereafter and said: "Let's take a walk." Jackson departed, accompanied by the in-

former. The latter returned after a few minutes and told Natisin that defendant wanted the rest of his money. Natisin walked over to Jackson's car, which was parked around the corner. Defendant said: "The stuff is by your foot, right at the rear of the car." The officer retrieved a small package from the ground beside the car and gave defendant \$5. He then asked Jackson whether he could buy a half ounce of heroin. Defendant said that "the stuff would be real good" and told the officer to telephone him. Inside the package retrieved by Natisin was a white powder which was proved not to contain a narcotic.

On March 5, 1957, Officer Natisin telephoned defendant and arranged to meet him that afternoon. Around 3:30 p. m. the officer drove to the Better Foods Market at Santa Barbara and Western Avenues in Los Angeles and parked on the parking lot. He had in his possession \$175 in currency. Defendant drove onto the lot, parked, and walked toward Natisin's car. As Jackson approached, the officer saw him drop a small package beside the left rear tire of another car. Natisin handed defendant \$75, got out of his car, picked up the bundle, and left a \$100 bill in its place. The bundle contained a white powder which was proved to be milk sugar. The three packages purchased by the officer were received in evidence without objection.

Officer Natisin testified on cross-examination that the informant had been arrested for a narcotics violation prior to February 25th and that he was aware of that fact at the time he first met defendant. He also stated that the informant began her telephone conversation with defendant by saying: "This is Julie." She did not give her last name to defendant. This testimony was elicited over the objections of the deputy district attorney that it involved confidential information. In arguing that the information was not confidential, defendant's counsel stated: "Well, the defendant knows the informant, so it couldn't be confidential."

Jackson was arrested at his home in the late afternoon of March 5th by J. R. Stroh,



a Los Angeles County sheriff's deputy and several other officers. The officers had neither a search warrant nor a warrant for defendant's arrest. Officer Stroh testified that he had furnished Officer Natisin with \$175 in currency earlier the same day. The bills were of the following denominations: One \$100 bill, five \$10 bills and five \$5 bills. Stroh dusted the bills with anthracine powder, a fluorescent substance, before giving them to Natisin and made a note of the serial numbers. About \$200 was found on defendant's person after his arrest. Stroh tested the money with an ultra-violet light and found traces of fluorescent powder on bills of the same denominations as those he had given to Natisin. There were also traces of powder on Jackson's hands. The officer compared the serial numbers of the bills discovered in defendant's pockets with the numbers of the bills he had previously given to Natisin; they were identical.

Upon being questioned by the officers, Jackson said that a "cat" had given him the \$200 found on his person. Stroh asked him "For what?" and defendant replied "You know." The officers then asked Jackson whether he had any narcotics paraphernalia and defendant said that he did. Jackson led them to the bathroom and showed them some hypodermic needles and some packages of powder; one of the packages was proved to contain heroin while the others were proved to contain milk sugar. When asked how much heroin he was selling and how much he was using, defendant told the officers: "Man, I use as much as I can sell." The needles and powders found in defendant's home were received in evidence without objection.

With respect to the prior convictions, the People introduced in evidence certified copies of official records showing that one Thomas Jackson had previously been convicted of two felonies and had served terms of imprisonment therefor in a California state prison. It was stipulated that defendant was the person named in the records.

Defendant testified that he did not sell any heroin to Officer Natisin. He did not give any packages to the officer. On two or

three occasions, he was approached by Natisin and a Miss Julie Smith, whom he already knew. Miss Smith introduced Natisin to defendant; Natisin asked him if he could arrange to obtain narcotics, but Jackson refused. Defendant stated that he had between \$60 and \$80 on his person at the time of his arrest. The money belonged to him and he did not get it from the officer.

As we said earlier, the court found defendant guilty of the three offenses alleged in the information, but dismissed the charges involving the transactions occurring February 25th and March 2nd.

Upon request for appointment of counsel on the present appeal, the court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeal. The matter was assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no valid ground of appeal. After we had examined the record, the request for appointment of counsel was denied. Defendant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our practice, we have made a thorough study of the record. We have discovered no insufficiency of the evidence and no error at the trial.

Section 11502 of the Health and Safety Code provides in material part: "Every person who agrees, consents, or \* \* \* officers to unlawfully sell, furnish, \* \* \* or give any narcotic to any person, \* \* \* and then sells, delivers, furnishes, \* \* \* or gives, \* \* \* any other liquid, substance, or material in lieu of any narcotic shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years."

[1] The evidence was sufficient to establish that defendant committed a violation of the statute on March 5, 1957. The testimony of the deputies warranted the court in finding that defendant agreed to sell a half ounce of heroin to Officer Natisin, that

the officer gave defendant \$175 for the narcotics, and that Jackson gave the officer in exchange a substance which proved to be milk sugar. Although defendant denied selling anything to Natisin, his testimony created only a conflict in the evidence, which was resolved against him by the trier of fact. *People v. Pastrana*, 136 Cal.App. 2d 358, 288 P.2d 568.

[2] Defendant was represented by counsel at the trial and his counsel did not object to the introduction in evidence of the substance he sold to Natisin or the narcotics paraphernalia taken from his home. In the absence of a proper objection in the trial court, the admissibility of the evidence may not be questioned on the appeal. 3 Cal.Jur. 2d 634.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



163 Cal.App.2d 360

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**  
**v.**

**William THOMAS, Defendant and Appellant.**  
**Cr. 6286.**

District Court of Appeal, Second District,  
Division 3, California.  
Sept. 4, 1958.

Hearing Denied Nov. 3, 1958.

Proceeding on petition for writ of error coram nobis. The Superior Court, Los Angeles County, H. Burton Noble, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Shinn, P. J., held that mere fact that complaint issued against defendant contained only one count, namely attempted robbery, and after a preliminary hearing, information subsequently filed by district attorney alleged count of attempted rob-

bery and additional count of assault with a deadly weapon, furnished no basis for relief from judgment of conviction for assault with a deadly weapon, as by statute, a district attorney is authorized to charge by information commission of any offense disclosed by evidence taken at the preliminary hearing even though such offense is not specified in the commitment, provided the offense charged related to the transaction which was the basis for the commitment order, and therefore, writ was properly denied.

Order affirmed.

### 1. Criminal Law Ⓒ998

In order to present a meritorious application for vacation of a judgment of conviction, there must be a strong showing of the existence of some fact which was unknown to the applicant at the time of trial and which could not have been ascertained by him in the exercise of reasonable diligence, and the fact must be one which, if it had been known, would have prevented the rendition of the judgment.

### 2. Indictment and Information Ⓒ41(1)

Under statute dealing with the duty of a district attorney to file an information, a district attorney is authorized to charge by information commission of any offense disclosed by evidence taken at preliminary hearing even though such offense is not specified in the commitment, providing the offense charged is related to the transaction which was the basis for the commitment order. West's Ann.Pen.Code, § 739.

### 3. Criminal Law Ⓒ997(4)

Mere fact that complaint issued against defendant contained only one count, namely attempted robbery, and after a preliminary hearing, information subsequently filed by district attorney alleged count of attempted robbery and additional count of assault with a deadly weapon, furnished no basis for relief from judgment of conviction for assault with a deadly weapon, as by statute, a district attorney is authorized to charge by information commission of any offense disclosed by

evidence taken at the preliminary hearing even though such offense is not specified in the commitment, provided the offense charged related to the transaction which was the basis for the commitment order, and therefore writ of error *coram nobis* was properly denied.

#### 4. Criminal Law §997(12)

A petition for a writ of error *coram nobis* could have properly been denied upon ground that there was no showing of any cause or excuse for delay of three years in making the application.

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William Thomas, in pro. per.

Edmund G. Brown, Atty. Gen., for defendant.

SHINN, Presiding Justice.

This is an appeal from an order denying a petition for writ of error *coram nobis*.

An information was filed against appellant in 1954, charging him in Count I with the attempted robbery of Manuel Earl Johnson on November 18, 1954, and in Count II with assaulting Johnson with a deadly weapon on the same date. December 17, 1954, appellant made a motion to dismiss Count I under section 995 of the Penal Code; at the same time, he entered a plea of not guilty as to Count II. December 22, 1954, Thomas withdrew his motion to dismiss Count I and entered a plea of not guilty. He was represented at the trial by a deputy public defender. Trial was to a jury which found him not guilty on Count I but found him guilty on Count II. Probation was denied and Thomas was sentenced to state prison for the term prescribed by law. Judgment was rendered March 24, 1955.

March 18, 1958, the instant petition was filed, setting forth as grounds for issuance of the writ that appellant was bound over by the committing magistrate only upon the charge of attempted robbery (Count I), of which he was subsequently acquitted; that the charge of assault with a deadly weapon (Count II), of which he was con-

victed, "had never been before a committing magistrate"; and that Count II was dismissed by the court under Penal Code, section 995 prior to his trial. The court below denied the petition, but the record does not disclose the ground or grounds for the ruling.

Upon application of appellant for appointment of counsel, this court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeal. The matter was assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no meritorious ground of appeal. After we had examined the record the request for appointment of counsel was denied. Appellant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our practice we have made a thorough study of the record.

[1] In our opinion the writ was properly denied. In order to present a meritorious application for vacation of a judgment there must be a strong showing of the existence of some fact which was unknown to the applicant at the time of trial and which could not have been ascertained by him in the exercise of reasonable diligence, and the fact must be one which, if it had been known, would have prevented the rendition of the judgment. *People v. Adamson*, 34 Cal.2d 320, 326-327, 210 P.2d 13, and cases cited. With respect to appellant's allegation that Count II of the information was dismissed prior to the trial, the record affirmatively discloses that Thomas made a motion to dismiss Count I, which he subsequently withdrew, and that he did not move to dismiss Count II.

With respect to the allegation that Count II "had never been before a committing magistrate", it appears from the record that a complaint was issued, containing but one count, namely, attempted robbery, and that after a preliminary hearing, appellant



was held to answer by the magistrate. The information subsequently filed by the district attorney alleged the one count of attempted robbery and an additional count of assault with a deadly weapon. However, these facts, standing alone, furnish no basis for relief from the judgment.

[2] Section 739 of the Penal Code, enacted in 1951, provides in material part: "When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county within 15 days after the commitment, an information against the defendant *which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.* \* \* \* (Emphasis added.) The statute authorizes the district attorney to charge by information the commission of any offense disclosed by the evidence taken at the preliminary hearing even though such offense is not specified in the commitment, provided the offense charged is related to the transaction which was the basis for the commitment order. *People v. Dean*, 158 Cal.App.2d 572, 322 P.2d 929, and cases cited.

Each count of the information filed by the district attorney alleged the commission of an offense against Manuel Johnson on November 18, 1954. Appellant has made no showing that the offenses were unrelated, or involved separate transactions, or that the evidence at the preliminary hearing was insufficient to warrant the magistrate in a reasonable belief that he was guilty of assaulting Johnson with a deadly weapon, as charged in the second count.

[3, 4] The facts alleged in the petition were wholly insufficient to justify a disturbance of the judgment. The petition could also properly have been denied upon the ground that there was no showing of any cause or excuse for the delay of three

years in making the application. *People v. Rodriguez*, 143 Cal.App.2d 506, 299 P.2d 1057.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.

Hearing denied; SHENK, J., dissenting.



163 Cal.App.2d 363

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Lloyd HUSTON, Defendant and Appellant.  
Cr. 2795.

District Court of Appeal, Third District,  
California.

Sept. 4, 1958.

Defendant was convicted of robbery. The Superior Court, Mendocino County, Hale McCowen, J., rendered judgment and defendant appealed. The District Court of Appeal, Schottky, J., held that witnesses' testimony, which was offered to show that defendant stated to various persons that he sought owner of property taken, in order that it might be returned, was inadmissible as hearsay where it was offered to prove truth of matter asserted in defendant's statements.

Affirmed.

#### 1. Robbery ☞24(1)

Evidence sustained conviction of robbery. West's Ann.Pen.Code, § 211.

#### 2. Robbery ☞6

In prosecution for robbery, evidence that defendant used a knife in order to effectuate crime was sufficient to satisfy statutory requirement of force. West's Ann.Pen.Code, § 211.

**3. Criminal Law** §419(1)

In prosecution for robbery, witnesses' testimony which was offered to show that defendant stated to various persons that he sought owner of property taken, in order that it might be returned, was inadmissible as hearsay where it was offered to prove truth of matter asserted in defendant's statements. West's Ann.Pen. Code, § 211.

**4. Criminal Law** §1114(1)

Contentions of defendant who had been convicted of robbery, that he had witnesses who could show that some of statements made during trial were slightly if not grossly wrong and that deputies had told him that he would get a phony trial concerned matters which did not appear in record and could not be reviewed on appeal. West's Ann.Pen.Code, § 211.

**5. Criminal Law** §1035(5)

Objection, made after trial, that one of jurors did not reside in county was made too late.

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David G. McInnes, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by William O. Minor, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Lloyd Huston was charged with the crime of robbery, the information alleging that he forcibly took from the person of one Earl Zumwalt \$70 in money and a Bulova wrist watch of the value of \$50 by means of force and fear. Defendant pleaded not guilty and was found guilty by the jury of the crime of robbery in the first degree. His application for probation and his motion for a new trial were denied and judgment was pronounced. He has appealed from the judgment and from the order denying his motion for a new trial.

Appellant wrote a letter to this court in which he attempted to set forth what he considers to be errors occurring during the course of the trial, and also stating that he

did not have an attorney. This court appointed Mr. David G. McInnes, of the Sacramento Bar, to represent appellant on appeal. Mr. McInnes has informed this court that after a thorough review of the record it is his opinion that appellant had a fair trial and that there is no merit to this appeal.

Earl Zumwalt testified that he arrived in Willits, California, December 14, 1956, for a two-day holiday. After getting a room he went to Manney's, a bar, for a few drinks. He was in and out of Manney's bar all afternoon and had several beers. During this time he cashed a check which gave him a total of about \$90 which he placed in his two front pockets. He met three women in Manney's, bought them drinks, and was generally careless with his money. The group attended various bars during the afternoon and were at Manney's or John's Lodge when appellant joined them. Zumwalt asked one of the women to drive him to Laytonville, but appellant told him that all the woman wanted was his money and that he would take him there in his car. Zumwalt left with appellant later in the evening.

At the time he had about \$70 in his pockets, and his Bulova wrist watch. About four to six miles north of Willits appellant stopped at a wide spot in the road, pulled out a knife and stuck Zumwalt with it. Appellant said "let's have it" and when Zumwalt replied "what are you talking about?" appellant said "the money." The knife was a large hunting knife with a single blade, and when Zumwalt attempted to slap it aside his thumb was cut. Appellant took Zumwalt's watch off his arm. He bent the victim over the seat, held the knife on him, scratched his neck and reached into his pockets and took out the money. He said he should kill Zumwalt. Appellant made Zumwalt take off his shoes and belt, took some keys in Zumwalt's possession and after some time left the victim standing in the road.

After being picked up by a passing motorist, Zumwalt was taken to the police sta-

tion in Willits and from there to the hospital where he was treated for a lacerated thumb. He had blood all over him. He immediately complained of the robbery to the police.

Appellant was arrested February 10, 1957, and two days later a police officer found the victim's watch on a woman at the residence of appellant.

Defendant testified that he drove Zumwalt toward Laytonville and they argued as to who would pay for the gasoline for the trip; that suddenly Zumwalt hit him in the chest, and to protect himself he reached for a knife which he had in the glove compartment; that while he was withdrawing the knife Zumwalt reached for it and cut himself; that he started to push Zumwalt and they scuffled, and during the scuffle the band on Zumwalt's watch broke and the watch fell to the seat of the car; that Zumwalt reached into his own pocket and threw the bills on the seat. Defendant contended that he did not know the denomination of the bills. He denied any intent to rob Zumwalt. He asserted that he later attempted to locate Zumwalt for the purpose of returning his property.

[1,2] The evidence as related is sufficient to sustain the judgment. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Penal Code, sec. 211. The evidence discloses that money and a watch were taken from Zumwalt's possession by appellant. There is evidence that appellant used a knife in order to effectuate the crime. This is sufficient to satisfy the requirement of force. Appellant's testimony merely raised a conflict for the jury to resolve.

Appellant, in his letter to the court, states that the court refused to permit his witnesses to testify. The only instance appearing in the record to which this statement could refer is when Mr. Osborne, a witness for the defense, was asked: "Did the defend-

ant ever at any time make any statement to you concerning some property he had?"

[3] An objection that the question called for a self-serving, hearsay declaration of the defendant was sustained. In his offer of proof appellant's counsel explained that he wanted to show that the "defendant stated to various persons that he sought the owner of this property in order that it may be returned." Since these statements were offered to prove the truth of the matter asserted in the statements themselves, they were clearly inadmissible hearsay. 1 Wharton's Criminal Evidence (1955 ed.), sec. 249; *In re Estate of Gaines*, 15 Cal.2d 255, 261, 100 P.2d 1055; *People v. King*, 140 Cal.App.2d 1, 5, 294 P.2d 972. No possible error could be predicated on this ruling.

[4] Appellant also contends in his letter that he has witnesses who can show that some of the statements made during the trial were slightly if not grossly wrong. This concerns matters outside of the record and cannot be reviewed on this appeal. Appellant also contends that the deputies told him that he would get a phony trial. This, too, concerns a matter which does not appear in the record and cannot be reviewed herein.

[5] The final contention in appellant's letter is that one of the jurors did not reside in the county. There is nothing in the record to support this contention. The record shows that the prospective jurors were examined on voir dire and that no objection to the alleged non-resident juror was made. An objection made after the trial is too late. *People v. McFarlane*, 138 Cal. 481, 490, 71 P. 568, 72 P. 48, 61 L.R.A. 245; 29 Cal.Jur.2d, Jury, sec. 35, p. 533.

After a careful review of the entire record we are satisfied that the appellant received a fair trial, that the jury was fully and correctly instructed, and that the evidence supports the judgment.

The judgment and the order are affirmed.

PEEK, J., and WARNE, J. pro tem., concur.



163 Cal.App.2d 255

**Matter of the Estate of Florence R.  
STEVENS, Deceased.**

**Robert C. KIRKWOOD, Controller of the  
State of California, Appellant,**

**v.**

**D. Z. ALBRIGHT, Executor, Esther Stevens  
Marshall, Kathryn Stevens Albright,  
Respondents.**

**Civ. 22784.**

**District Court of Appeal, Second District,  
Division 3, California.**

**Aug. 29, 1958.**

Proceedings in the matter of decedent's estate. The Superior Court of Los Angeles County, Arthur K. Marshall, J., entered an order fixing inheritance tax, and an appeal was taken. The District Court of Appeal, Patrosso, J. pro tem., held that for purposes of Revenue and Taxation Code section, subjecting to inheritance tax inter vivos transfers made without valuable and adequate consideration if transferee promised to make payments to, or care for, transferor, adequacy of consideration must be determined as of date when transfer was made; and held that since annuity had had fair and reasonable value of not more than \$75,000 on date when 73 year old woman (the decedent) transferred property then worth \$155,000 to her daughter in consideration for daughter's agreement to assume \$34,000 mortgage and pay her \$600 per month for life, there had been inadequate consideration for transfer, notwithstanding fact that decedent had lived to be 93 and that total amount paid under annuity agreement had exceeded \$140,000.

Reversed with directions.

**1. Taxation ☞900(5)**

In inheritance tax case, trial court's determination that consideration paid to decedent for transfer of property had been valuable and adequate was, though denominated a "finding of fact," clearly a conclusion of law, the validity of which was dependent upon probative facts from which it had been drawn; and there being no dis-

pute as to facts, such determination was not binding upon reviewing court.

**2. Taxation ☞895(4)**

Adequacy of consideration for inter vivos transfer is to be determined, for inheritance tax purposes, as of date of transfer rather than as of date of transferor's death.

**3. Taxation ☞878(1)**

Where annuity had fair and reasonable value of not more than \$75,000 on date when 73 year old woman transferred property then worth \$155,000 to her daughter in consideration for daughter's agreement to assume \$34,000 mortgage and pay her \$600 per month for life, there was, for inheritance tax purposes, inadequate consideration for transfer, notwithstanding fact that mother lived to be 93 and that total amount paid under annuity agreement exceeded \$140,000.

**4. Taxation ☞895(6)**

In determining, for inheritance tax purposes, value of an annuity promised to transferor in consideration for transfer of property, net income received from transferred property, or at least the income which transferor might have normally been expected to have received from transferred property, must be deducted in determining value of consideration (annuity) given for transfer of property. West's Ann.Rev. & Tax.Code, §§ 13641, 13643-13645.

**5. Contracts ☞53**

Adequacy of consideration for contract must be determined as of date of agreement.

**6. Appeal and Error ☞1008(3)**

Where interpretation and legal effect of written agreement depended solely on language of document, reviewing court was not bound by trial court's construction and could determine effect of said agreement as a matter of law.

**7. Taxation ☞878(1)**

Liability in inheritance tax cases does not turn upon intention of grantor, but upon character of interests created by transfer; and even though decedent had purported to

make an exchange of undivided interest in property for an annuity having a certain value and to "give" to her daughter the remaining undivided interest in property, it did not follow, for purposes of determining inheritance tax liability, that two separate and independent transactions had been in reality entered into.

#### 8. Taxation Ⓒ881

Inheritance tax on transfer, under which transferee promises to make payments to transferor, cannot be avoided by payment of consideration only equal to value of undivided interest denominated as "sold" and not equal to value of entire property, including undivided interest therein designated as being subject of "gift". West's Ann.Rev. & Tax.Code, § 13645.

#### 9. Taxation Ⓒ878(1)

Revenue and Taxation Code section codified a portion of 1935 inheritance tax act and was designed to subject to inheritance tax *inter vivos* transfers made without valuable and adequate consideration if transferee promised to make payments to, "or" care for, transferor; and under that section transfer would be taxable even though payments promised were annuity payments and even if such payments were not intended for support of transferor. West's Ann.Rev. & Tax.Code, § 13645.

#### 10. Taxation Ⓒ878(1)

Consideration paid to insurance company for annuity policy is ordinarily adequate; but since inheritance tax law, by its express terms, includes all transfers by "bargain" and "sale" made without consideration, a transfer of property to insurance company in exchange for annuity could come within purview of inheritance tax law. West's Ann.Rev. & Tax.Code, § 13641.

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James W. Hickey\*, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Chief Assistant Inheritance Tax Atty., Joseph D. Lear, Asst. Chief Inheritance Tax Atty., San Francisco, William R. Elam, Asst. Inheritance Tax Atty., Los Angeles, for appellant.

Chester E. Cleveland, Beverly Hills, Latham & Watkins, A. R. Kimbrough and C. Robert Wilmsen, Los Angeles, for respondents.

#### PATROSSO, Justice pro tem.

Appeal by the Controller of the State of California from an order fixing the inheritance tax in the above-named estate.

The sole question presented is whether certain *inter vivos* transfers by the decedent, hereinafter to be mentioned, are subject to inheritance tax.

The facts are not in dispute. The decedent, Florence R. Stevens, died on May 29, 1955, at the age of 93. On December 20, 1935, when Mrs. Stevens was 73 years of age, she conveyed, by deed absolute in form, three parcels of real property to her daughter Kathryn Stevens Albright. Contemporaneously with the execution of the deed, however, an agreement was executed between Mrs. Stevens and Kathryn which, after reciting the conveyance of said real properties to Kathryn, provides that in consideration of said conveyance and of the natural love and affection between the parties Kathryn agrees to pay to her mother for the term of the latter's life the sum of \$600 per month commencing January 10, 1936, as and for an annuity of \$7,200 per annum. Kathryn also assumed and promised to pay the unpaid balance of \$34,000 due upon a note secured by a mortgage upon one of the parcels so transferred to Kathryn. Additionally, the agreement recites that the parties had agreed that the net value of the real properties transferred to Kathryn, after deducting the \$34,000 mortgage, was \$121,000 and then proceeds to provide as follows: "(4) Of the amount of the property transferred to the party of the second party [Kathryn] Seventy-five Thousand Dollars (\$75,000.00) thereof represents the cost of the annuity hereinabove provided for. The balance the party of the first part [Mrs. Stevens] has given, and by these presents does give, to the party of the second part without restriction as an outright gift."

Also contemporaneously with the execution of the deed and the agreement last above mentioned Kathryn executed a declaration of trust wherein she acknowledged that she held an undivided one-half interest in and to the properties conveyed to Kathryn by Mrs. Stevens in trust for another daughter of Mrs. Stevens, Esther Stevens Heinsch. It was therein provided that the trust thereby created was to continue until the death of Mrs. Stevens and that the net income from the trust property after deducting therefrom all expenses incurred in the maintenance and operation thereof, all payments made on account of the mortgage upon the one parcel and the retention by the trustee of \$300 per month (one-half of the \$600 monthly payment which Kathryn had agreed to pay to her mother) was payable to Esther or in the event of her death prior to the termination of the trust to Esther's children. Upon the termination of the trust the corpus was to vest in Esther or in the event of her prior death in her children.

At the same time, Kathryn and Esther entered into an agreement which, after reciting the annuity agreement entered into between Kathryn and Mrs. Stevens and the agreement of the former to pay the mortgage upon one of the parcels transferred to Kathryn and the execution of the declaration of trust last above mentioned, provides that Esther acknowledges that Kathryn executed said annuity agreement for the joint benefit of Kathryn and Esther and the latter "assumes and agrees to share equally with second party [Kathryn] any and all obligations created under said annuity agreement."

Appellant contends that the transfer of the property in question is taxable under each and all of sections 13643, 13644 and 13645 of the Revenue and Taxation Code. This contention is necessarily premised upon the proposition that the transfer was made without a "valuable and adequate consideration" as that term is defined in section 13641 of the Revenue and Taxation Code, for the sections under which the right to tax is asserted by the appellant

have application only to such transfers. Thus we first address ourselves to a consideration of the evidence upon this subject.

It is admitted that the net value of the properties transferred, as of the date of the transfer, was \$121,000. Additionally, it is made to appear that the annual net income realized by Mrs. Stevens from the property so transferred during the three years immediately preceding the transfer was less than the \$7,200 annuity agreed to be paid commencing with the year 1936 as aforesaid. Specifically, the net income from the property during said years, computed without any deduction for annual depreciation, was as follows: 1933, \$5,279.49; 1934, \$4,054.62; 1935, \$6,391.31.

As to the net income realized by the daughters from the property after the transfer, the evidence was as follows: From 1935 to 1940, the monthly net income from the transferred property was sometimes sufficient and sometimes not sufficient to equal the \$600 monthly payment; and from 1940 to decedent's death on May 29, 1955, the net income was equal to or more than \$600 per month. The exact amount of the net income realized by the daughters from the transferred property during the years from December 20, 1935, to May 29, 1955, cannot be ascertained from the record; but the evidence clearly establishes that substantial net income was realized by the daughters from the transferred property, which said net income during the period from 1940 to May 29, 1955, was equal to or in excess of \$600 per month. The evidence also showed that, during 1946, the daughters sold portions of the transferred property, realizing a net of \$198,826.06 therefrom and reinvested the proceeds in other investments for their own account.

The evidence further discloses that, during each and every month from January 1936 to May 1955 the daughters paid to their mother the sum of \$600 pursuant to the annuity agreement; and that the total of the annuity payments so paid by them to Mrs. Stevens amounted to \$140,400. Also the daughters paid the mortgage indebted-



ness of \$34,000 which they had assumed and agreed to pay. Further, the daughters paid for substantial alterations and improvements to the transferred property the total sum of \$14,600.

There was evidence adduced by respondents that, on December 20, 1935, an annuity contract providing a \$600 monthly life income to a woman age 73 (Mrs. Stevens' age at said time) could have been purchased from insurance companies at cost ranging from \$65,520 to \$67,980 for such a life annuity contract containing no cash refund provisions, and at cost ranging from \$84,900 to \$90,960 for such an annuity contract containing cash refund provisions in event the annuitant died before she had received a return equal to the premium paid.

In this connection, there was also the further testimony of decedent's son-in-law (a banker of long experience who had for some years been assisting Mrs. Stevens in the management of her properties) that an attempt had been made in 1935 to determine the capitalized value of an annuity providing for payment of a \$7,200 annuity for life to a woman age 73; that various insurance companies had been contacted; that a variety of figures had been quoted by the insurance companies; and that \$75,000 seemed to be a reasonable figure for the capitalized value of such an insurance contract taking into consideration the variety of figures quoted by the various insurance companies.

The determination of the question as to whether the transfer was supported by a valuable and adequate consideration is dependent in part on the answer to a related question, later to be considered; to wit, whether it can be held, as found by the trial court, that Mrs. Stevens and Kathryn entered into two separate and distinct transactions, namely: first, a bargain and sale exchange of an undivided 75/121st interest in the said real property for an annuity having a fair market value of \$75,000; and, second, a complete, absolute and irrevocable gift (independent of the

exchange) of an undivided 46/121st interest in the said real property.

The first of the two bases upon which the trial court found and respondents contend that the transfer was made for a valuable and adequate consideration is that the payments made by the daughters to or on behalf of their mother (i. e., the annuity payments in the total sum of \$140,400 and the payment of \$34,000 mortgage indebtedness) constituted a valuable and adequate consideration for the transferred property.

More specifically, the trial court, in this particular connection, found: "The total amount of such sums so paid [by the daughters to their mother pursuant to the annuity agreement] equals \$140,400.00. Also, [the daughters] paid the mortgage indebtedness of \$34,000.00 which they had expressly assumed and agreed to pay. The total consideration paid therefor by [the daughters] from their own funds which did not originate directly or indirectly with the decedent was \$174,400.00. *The consideration paid was valuable and adequate and was more than equal in money or money's worth to the full value of the three parcels of property described in the inheritance tax report.*" (Emphasis added.)

[1-3] While denominated a finding of fact the last sentence thereof, which we have emphasized, is clearly a conclusion of law the validity of which is dependent upon the probative facts from which it is drawn and concerning which there is no dispute. The conclusion therefore is not, as respondents contend, binding upon this court unless it be true as a matter of law that the adequacy of the consideration paid or given in return for a promise to make annuity payments is to be determined as of the date of the death of the annuitant and measured by the total amount of payments made pursuant thereto during the lifetime of the annuitant. We have concluded that the law is otherwise and it may not be held that the payments so made by the daughters constituted a valuable and adequate consideration for the transferred property.

In the first place, as previously noted, the undisputed evidence shows, and the trial court also found, that the net income received by the daughters from the transferred property was equal to or more than \$600 per month from 1940 until the death of the decedent on May 29, 1955; and that, from December 20, 1935, to January 1, 1940, said net income in some months would equal \$600 and in some months would not equal \$600.

While the evidence may fall somewhat short of definitely establishing, as the controller contends, that the net income received by the daughters from the transferred property equaled or exceeded the total amount of the \$600 monthly payments made to the mother, it clearly establishes at the minimum that net income in excess of \$111,000 was received by the daughters from the transferred property.

The trial court's aforementioned conclusion that the said \$174,400 so paid by the daughters in annuity and mortgage payments was more than equal in money or money's worth to the full value of the transferred property was obviously made without taking into consideration either the net income realized by the transferees from the transferred property during the same period, or the sum which the transferor might have normally been expected to have received from the transferred property or on its commuted value.

[4] Assuming without deciding at this point that the said payments could be properly considered at all (in view of the other evidence and findings as to the fair market value of the annuity agreed to be paid at the time of the transfer, as hereinafter discussed) in determining whether the transfer was made for a valuable and adequate consideration, there is no warrant in our opinion for treating the gross amount of the said payments so made as the value of the consideration given without making any adjustment or deduction therefrom for the net income received by the transferees from the transferred property; or at least without making adjustment and deduction for the income which the transferor might

normally have been expected to have received from the transferred property or on its commuted value.

We see no escape from the logic of the principle enunciated in *Fidelity Union Trust Co. v. Martin*, 118 N.J.L. 277, 192 A. 74, 80 and *Updike v. Commissioner of Internal Revenue*, 8 Cir., 88 F.2d 807, 813, that, in determining the value of an annuity promised to be paid to a transferor in consideration of a transfer of property to the transferee, the net income received from the transferred property or at least the income which the transferor might have normally been expected to have received from the transferred property or on its commuted value, must be deducted in determining the value of the consideration (annuity) given for the transferred property.

In *Fidelity Union Trust Co. v. Martin*, supra, where certain of the transferees had agreed to pay annuities to the transferor in excess of the amount which the transferor might normally have realized upon the principal amount transferred, the Supreme Court of New Jersey enunciated said principle succinctly, as follows, (192 A. at page 80): "We also concur in the result reached by the Vice-Ordinary \* \* as to the basic principle upon which the actual financial value of the consideration received by the donor for each transfer should be computed. Summarized it may be stated thus: That the consideration of adequate financial value is the amount by which the sum agreed to be paid annually exceeds the sum which the donor would normally receive on the fund commuted as of the date of the instrument of transfer."

In *Updike v. Commissioner of Internal Revenue*, supra, where the transferor in contemplation of death had transferred property to his three sons in consideration of their promise to pay the father during his life the yearly sum of \$27,000 and where it appeared that the annuity of \$27,000 amounted approximately to the income derived from the transferred property, the Circuit Court of Appeals (Eighth Circuit), after pointing out that the father's estate

would have been taxed for the entire value of the transferred property had he kept the property until his death, stated, *inter alia*, as follows (88 F.2d at page 813): "That being the situation, why should the tax be less where he has transferred in contemplation of death and the transferee in substance has agreed to collect the income and pay it back to him in the form of an annuity? \* \* \* [T]he value of the transferred property at the time of decedent's death was not diminished by the fact that there had been paid back to him in the form of an annuity an amount substantially equal to the income derived from [the transferred] property. \* \* \* To regard such an annuity as consideration would lead to absurd consequences." While it is true, as respondents point out, that the *Udike* case was essentially determined upon the basis that the transfer therein was made in contemplation of death and that the federal estate tax regulations did not allow an annuity to be deducted where given in exchange for a transfer of property made in contemplation of death, the logic of the court's observations that an annuity cannot be regarded as consideration for a transfer where the income derived from the transferred property is substantially equal to the amount of the annuity, is not and cannot be disputed.

Also while the court in the *Udike* case had before it a situation where the income derived from the transferred property was substantially equal to the amount of the annuity, it necessarily follows that where the transferred property produces income although not equal to the amount of the annuity there is no consideration to the extent of the income derived therefrom.

*Nourse v. Riddell*, D.C., 143 F.Supp. 759, cited and relied upon by respondents, is factually distinguishable from the instant case. If, however, it may be said to support the proposition that, upon the facts of the instant case, the adequacy of the consideration for a promise to make annuity payments is to be determined as of the date of the annuitant's death and measured by the total amount of the payments made

during the annuitant's lifetime we cannot subscribe thereto.

Further, the respondents' own evidence, construed in the most favorable light to them, discloses and the trial court found, that the fair and reasonable value of the annuity at the time of the transfer was not in excess of \$75,000. In view thereof and for the reasons set forth immediately below, it cannot be held that the part of the consideration for the transfer represented by the annuity is to be evaluated at \$140,400 (the total of the annuity payments made to the mother) as found by the trial court.

[5] It is, of course, the established rule in the law of contracts that the adequacy of consideration must be determined as of the date of the agreement. *Drullinger v. Erskine*, 71 Cal.App.2d 492, 495, 163 P.2d 48; *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 165, 88 P.2d 698, 89 P.2d 386; 12 Cal.Jur.2d 225, 226.

There is no reason why the same rule should not apply in determining the adequacy of the consideration given for an *inter vivos* transfer under the inheritance tax law. Indeed if the adequacy of consideration for annuity contracts were to be determined as of the date of the annuitant's death many such transactions, not otherwise taxable, would be rendered so by the fortuitous circumstance that the annuitant died before the payments received equaled the consideration paid for the contract.

Briefly respondents' contention is that there is no logical reason nor rule of law, except perhaps in eminent domain cases, which forbids the use of knowledge acquired later in ascertaining a value which, if known at the valuation date, would have materially affected the amount fixed as the price or value. Accordingly, respondents urge that, in evaluating the consideration given for the transfer (the annuity), said annuity should be evaluated in accordance with the amount of the actual payments later made to the annuitant. However, it is implicit in their argument and essential to their contention that the other



factor involved, i. e., the transferred property should be evaluated as of the date of the transfer.

It is wholly inconsistent to evaluate the property transferred as of the date of the transfer and to evaluate the consideration given (the annuity) as of a later date, as the respondents contend and as the trial court in fact did; and it would further appear that, if the value of the annuity is to be determined in accordance with the situation existing at date of the annuitant's death, the value of the property should likewise be valued as of date of the annuitant's death. In the instant case this would only serve to prove that there was not an adequate consideration for the transfer, since the transferred property had value, as shown by the inheritance tax appraiser's report, of \$273,250 as of the date of the annuitant's death as compared with the \$174,400 paid to the annuitant or on her behalf.

The second of the two bases upon which the trial court found and respondents contend that the transfer was made for a valuable and adequate consideration is that Mrs. Stevens and Kathryn, in the view of the trial court, entered into two separate and distinct transactions; namely, first, a bargain and sale exchange of an undivided  $\frac{75}{121}$ st interest in the transferred property for a valuable and adequate consideration of \$75,000; and, secondly, a complete, absolute and irrevocable gift (independent of said exchange) of an undivided  $\frac{46}{121}$ st interest in the transferred property from Mrs. Stevens to Kathryn.

Although certain of respondents' own evidence establishes that the annuity in question could have been purchased at cost ranging from \$65,520 to \$67,980 and although appellant contends that it had a lower value if evaluated in accordance with his "Combined Experienced Tables of Mortality," there is no question that there was some evidence (i. e., the testimony aforementioned of decedent's son-in-law) sufficient to sustain the trial court's finding that the annuity had a fair market value of \$75,000 as of the time of the transfer.

The primary questions to be determined in this connection are therefore: Whether the trial court's findings that the parties entered into the two said separate and independent transactions can be sustained; and, if so, whether the giving of a consideration adequate for the transfer of a  $\frac{75}{121}$ st interest in the transferred property is adequate where an accompanying gift of a  $\frac{46}{121}$ st interest is also made to the transferee.

As hereinbefore quoted in full, the agreement between Mrs. Stevens and Kathryn by its terms states that of the amount of the property transferred to Kathryn, \$75,000 represented the cost of the annuity which Kathryn agreed to pay to her mother, and that the balance was given to Kathryn without restriction as an outright gift.

The only parol evidence (testimony of decedent's son-in-law) introduced in aid of the interpretation of the agreement added nothing and afforded no aid in interpreting the agreement. Said testimony consisted merely of statements by the witness with reference to the agreement that it was his opinion that there was an outright gift by Mrs. Stevens to Kathryn of the equity (balance) in the property in excess of \$75,000 and the \$34,000 mortgage indebtedness.

[6] Accordingly, since the interpretation and legal effect of the said written agreement depended solely on the language of the document, this court on appeal is not bound by the trial court's construction, but may determine the effect of said agreement as a matter of law. (12 Cal.Jur.2d 326, 327.)

[7] There can be no doubt that judged by the language of the agreement alone the decedent purported to make a sale or exchange of an undivided interest in the property for \$75,000 and to give to her daughter the remaining undivided interest in the property represented by the value of said property in excess of \$75,000; but it does not follow in determining inheritance tax liability that two separate and independent

transactions were in reality entered into, notwithstanding the expressed intention.

As succinctly stated in *Re Estate of Hyde*, 92 Cal.App.2d 6, 14, 206 P.2d 420, 425, "[i]ability in [inheritance tax] cases does not turn upon the intention of the grantor, but upon the character of the interests created by the transfer."

As further and more completely stated by the Supreme Court of New Jersey in *Schroeder v. Zink*, 1949, 4 N.J. 1, 71 A.2d 321, 325-326: "In taxing *inter vivos* transfers the substance rather than the form of the transfer controls. \* \* \* So it has been held that the statute is concerned with the *net substantial result of the entire transaction*. \* \* \* As expressed in *In re Kellogg's Estate*, 123 N.J.Eq. 322, 324, 197 A. 263, 264 \* \* \*, '*that which is material and all-important is whether the thing which has been done, amounts in substance to the thing which the Legislature has made taxable,—not whether the thing which has been done has in substance accomplished the purpose of the transferor*.'" (Emphasis added.)

Commenting with apparent approval on the exhaustive treatise by Professor Rottschaefer in 26 Iowa Law Review 514, the court in *Re Estate of Hyde*, supra, 92 Cal. App.2d 6, 18, 206 P.2d 420, 428, observes: "The author concludes that most of the courts today are no longer using the technical and formal reasoning once employed, but are looking to see, *from a realistic standpoint, what economic benefits are in fact shifted by the questioned transfer*." (Emphasis added.)

From any realistic viewpoint, the net substantial result of the entire transaction herein was that the decedent transferred the entire property to the transferee, and received back in consideration therefor the transferee's agreement to pay her \$600 per month for life.

Except for the decedent's declaration that she intended part of the transferred property to be a gift, such transfer was clearly not made for an adequate consideration, since the value of the annuity at the time

of the transfer was not in excess of \$75,000 and the mortgage indebtedness assumed only amounted to \$34,000 making the total of the consideration given \$109,000 for transferred property having a value of \$155,000 at the time of the transfer.

The further question is whether a transferor can alter the situation by a declaration that the portion of the transferred property exceeding the value of the consideration given, is intended to be a gift. Under the authorities cited and under any realistic view of the matter, the decedent's intention cannot change "the thing which has been done"; namely, the transfer of the entire property to the transferee for a promise on the transferee's part to pay the transferor \$600 per month for life.

In *re Estate of Thurston*, 36 Cal.2d 207, 211, 223 P.2d 12, 14, cited and relied upon by respondents, does not support respondents' position. While it is stated therein that "[i]t is immaterial whether such a transfer is accomplished by a single transaction or, \* \* \* by an initial transfer and [a] subsequent relinquishment," the language had reference to a situation where the transferor first made a transfer of real property without consideration to his children and reserved to himself a life estate, and at a later date made a relinquishment (an outright transfer) of his retained interest (his life estate) in said real property.

The quoted language has, of course, to be construed in relation to the whole context; and, as so construed, it merely means that a transferor might in a single transaction make an outright gift of real property; or, where he first makes a gift but reserves a life estate in the real property, he may later make a relinquishment (an outright transfer) of his retained interest in said real property. Accordingly, it may very well have been that the decedent herein could have made a relinquishment of her interest in the annuity, but she did not do so.

[8] By analogy and since a transfer under which the transferee promises to make payments to the transferor falls in the same category as a transfer in con-

temptation of death insofar as tax liability is concerned, it would also seem that the tax on a transfer under which the transferee promises to make payments to the transferor, cannot be avoided by payment of a consideration only equal to the value of an undivided interest denominated as a sale and not equal to the value of the entire property including the undivided interest therein designated as a gift.

We are not unmindful of *Hirsh v. United States*, 1929, 35 F.2d 982, 986, cited by respondents, wherein the Court of Claims stated in substance, with reference to a somewhat analogous agreement, that the agreement provided for two things, first a gift and secondly the purchase of an annuity; and that the fact that the decedent chose to unite the gift with the purchase of the annuity in one transaction, did not alter the fact that the agreement provided for two different things. The case was however primarily decided on other considerations (i. e., that a transfer of the type made was not taxable as a part of the estate of the decedent under federal statutes materially different from section 13645 of our Revenue and Taxation Code). In any event for the reasons indicated above, we are not disposed to follow it here.

The final question which remains to be determined is: Whether the transfer in question is one made subject to tax under any provision of the inheritance tax law.

As previously mentioned, the controller contends that the said transfer is subject to tax under each and all of the following sections of the Inheritance Tax Law: namely, (1) under section 13643 of the Revenue and Taxation Code as a transfer made with intention to take effect in possession or enjoyment at or after the death of the transferor; (2) under section 13644 as a transfer under which the transferor expressly or impliedly reserved for his life an income or interest in the property transferred; and (3) under section 13645 as a transfer under which the transferee promised to make payments to or care for the transferor.

Much of the argument in the briefs is devoted to the question of whether the said transfer is subject to tax under section 13643 or section 13644, and to the question of whether *In re Estate of Hyde*, supra, 92 Cal.App.2d 6, 206 P.2d 420 (where it was held that the transfers made therein pursuant to agreement on the part of the transferees to pay annuities to the transferor were subject to the tax under §§ 13643 and 13644), is applicable and controlling herein.

In our opinion, however, it is unnecessary to consider whether the transfers herein are subject to tax under said sections 13643 or 13644 for the reason that the transfer made herein is in any event clearly subject to tax under section 13645 of the Revenue and Taxation Code.

It should be mentioned at this point that the question of whether the transfers made in the *Hyde* case were taxable under said section 13645 was not passed upon in that case (see the opinion in *Re Estate of Hyde*, supra, 92 Cal.App.2d at page 21, 206 P.2d at page 429), for the reasons that most of the transfers there involved were made before the provisions contained in said section were first enacted into law (Stats.1935, ch. 358, pp. 1266, 1268) and were held in any event to be taxable under sections 13643 and 13644.

[9] Section 13645 of the Revenue and Taxation Code provides, as follows: "A transfer conforming to Section 13641 [i. e., an *inter vivos* transfer made without a valuable and adequate consideration] and under which the transferee promises to make payments to or care for the transferor is a transfer subject to this part."

Said section is a codification of the last clause of subdivision (3) (b) of section 2 of the "Inheritance Tax Act of 1935" (Stats.1935, ch. 358, pp. 1266, 1268, effective June 25, 1935), which was in effect at the time the transfer herein was made and which provided that *inter vivos* transfers made without valuable and adequate consideration were subject to inheritance tax when: "(b) Intended to take effect in pos-



session or enjoyment at or after [the transferor's] death, or in which a life income or interest is reserved by the grantor, either expressly or impliedly, *or by the grantee promising to make payments to or care for the grantor.*" (Emphasis added.)

Said provision now codified as section 13645 of the Revenue and Taxation Code was first added to the inheritance tax law in 1935. The prior provisions of the inheritance tax law simply provided that *inter vivos* transfers were taxable when made: "(a) In contemplation of the death of the \* \* \* donor, or, (b) Intended to take effect in possession or enjoyment at or after such death." In re Estate of Schmidt, 49 Cal.App.2d 86, 89, 121 P.2d 104, 106; Deering's General Laws (1931), Act 8443, § 2, subd. 3.

It had long been a perplexing question before the courts whether a transfer was taxable where the transferee promised to pay the transferor an annuity or to care for him. 157 A.L.R. 964, 995 et seq.; 26 Iowa Law Review 514. It was fairly well established that, if the annuity promised to be paid was dependent upon and only payable out of and to the extent of income to be received from the transferred property, the transfer would be held to be taxable. However, if the transferee made an independent promise to pay an annuity or care for the transferor not tied into or dependent on the income to be received from the transferred property, the cases were in conflict as to whether the transfer was taxable. 157 A.L.R. 964, 995, et seq.; 26 Iowa Law Review 514; Fidelity Union Trust Co. v. Martin, supra, 118 N.J.L. 277, 192 A. 74.

In view thereof and of the express and sweeping language of section 13645 (and similarly of the last clause of subd. (3) (b) of § 2 of the "Inheritance Tax Act of 1935"), it cannot be doubted that the Legislature intended to close the gap and to subject to tax *inter vivos* transfers made without valuable and adequate consideration where the transferee promises to make payments to or care for the transferor.

Respondents in effect are asking us to construe section 13645 as though the words read "under which the transferee promises to make payments (*other than annuity payments*) to \* \* \* the transferor." The section cannot be so read and permits of no such exception.

Respondents would also have us construe the section as applying only to "support payments" and to hold it inapplicable to the situation herein since there was no evidence that the annuity payments were made as "support payments." The unmistakable wording of the section is in the alternative, i. e., that the transfer is taxable where "the transferee promises to make payments to *or* care for the transferor." (Emphasis added.)

[10] Finally, there is no merit to respondents' implied claim that, if section 13645 is construed as having reference to and including annuity payments, such construction would, in principle, subject ordinary annuities purchased from insurance companies to taxation.

Briefly and as the court noted in Re Estate of Hyde, supra, the consideration ordinarily paid the annuitant in the purchase of an annuity policy from an insurance company is adequate. However, if an insurance company should depart from its usual practice of asking and receiving cash payment for the premium for issuance of the annuity contract and if it should elect to enter into an arrangement under which the annuitant transfers to it, or exchanges property, in payment of the premium, there is no reason why such a transfer would not be taxable if the insurance company should receive property having a far greater value than its ordinary premium for the issuance of an annuity contract.

Our inheritance tax law by its express terms includes all transfers by "bargain" and "sale" where made without adequate consideration (Rev. & Tax.Code, § 13641); and a sale or exchange made to insurance company without adequate consideration would be as equally within the purview of

the inheritance tax law as the transfer made herein. See: *Schroeder v. Zink*, supra, 4 N.J. 1, 71 A.2d 321, 325, in re a contract for purchase of corporate stock.

In the appellant's reply brief it is conceded that in valuing the properties transferred for the purpose of determining the inheritance tax thereon there should be deducted from the value thereof as determined at date of death the sum of \$34,000 paid on account of the mortgage and the sum of \$14,600 paid for improvements by the daughters subsequent to the transfer, and if the appraiser, in his appraisal, has not made allowance therefor he should be instructed to do so.

The order appealed from is reversed with instructions to the trial court to take appropriate proceedings not inconsistent herewith and to fix the inheritance tax accordingly.

SHINN, P. J., concurs.

VALLÉE, J., concurs in the judgment.



163 Cal.App.2d 351

**Alma C. PETERS, Plaintiff and Appellant,**

**v.**

**Clarence O. PETERS, Defendant and Respondent.**

**Civ. 22843.**

District Court of Appeal, Second District,  
Division 3, California.

Sept. 4, 1958.

Divorce action. The Superior Court, Los Angeles County, William P. Haughton, J., entered an order setting aside defendant husband's default and an interlocutory decree, and wife appealed. The District Court of Appeal, Shinn, P. J., held

that where wife alleged in her verified complaint that \$80 per month for child support was a reasonable amount, and from allegations of the complaint that community property had been divided, it was obvious that the parties had agreed upon an amount for child support, and husband had no reason to believe wife would request more than the agreed amount or that without such a request the court would grant more, action of the court in granting a larger amount for child support constituted a surprise to both parties, and court did not abuse its discretion in setting aside the decree entered following husband's default, to allow husband to litigate question of child support.

Order affirmed.

#### 1. Divorce $\Rightarrow$ 161, 184(5)

A motion to set aside a default judgment of divorce is addressed to the sound discretion of the trial court and an order vacating the decree will not be disturbed on appeal unless it is shown that the court has been guilty of a plain abuse of discretion.

#### 2. Divorce $\Rightarrow$ 161

In divorce action, where wife alleged in her verified complaint that \$80 per month for child support was a reasonable amount, and from allegations of the complaint that community property had been divided, it was obvious that the parties had agreed upon an amount for child support, and husband had no reason to believe wife would request more than the agreed amount or that without such a request the court would grant more, action of the court in granting a larger amount for child support constituted a surprise to both parties, and court did not abuse its discretion in setting aside the decree entered following husband's default, to allow husband to litigate question of child support. West's Ann. Code Civ.Proc. § 473.

J. M. Sinclair, Los Angeles, for appellant.

Moss & Sherman, Los Angeles, for respondent.

SHINN, Presiding Justice.

Alma C. Peters sued her husband, Clarence, for divorce upon the ground of cruelty. She also sought custody of their four year old son, and an order requiring defendant to make reasonable payments for his support. The complaint alleged that the parties had divided their community property and that the agreement therefor was fully executed; it also alleged that \$80 a month was a reasonable amount for the support of the child and within the ability of defendant to pay. Defendant was served with summons and complaint and upon his failure to appear in the action his default was duly entered. On June 19, 1957, the matter was heard as a default and the court granted plaintiff an interlocutory decree, awarding her custody of Danny and ordering defendant to pay \$115 a month for child support. July 13, 1957, defendant noticed a motion under section 473 of the Code of Civil Procedure to vacate the default and the default judgment upon the grounds that they had been taken against him through mistake, inadvertence and surprise. The motion was granted and the default and the interlocutory decree were set aside. Plaintiff appeals.

The motion was heard on affidavits of Mr. and Mrs. Peters. The affidavit of Mr. Peters averred as follows: Defendant is a fireman employed by the City of Los Angeles. He and his wife separated on or about March 1, 1957. Prior to the separation, they entered into an oral agreement respecting their property rights. In accordance with the agreement, defendant assigned to his wife his interest in the family home; Mrs. Peters sold the house and agreed to pay the fee of her attorney out of the proceeds of the sale. The parties also agreed that Mrs. Peters would have custody of the son, with rights of reasonable visitation in her husband, and that Mr. Peters would pay \$80 a month for

the support of the child. Pursuant to the agreement, defendant went to the office of his wife's attorney, where he was served with summons and complaint in the divorce action. After reading the complaint, he informed the attorney that the allegations respecting the division of community property and the amount of child support reflected his agreement with Mrs. Peters. The attorney told him that "this was the agreement" and that the court would make its order for child support in accordance with the allegations and prayer of the complaint, that it would be unnecessary for him to retain his own attorney or to appear in the proceedings, and that he would be protected. Thereafter defendant took no further steps, and he was subsequently advised, in a letter from the attorney, that his default had been entered and that the court had ordered support payments in the amount of \$115 a month. The attorney wrote: "This was done by the Judge without us asking for same and, of course, you will be required to comply." A copy of the letter was attached to the affidavit as an exhibit. Defendant also averred that the circumstances of the parties were unchanged, that he had been making the agreed payments of \$80 a month, and that he had not been advised by his wife or by her attorney that a sum in excess of \$80 a month would be requested or obtained. Defendant tendered a proposed answer, alleging that he was willing and able to pay \$80 a month for child support but was unable to pay a greater amount. The averments of the defendant's affidavit were not denied.

Mrs. Peters averred in her affidavit that she entered in good faith into the agreement set forth in her husband's affidavit and that neither she nor her attorney asked at the trial for child support in excess of \$80 a month. She gave truthful answers to the questions asked her by the judge. Mrs. Peters also averred that the actual cost of maintaining the child was more than \$115 a month and defendant was able to pay that amount.



In urging a reversal of the order, Mrs. Peters contends that the facts alleged by her husband were insufficient as a matter of law to justify vacation of the default and the interlocutory decree. She argues, in this connection, that Mr. Peters had no right to rely upon her attorney's representations that the court would order child support payments of \$80 a month and that he should not have been relieved from the consequences of his default merely because the amount of the order exceeded the amount he expected to pay. The argument cannot be maintained.

[1] A motion to set aside a default judgment of divorce is addressed to the sound discretion of the trial court and an order vacating the decree will not be disturbed on appeal unless it is shown that the court has been guilty of a plain abuse of discretion. *Gregory v. Gregory*, 92 Cal. App.2d 343, 345-346, 206 P.2d 1122, and cases cited.

[2] Defendant made out a clear case for relief. Both he and plaintiff's attorney properly assumed that the court would award \$80 per month for child support. Plaintiff had alleged in her verified complaint that this was a reasonable amount and from the allegation of the complaint that the community property had been divided it was obvious that the parties had agreed upon an amount for child support. Defendant had no reason to believe that plaintiff would request more than the agreed amount or that without such a request the court would grant more. The action of the court, no doubt, came as a surprise to both parties.

The court did not abuse its discretion in setting aside the decree so as to allow defendant to litigate the question of child support. Vacation of the judgment was not only proper but it could not reasonably have been refused. *Garcia v. Garcia*, 105 Cal.App.2d 289, 233 P.2d 23.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.

SAN FRANCISCO BREWING CORPORATION, a corporation, Plaintiff and Appellant,

v.

Clyde A. BOWMAN and Luella Bowman, doing business under the firm name and style of Bowman's Beverage Company and as individuals; Bowman's Beverages, Inc., a corporation, Defendants and Respondents.

Clyde A. BOWMAN, doing business under the firm name and style of Bowman's Beverages, Cross-complainant and Respondent,

v.

SAN FRANCISCO BREWING CORPORATION, a corporation, Cross-Defendant and Appellant.\*

Civ. 9194.

District Court of Appeal, Third District,  
California.

Sept. 3, 1958.

Rehearing Denied Sept. 30, 1958.

Hearing Granted Oct. 28, 1958.

Action by brewer against a distributor for balance due on open account for beer sold, wherein distributor cross-complained for damages for breach of contract. The Superior Court, Butte County, J. F. Good, J., entered judgment adverse to brewer and it appealed. The District Court of Appeal, Van Dyke, P. J., held that where evidence presented a question for the jury as to the existence of an oral contract for the exclusive sale and distribution of brewer's product in an agreed area, to run for a reasonable duration, brewer was entitled to an instruction that if jury found the parties agreed that brewer would continue distributor as its distributor for a reasonable time, then it must determine what period would constitute such reasonable time, and if such reasonable time exceeded one year, such agreement would not be binding upon brewer unless in writing, and failure to give such instruction was prejudicial error.

Judgment reversed.

#### 1. Contracts $\S$ 9(3), 215(1)

An oral contract for the exclusive sale and distribution of brewer's products in an agreed area with no provision as to dura-

tion, but of such nature as to support a finding that the parties in fact agreed upon a reasonable duration, is enforceable, notwithstanding want of definiteness as to duration, and under such a contract, the parties are considered as having agreed upon a reasonable duration and reasonable notice is required before either party can terminate it without being guilty of a breach.

## 2. Contracts Ⓒ29

In action by brewer against a distributor for balance due on open account for beer sold, wherein distributor cross-complained for damages for breach of contract, evidence presented a question for the jury as to existence of an oral contract for exclusive sale and distribution of brewer's products in an agreed area with no provision as to duration, but under circumstances implying that the parties agreed upon a reasonable duration.

## 3. Contracts Ⓒ216

When parties to an agreement undertake a course of dealing and do not expressly include in their agreement any definite undertaking as to the time such course of dealing shall continue, the law implies that such course of dealing shall continue for such period of time as is reasonable in the nature of the business contemplated by the agreement in the light of the course of the dealing between the parties.

## 4. Appeal and Error Ⓒ882(12)

Where an instruction with which other instructions allegedly conflicted was in itself a correct instruction, and alleged conflicting instructions were given at the request of plaintiff in an action for money due, plaintiff could not predicate error on the giving of such allegedly conflicting instructions.

## 5. Contracts Ⓒ353(6)

In an action by brewer for breach of a beer distributing contract, brewer was entitled to an instruction that if jury found distributor was not obligated to continue to act as distributor for any period of time, then brewer was not obligated to continue

defendant as his distributor and could terminate the relationship at will, without liability.

## 6. Contracts Ⓒ353(6)

In action for breach of a beer distributing contract, trial court did not err in refusing instruction to the effect that if distributor had a reasonable time to recoup his expenditures and had made a profit, he could not recover damages on account of the termination of the contract by brewer, since if contract was one which was to run for a reasonable time it would not expire as soon as a profit has been made, nor would it become terminable at will.

## 7. Frauds, Statute of Ⓒ153

Where, in action for breach of an oral contract for exclusive distributorship of a brewer's beer, brewer denied making the contract in toto, such denial was sufficient to justify reliance by brewer upon the statute of frauds.

## 8. Appeal and Error Ⓒ1067

### Frauds, Statute of Ⓒ160

In action for breach of an oral contract without a fixed duration, for exclusive distributorship of beer, where evidence presented a question for the jury as to the existence of an oral contract for the exclusive sale and distribution of brewer's product in an agreed area, to run for a reasonable duration, brewer was entitled to an instruction that if jury found the parties agreed that brewer would continue distributor as its distributor for a reasonable time, then it must determine what period would constitute such reasonable time, and if such reasonable time exceeded one year, such agreement would not be binding upon brewer unless in writing, and failure to give such instruction was prejudicial error.

P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, and Elbert W. Davis, Hoffman, Davis & Martin, San Francisco, for appellant.

Price & Morony, Chico, and J. Albert Hutchinson, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff San Francisco Brewing Corporation brought this action on September 30, 1954, against defendant Clyde A. Bowman, doing business as Bowman's Beverage Company. Plaintiff alleged that defendant was indebted to it in the sum of \$18,027.14, being the balance due on an open account for beer sold and delivered during the preceding two years. Defendant's answer admitted his indebtedness to plaintiff in the sum alleged, but asserted that nothing was due because of offsetting demands. He also cross-complained for damages in the sum of \$162,000 for breach of contract. The jury returned a verdict in favor of defendant and fixed his damage at \$36,040. Judgment was entered accordingly in favor of defendant in the sum of \$18,012.86 (the amount of the verdict less the admitted indebtedness sued on). Plaintiff appeals.

Viewing the evidence, as we must, in support of the verdict, it appears that in 1935 defendant was a partner with his father in the business of distributing carbonated beverages and beer in Butte County. Late in 1935 or early in 1936 plaintiff entered into an agreement with the partners by which they were given the exclusive right to distribute and sell its products in Butte County with the exception of the towns of Gridley and Biggs. Plaintiff agreed to furnish all of its products which the partners could sell, and the partners agreed to sell and distribute these products, to furnish sufficient equipment, manpower and warehousing to fill the demands for these products in the territory, to furnish sufficient capital to buy and maintain a reasonable inventory and generally to promote sales within the county. The agreement was to continue as long as the partners, to use defendant's expression, "took care of the territory." At that time the products of plaintiff with which the parties were concerned, were two brands of beer known as "Golden State" and "Pilsen Gold". Early in 1937 plaintiff discontinued those brands and substituted a brand known as "Burgermeister", which product the partners continued to sell and distribute. The partner-

ship between defendant and his father was dissolved around 1938, and for a while thereafter defendant continued individually to distribute Burgermeister under the same conditions which had applied to the preceding partnership business. After a period defendant entered into a second partnership which in turn continued the distribution of plaintiff's beer. At plaintiff's request this partnership was dissolved in 1950. Thereupon defendant, as an individual, continued the distribution of plaintiff's product under the same conditions as had originally been agreed upon until July 28, 1954, when plaintiff without notice and without cause cancelled the distributorship, refused to continue supplying its product to defendant and gave the exclusive right for the distribution thereof in Butte County to another. During all of the time defendant individually and in partnership had distributed plaintiff's product in Butte County up to a date in February, 1954, the business had included the distribution of a rival product known as "Acme" beer. This had been with knowledge of and without objection by plaintiff until February, 1954, when it requested defendant to discontinue the distribution of the rival product, assuring him that if he would terminate his Acme distributorship, plaintiff would then continue his exclusive right to distribute Burgermeister. Accordingly, defendant complied with plaintiff's desires, terminated his Acme distributorship and concentrated his sales efforts on Burgermeister. On the first of June, 1954, he met plaintiff's further demand that he employ a sales promotion and display man, again upon statements by plaintiff that if he would do this plaintiff would continue his distributorship. Shortly prior to termination he met a further demand of plaintiff that he purchase specialized motor equipment for the delivery of its product. Also in order to serve the convenience of plaintiff by enabling it to maintain a uniform schedule of production throughout the year, defendant had for many years met the demands of plaintiff to build up his inventory during slack seasons beyond his distribution requirements. This required him



to provide storage for the large inventory thus accumulated, which requirement he met by constructing a warehouse in Chico in 1951. Defendant testified generally that in all things he had performed the duties cast upon him by his agreements with plaintiff.

There is no substantial testimony contrary to the testimony of defendant that the exclusive right to distribute plaintiff's beer existed over the years, and that from time to time defendant and his associates complied with plaintiff's requirements up to and including the final period when defendant alone was plaintiff's distributor. Likewise there is no substantial conflict as to defendant having, from 1950 on, met plaintiff's demands that he terminate his Acme distributorship, that he employ a sales promotion and display man, that he purchase and use specialized motor equipment, and that he buy and store beer in excess of seasonal demands. The witnesses for both parties also agreed that there were no specific covenants as to the duration of the relationship. But there was sharp disagreement as to the manner in which and the conditions under which those relationships terminated. Defendant contended that the contractual obligations of plaintiff to him were to afford him a reasonable continuance of his distributorship and a reasonable notice before termination so as to protect him from the loss he claimed to have suffered by the abrupt termination which took place. Plaintiff contended that the contractual relationship was such that either party could terminate at will, and that therefore the termination effected by it was within its rights and afforded no ground for recovery of damages for breach of contract.

[1] We think it apparent from the record that from the beginning there existed between plaintiff and defendant—first as a partner with his father, then for a period as an individual, for a further period as a partner with another, and lastly from 1950 on as an individual—an oral contract for the exclusive sale and distribution of plaintiff's products in the agreed area, with

no provisions as to duration but of such nature as to support a finding that the parties in fact agreed upon a reasonable duration in view of the circumstances. A contract of that nature, with no provision as to duration, has been held to be enforceable, notwithstanding want of definiteness as to duration, and the parties are considered as having agreed upon a reasonable duration and a reasonable notice before either party can terminate it without breach. 4 Williston on Contracts, Rev.Ed., sec. 1027A(3), p. 2852; *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, D.C., 123 F.Supp. 484, 493; *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386. Under the evidence the jury could, as it impliedly did, find that plaintiff breached its contract and was liable for damages proximately caused thereby.

[2] Plaintiff first contends that the verdict is unsupported because the original agreement was made with the partnership between father and son, and asserts that no subsequent agreement with defendant was either alleged or proved. There is no point to the contention, since what we have heretofore said demonstrates substantial proof of a contract arising in 1950 between plaintiff and defendant as an individual. While it is true that the period of oral negotiations which began in 1935 appears to have been the only time when specific conversations were had, it is also apparent from defendant's testimony that by their conduct the parties continued under the same plan and agreement from that time forth and through the varying changes in the persons interested as distributors to and including the last four years, during which defendant alone continued the same relationship, although without any further specific discussion as to its precise nature.

[3] Plaintiff further asserts that the court erred in giving an instruction which reads in part as follows:

"When the parties to an agreement undertake a course of dealing and do not expressly include in their agreement any definite stipulation or under-

taking as to the time such course of dealing shall continue, the law implies that such course of dealing shall continue for such period of time as is reasonable in the nature of the business contemplated by the agreement, and such reasonable time is defined as that which is reasonable in the light of the course of the dealing and all the circumstances of the case and the reasonable contemplation and expectations of the parties \* \* \*."

The instruction went on to state that such an agreement could not be lawfully terminated by a party without either the consent of the other or lawful justification for termination or until a reasonable time after notice given by one party to the other of an intent to terminate. Of course the instruction must be examined within the framework of the case made, and when so examined it appears to have been a correct instruction. Upon the subject of termination of exclusive sales and distribution contracts such as we have here, 4 Williston on Contracts, Rev.Ed., sec. 1027A, page 2847 et seq., after pointing out that the validity of such contracts during their continuance is obvious, states that where the agreement contains no provision whatever for its termination it is properly held to be " \* \* \* an enforceable executory contract, binding each party for a reasonable time." He also further states (at page 2852): " \* \* \* It is the settled law of agency that if the agent or employee furnishes a consideration in addition to his mere services, he is deemed to have purchased the employment for at least a reasonable period where the duration of the employment is not otherwise defined. A similar result should be reached though the dealer is a buyer-distributor rather than a technical agent, where in addition to undertaking to pay for the manufacturer's products as ordered, he promises to establish or maintain adequate sales and demonstration facilities or to provide a maintenance and repair service for handling said products." See also *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, supra,

and *Long Beach Drug Co. v. United Drug Co.*, supra.

[4] Plaintiff charges other errors in instructions. In addition to the above instruction, the court told the jury that if no time limit was fixed in the contract between the parties during which the contract was to continue, it would ordinarily be terminable at the will of either party unless from all of the circumstances the jury should find that the mutual agreement expressly or impliedly contemplated a continuance for a reasonable time or provided a reasonable notice of termination; that in order for the termination to constitute a breach, defendant had to prove a promise on the part of plaintiff that it would not terminate the contract without notice or would have to prove a promise that the contract was to have continued in effect for some time beyond the date of actual termination as determined by the jury on consideration of all the evidence. Plaintiff declares that these last instructions conflicted with the other. We find no real conflict. But in any event, since the instruction with which it is claimed these instructions conflicted was in itself a correct instruction, and since these alleged conflicting instructions were given at the request of plaintiff, error cannot be predicated on their giving since to do so would offend against the rule of invited error. See 4 Cal.Jur.2d, Appeal and Error, sec. 557, pp. 423-424.

[5] Plaintiff requested the court to instruct the jury that if it should find defendant was not obligated to continue to act as distributor for any period of time, then plaintiff was not obligated to continue defendant as its distributor and could terminate the relationship at will, without liability. The court refused to so instruct. The requested instruction could well have been given. It was correct in law and presented a theory of nonliability relied on by plaintiff.

[6] Plaintiff next contends the court erred in refusing its requested instruction to the effect that if defendant had had a reasonable time to recoup his expenditures

and had made a profit, he could not recover damages on account of the termination of the contract by it, for in such case and as a matter of law a reasonable time for its duration would have expired. It would have been error to have given this instruction. One of the reasons often given why a reasonable time of duration is implied is that such implied duration is justified where expenditures have been made in order to protect the sales distributor from loss. But it does not result that as soon as a profit has been made the contract becomes terminable at will.

It is further contended by plaintiff that the trial court erred in refusing its requested instruction on the statute of frauds. That instruction reads as follows:

"If you find that there was an agreement between the parties which would impose an obligation upon plaintiff to continue for a period of more than one year, then defendant cannot recover unless such agreement was in writing.

"If you find that the parties agreed that plaintiff would continue defendant as its distributor for a reasonable time, then you must determine what period would constitute such reasonable time; if, however, such reasonable time would exceed one year, then said agreement would not be binding upon plaintiff unless it was in writing."

The court had told the jury that in disposing of the case they must, from all of the circumstances, determine what was a reasonable time for the duration of the contract between the parties. It is obvious that the jury did find that the contract was to endure for a time beyond the date of July 28, 1954, on which date plaintiff ceased to perform and informed defendant that it considered it was no longer bound to perform. Although neither party asked for a special verdict as to what constituted a reasonable time, there can be no question but that the case was clearly tried upon the theory that there had been a breach through premature termination and refusal to perform further; that this premature termination had caused damage to

defendant; and that the damage so caused totaled the amount allowed by the jury in its verdict. The evidence of damage had to do with losses incurred by defendant from expenditures he had made in reliance upon continuance of the contract and obligations he had assumed upon the same ground. Upon this record, therefore, if a contract of this nature which the parties impliedly have agreed shall continue for a reasonable time, without having defined that time, comes within the statute when the trier of fact determines that the reasonable time exceeded a year from the making of the contract, then plaintiff was entitled to have the jury so instructed. The issue thus presented is a difficult one to resolve. Apparently no California case has been determined by our appellate courts which specifically considers the question. There are, however, several recent federal cases which constitute persuasive authority and which approve the view contended for by plaintiff. The first is *Fibreboard Products, Inc., v. Townsend*, decided by the United States Court of Appeals, 9 Cir., on February 2, 1953, and reported in 202 F.2d 180. There the trial court gave damages for wrongful prior termination finding that a contract for employment for an indefinite time was made under such circumstances that a reasonable time of employment was agreed upon by implication and that the reasonable time was two years. The court rejected the contention that such an agreement was within the statute but also advanced as an additional ground for affirmance the doctrine of estoppel to rely on the statute, saying at page 183: "In any event, the detriment suffered by plaintiff is sufficient to estop defendant from asserting the Statute of Frauds."

The next federal case in point of time is *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, *supra*, involving an ordinary liquor distributorship agreement without definite agreement on duration. The court held the parties could not terminate the relationship at will; that under California law a party seeking to terminate such a contract must give the other party reason-



able notice of intention to terminate and could not terminate until at least a reasonable time had expired, which the court specifically found to be one year.

The most recent federal case is *Hunt Foods, Inc., v. Phillips*, 9 Cir., 248 F.2d 23 (Aug. 7, 1957), which involved an action by partners against a food processor for breach of contract whereby the partnership had become the exclusive distributor of the processor's food to certain military establishments. There was evidence of such a change of condition by the distributor's inducing them to enter into the contract as to justify the defense of estoppel to raise the statute of frauds, and the case finally turned upon that issue. But in discussing the impact of the statute the court said:

"Appellant argues that the California Statute of Frauds [C.C. sec. 1624 (1)] is a defense to this action because the alleged oral contract was to continue for more than one year." (At page 31.)

The above quotation from the *Hunt Foods* case referred to this footnote:

"Because the trial court held that the contract was for a reasonable time and the reasonable time had not yet elapsed, some sixteen months after the commencement date, it is apparent that the contract is within the statute of frauds, being more than one year in duration. See concurring opinion by Judges Pope and Healy in *Fibreboard Products v. Townsend*, 9 Cir., 202 F.2d 180. *Hopper v. Lennen & Mitchell*, 9 Cir., 146 F.2d 364, 161 A.L.R. 282, is an accord with this view. *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, D.C., 123 F.Supp. 484, is not inconsistent with our view since in that case it was held that if notice of termination was given at the earliest possible moment, performance could be completed within one year."

One other case has come to our attention—*Hall v. Hall*, Tex.1957, 308 S.W.2d 12 (rehearing denied January 22, 1958).

There the plaintiff brought action against defendant, a manufacturing partnership, for breach of an oral contract whereby plaintiff was to represent the partnership in "developing" a certain untapped sales territory. The Texas statute pleaded in defense, paragraph 5 of Article 3995, Vernon's Texas Civil Statutes, barred action upon an oral promise or agreement "which is not to be performed within the space of one year from the making thereof." The applicability of the statute to the contract in the light of the jury's findings at the trial presented the principal question in the case. The jury had found by special verdict that the contract was to endure for a reasonable time after its making and by a second special verdict had found that the reasonable time impliedly agreed upon was three years. The court said (308 S.W.2d at pages 14-16):

"Considering first the question of whether the contract was or was not within the purview of the statute, we find no authority in the briefs, or by our own research, that is very helpful. \* \* \*

"His reasoning as to why the contract falls without the statute is that, since it lacks an express provision as to duration of performance, the term of a reasonable time is implied; that a contract providing a term of a reasonable time is one of uncertain duration and therefore not within the statute; that the finding of a reasonable time to be three years does not alter the status of the contract as one of indefinite duration—does not make it a contract which, by its terms, cannot be performed within one year."

The court reasoned as follows:

"In the first place, and despite the strict requirement that impossibility of performance within one year must appear from the terms of the contract, we see no reason why the mere fact of duration of performance being *implied* keeps the contract from being within the statute \* \* \* What is implied in a contract is as much one

of its terms 'as though expressly set forth therein.' [Citation.]

\* \* \* \* \*

"Where the circumstances justify the law in implying any term of performance, they also justify it in defining the period in regular units of time, such as days or years \* \* \* Actually what the law does is to supply the term in units of time, but using the yardstick of reasonableness in so doing. What it determines in the instant case is that 'the contract reasonably implies performance over three years'. The respondent-plaintiff, in seeking to uphold a recovery on the contract for commissions to have been earned in the third year thereof, necessarily asserts a contract with a performance term of three years. He could hardly expect to recover specific damages if the term were the merely abstract one of 'a reasonable time'."

Defendant, in support of the judgment, argues that the doctrine of estoppel to defend under the statute of frauds is applicable here. That may be, but there has been no determination of that issue since it was not submitted to the jury, probably because the trial court, refusing plaintiff's requested instruction on the statute, deemed the statute wholly inapplicable. If the statute was applicable, and if the previously quoted instruction should have been given, then the judgment must be reversed notwithstanding any issue that might have been submitted to the jury on the doctrine of estoppel.

[7] Defendant also says that plaintiff waived its right to rely upon the statute by not specifically pleading the statute and by not objecting to testimony in proof of the contract. But plaintiff denied the making of the contract in toto and that has been held sufficient to justify reliance upon the statute of frauds. 23 Cal.Jur.2d, *Frauds, Statute of*, sec. 150, p. 440, citing *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L.R.A. 826; *Harris v. Frank*, 81 Cal. 280, 22 P. 856; and *Walsh v. Standart*, 174 Cal. 807, 164 P. 795.

[8] Addressing ourselves now to the proposition posed by the request for the instruction, we find ourselves unable to escape the reasoning applied by the Ninth Circuit and by the Texas Supreme Court in the cases we have referred to. We think both the express and implied terms of a contract are equally terms of the agreement within the meaning of that phrase as used in the statute. If the parties choose to submit the determination of what in fact was to have been the duration of the contract to the arbitrament of courts and juries in an action brought thereon, we think the contract as determined in such suit by the trier of fact is the contract which they must be taken as having made. Therefore, the plaintiff was entitled to have the jury instructed as requested, for if the contract did carry within it an implied agreement that it should endure for a reasonable time, and if in fact such reasonable time amounted to a period in excess of the period allowed by the statute, then the contract being wholly oral could not be enforced.

The result of this conclusion is that the judgment must be reversed.

Plaintiff has urged numerous objections to other instructions including those upon damages. However we think it unnecessary to discuss these assignments in detail in view of the reversal to be ordered, as they are not apt to recur on retrial. The determination on retrial of the time the parties agreed the contract should endure may result in a judgment in favor of plaintiff upon the issues raised by the cross-complaint because of the bar of the statute; the finding may be made that notwithstanding the bar of the statute plaintiff is estopped to assert it; the finding may be that the time within which the contract was to endure was one year or less from the time of its making, as was the holding of the trial court in *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, *supra*. Several of the items of damage claimed and concerning which evidence was adduced during the trial will be materially affected by the findings made in respect of

the time of duration. For instance, if by reason of the estoppel defendant is permitted to recover upon the basis that the contract still had two years to run when wrongfully terminated, loss of profits claimed would be limited to such period. It is unnecessary to discuss these matters further.

For the reasons given, the judgment is reversed.

WARNE, J. pro tem., and PEEK, J., concur.



163 Cal.App.2d 289

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Charles Frederick NEELY and Norman W.  
Golland, Defendants,

Norman W. Golland, Appellant.

Cr. 6016.

District Court of Appeal, Second District,  
Division 1, California.

Sept. 2, 1958.

Rehearing Denied Sept. 24, 1958.

Hearing Denied Oct. 28, 1958.

Prosecutions for robbery and murder. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgments of conviction and one of the defendants appealed from sentences and judgment, and from an order denying a motion for a new trial. The District Court of Appeal, Fourth, J., held that corroborating testimony tended to connect defendant to crime committed in such a manner as could reasonably satisfy the jury and trial judge that an accomplice was telling the truth, and therefore such corroborating testimony was sufficient to permit state to use accomplice testimony.

Attempted appeal from sentences dismissed, judgments and order affirmed.

#### 1. Criminal Law §511(2)

Where a conviction is sought upon testimony of an accomplice, corroborating evi-

dence required is sufficient if it tends to connect defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated told the truth. West's Ann.Pen.Code, § 1111.

#### 2. Criminal Law §511(1)

In order to sustain a conviction upon the testimony of an accomplice, it is not necessary that the accomplice be corroborated as to every fact to which he testifies.

#### 3. Criminal Law §511(7)

False and contradictory statements of a defendant in relation to the charge are corroborative evidence of accomplice's testimony.

#### 4. Criminal Law §510

Proof of the elements of a crime, as contrasted with proof of the connection of the defendant with the commission thereof, may rest upon the uncorroborated testimony of an accomplice.

#### 5. Criminal Law §511(2)

In prosecution for robbery and murder, corroborating testimony tended to connect defendant to crimes committed in such a manner as could reasonably satisfy the jury and trial judge that an accomplice was telling the truth, and therefore such corroborating testimony was sufficient to permit the state to use testimony of an accomplice. West's Ann.Pen.Code, § 1111.

#### 6. Criminal Law §511(1)

It is the combined and cumulative weight of the evidence furnished by non-accomplice witnesses which meets test of sufficient corroboration of accomplice's testimony to sustain a conviction thereon. West's Ann.Pen.Code, § 1111.

#### 7. Homicide §250

##### Robbery §24(1)

Evidence was sufficient to sustain convictions for robbery and murder.

#### 8. Criminal Law §1186(4)

##### Witnesses §251

In criminal prosecution, question asked an alibi witness, on direct examination, as to whether there was any particular reason the witness had to recall the time at which he allegedly saw defendant was proper



direct examination to strengthen the ground of knowledge of the witness, and to show reasons for trusting his testimony, but error of trial court in rejecting such testimony would not be deemed prejudicial in view of fact the same question was put to the witness on cross-examination, and on re-direct examination no questions were put to the witness on such matter. West's Ann. Const. art. 6, § 4½.

#### 9. Criminal Law ☞1186(4)

Even if trial court erred in instructing jury that evidence that a defendant endeavored to procure false or fabricated evidence to be produced at the trial might be considered by the jury as a circumstance tending to prove a consciousness of guilt, because of a lack of evidence that defendant endeavored to procure false or fabricated evidence, such error did not constitute ground for reversal of judgment of conviction where on consideration of entire case and taking all the evidence into consideration no miscarriage of justice appeared in the giving of such instruction. West's Ann.Const. art. 6, § 4½.

#### 10. Witnesses ☞395

In criminal prosecution, trial court did not err in admitting two written statements made by an accomplice implicating defendants, under "the recent fabrication" exception to the hearsay rule, in view of fact counsel for defendant, by his questioning of accomplice, attempted to show he was testifying from improper motives of interest, or improper influences, or that his testimony was recently fabricated, and under such circumstances, prior consistent statements were admissible as tending to show the witness was not controlled by such influences, or that his testimony was not recently fabricated.

#### 11. Criminal Law ☞316

In robbery-murder prosecution, failure of defendant to take the witness stand to explain certain evidence introduced in the cause which appeared to be within his power to explain, including testimony of defendant's fingerprint on door of "get-away car", could be considered by the jury as

tending to indicate the truth of evidence produced, and as indicating and making permissible drawing of unfavorable inferences against defendant as more probably correct than inferences favorable to him. West's Ann.Const. art. 1, § 13.

Ernest L. Graves, Wilmington, Wm. J. Clark, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Joe J. Yasaki, Deputy Atty. Gen., for respondent.

#### FOURT, Justice.

This is an appeal from the judgments and sentences rendered after verdicts of guilty by a jury, wherein the appellant was charged with and convicted of robbery and murder.

In an information filed in Los Angeles county, the co-defendant Neely and appellant Norman W. Golland, were charged in count I with robbery in that they did about December 28, 1956, while armed with a deadly weapon, by force and fear, take \$14 from the person and immediate presence of Vera Kaloostian. In count II Neely and appellant were charged with murdering Joseph Walter Leopold.

It was alleged in the information that Neely had previously been convicted of forgery in about 1956, and had served a term in the federal prison therefor, and had been convicted of robbery in Los Angeles county in about 1952, and had served a term in the state prison therefor. It was alleged that Golland had previously been convicted of forgery of a fictitious name in about 1951, and robbery in about 1952, and had served separate terms in the state prison for each of said offenses. On February 20, 1957, Neely denied the prior convictions and entered pleas of not guilty and not guilty by reason of insanity, and three doctors were appointed pursuant to the provisions of section 1027, Penal Code, to examine Neely and report to the court. On February 20, 1957, appellant entered a plea of not guilty to the charges and stood mute as to the prior convictions. The court thereupon, for the record, entered up a

denial of the prior convictions. The appellant made a motion for a separate trial and such motion was denied.

On May 8, 1957, the case started to trial and Neely withdrew his plea of not guilty and not guilty by reason of insanity as to count II and entered a plea of guilty of murder in the first degree and admitted the two prior convictions. It was stipulated that the court might read and consider the reports of the doctors filed in the case in considering judgment. The time of sentencing Neely was continued to May 22, 1957.

Appellant made a motion to dismiss count II as to him, and such motion was denied. He then made a motion to compel the prosecution to elect as to which count it would proceed upon, and that motion was also denied. The appellant then admitted the prior convictions.

The jury found the appellant guilty of robbery in the first degree, and also found that he was armed at the time of the commission of the offense. The jury also found appellant guilty of murder in the first degree and recommended punishment by imprisonment in the state prison for life. A motion for a new trial was made and denied, and appellant was sentenced. The appeal to be considered is from the judgment of conviction and from the order denying appellant's motion for a new trial.

A résumé of the testimony is as follows: Neely resided in Bakersfield and was employed as a roustabout by an oil company. At one time he owned a 1951 model Ford automobile, but he was involved in an accident with that car about December 19, 1956, in which accident he had his jaw injured and was hospitalized thereafter for several days. After he got out of the hospital, but before December 27, 1956, he borrowed, on two or three occasions, for not more than an hour or so on each occasion, a 1951 model Plymouth automobile (California license number FER 866) from a friend, Mrs. Frances Leard. About 1:30 o'clock p. m., Thursday, December 27, he borrowed the Plymouth car from Mrs. Leard, stating that he was going to Los

Angeles. In the late afternoon of December 27, 1956, Neely registered at the Grant Hotel on Sunset Boulevard in Los Angeles, under the name of Ron Allard, and as being from Minneapolis, Minnesota. About 6:15 o'clock of that same day he left the hotel and about an hour later returned with the appellant. When they entered the hotel Neely went to a telephone which was attached to the wall and looked at the classified section of the telephone book. During this time the appellant was close by the hotel clerk, who testified positively that the appellant was with Neely at that time. Neely and the appellant then went to Neely's room. The hotel clerk worked on his regular shift until 5:00 o'clock a. m. of Friday, December 28th, 1956, but he did not see either Neely or the appellant leave the hotel during the night or early morning.

About 7:15 o'clock p. m., December 28, 1956, Mrs. Vera Kaloostian was working at a check stand in a Safeway grocery store, located at 1921 North Wilcox, Los Angeles. As she was sacking some grocery items for Joseph W. Leopold she noticed a man, wearing a hat and mask and dressed in army khaki clothes and holding a gun, enter the store. The mask was of black silk material and it covered the face of the man wearing it from the eyes down. The man walked up to Mrs. Kaloostian and said, "This is a holdup; open the register;" whereupon she responded by unlocking the register. The drawer opened and the man reached into it and took out "a few bills."

The robber then started to leave and as he did so Mr. Leopold picked up a can and threw it at him. The checker then heard a shot and a "whiz-like, or something" right beside her ear. She called for help from the management.

There was uncontradicted evidence that Leopold was struck in the head by a bullet and died from the wound he so received. An officer stated that he arrived at the store about 7:15 o'clock p. m. and saw a man who was later identified as Leopold, lying in the aisle of one of the check stands.

Shortly after 7:00 o'clock p. m. on December 28, 1956, Miss Janet Parker was

riding in a car driven by her brother in a southerly direction on Wilcox Avenue, in the block where the Safeway store heretofore mentioned is located. As they passed the store she saw a masked man, holding a shining object in his hand, run from the store into the parking lot which immediately adjoins the store to the south. The running, masked man ran in front of a car which was parked headed out toward the street, and entered it from the passenger side. The car had started moving toward the exit to the street before the masked man had gotten into it, and then "it moved out rather fast." That car then turned from the parking lot to its right onto Wilcox Avenue, and was directly behind and going in the same direction as the car in which Miss Parker was then riding. At the first intersection, which was but a short distance from the parking lot, both cars stopped. Miss Parker had looked over her shoulder to ascertain the front license number on the car which the masked man had entered, and when the cars were stopped she was able to see the first three letters on the front license plate. The car in which Miss Parker was riding continued southward on Wilcox Avenue for one block and then turned right in a westerly direction. The street (Yucca) which the Parker car then traveled, within a short distance, curves in an "S-turn," and the Parker car turned in a southerly direction.

At the first intersection (North Wilcox and Franklin) from the parking lot the robber's car turned to its right, or westerly (on Franklin), and apparently, at the first intersection thereafter (Grace and Franklin) turned to its left and went southward, and finally into the "S-turn" heretofore mentioned. At that point Miss Parker saw the robber car coming from the front and to her right. The two cars came close to each other and the robber car was compelled to stop for the Parker car to avoid a collision. Miss Parker then saw the front license plate and memorized the letters and numbers which were FER 866. She also saw that there was someone in the passenger side of the robber car "but it was just

a shadow then" and she could not see anyone on the driver's side.

At about 7:40 o'clock p. m., Friday, December 28, 1956, Rex Berridge, a truck driver who had known appellant for about seven years, saw the appellant, who appeared to be waiting for a bus at the corner of Sunset and Parkman. Berridge had watched the Friday-night fight on a television. Such fight, according to a representative of the broadcasting company, ended at 7:39.20 p. m. Golland asked Berridge if he, Golland, could buy him, Berridge, a drink and Berridge refused. A bus drove up headed eastward toward Los Angeles, and appellant got on it.

There was also testimony to the effect that "just somewhere after seven o'clock" the appellant was seen walking on the corner of Sunset and Le Moyne by some of his friends, namely James Godkin, Jr., Gus Rantes, Bob Lively and Milt Moore. The appellant got into a car that Rantes was driving and thereafter proceeded along various streets for seven or eight miles and then that automobile was stopped near the intersection of Sunset and Echo Park, close to the Sunset Bar, where appellant got out of the car and started toward the Sunset Bar. The appellant entered the Sunset Bar, sometime between 9:00 o'clock p. m. and 10:00 o'clock p. m., according to the testimony of the bartender who stated that he "watched the clock" in the establishment, which clock was kept about twenty minutes fast.

The Leard Plymouth automobile, license number FER 866, was returned to Mrs. Leard in Bakersfield at about 11:00 o'clock p. m., Friday, December 28, 1956.

Neely was arrested about 12:15 o'clock a. m., December 29, 1956, at the home of Mrs. Leard in Bakersfield.

At about 2:15 a. m., December 29, 1956, the appellant was arrested, at the Sunset Bar, for suspicion of robbery, by the Los Angeles police officers. At the time of the arrest one of the police officers engaged the appellant in a conversation and advised him that another man was involved in the



crime. The appellant was asked, while he was still at the bar, to relate what he had done that day, and Golland stated that he got up about 9:00 o'clock a. m., ate breakfast, and went to the library at Fifth and Flower streets, where he remained until about 5:30 o'clock p. m. He further said that he later met Rantes at Sunset and Alvarado, and that he had ridden with him in the Rantes car for about an hour, and was then let off at the bar at about 7:30 o'clock p. m.

Later, the same officer who had talked with Golland at the bar, had a second talk with him at the Hollywood Police Station in the presence of two other officers. The officer then asked Golland if he knew Charles Frederick Neely, and the appellant said at first that he did not know Neely, but when asked the same question a little later stated that he did recollect the name, but that he had not seen Neely for a long time.

Another officer had two talks with the appellant. The first was held at about 11:00 o'clock a. m., on Saturday, December 29, 1956, in the presence of a second officer, when the appellant was told that he was under arrest for murder. The appellant then stated that he was with John Orendorf, a bail bondsman, from about 2:00 o'clock a. m. until 8:00 a. m. on Friday, December 28, 1956; that Orendorf had driven him to the vicinity of Fifth and Hill streets, and that from there he had gone to the library where he remained until noon; that he walked home from there and then walked back to the library, where he remained until about 5:00 o'clock p. m.; that he then walked to the vicinity of Alvarado and Sunset where he had coffee with two or three other persons, and then, while walking along Sunset Boulevard, he was picked up by Rantes and two others in an automobile and that he stayed with them for several hours, driving around the city, and that they let him off at the Sunset Bar at which place he stayed until the time of his arrest.

The second talk between the officer and the appellant was held the next day in the presence of a shorthand reporter. At that

time Golland stated that he had not seen Neely on December 27, 1956, and that the last time he saw Neely was sometime before Christmas. He also stated that he had not been in any 1950 or 1951 Plymouth automobile with Neely and that he had not participated in any robbery or murder with Neely. As to his activities on December 28, 1956, the appellant gave substantially the same account which he had initially given to the officer, except that he stated that he had taken the bus home from the library at noontime.

A police officer connected with the scientific investigation division, latent fingerprint detail, of the Police Department, went to Bakersfield on Sunday, December 30, 1956, and, with another officer of the same detail, examined the Leard Plymouth automobile for latent fingerprints. They found some identifiable and some unidentifiable fingerprints. One of the latent fingerprints was found inside of the door on the driver's side of the automobile on the window frame, located under the window. On January 7, 1957, the officer rolled ink fingerprints of the appellant and then compared the latent fingerprint lifted from the car door window frame, with the rolled left thumbprint of the appellant. Based on his study and comparison, the officer formed the opinion that the two fingerprints, that is, the latent one and the rolled one, were made by one and the same person, namely Norman W. Golland.

Now considering particularly the testimony of Neely, who stated in substance as follows: that he lived in Bakersfield and, on December 16th or 17th, he had driven to Los Angeles in his 1951 Ford automobile, and, while parked by a cafe in the Sunset-Echo Park area, met the appellant, whom he had previously known, and had a short talk with him, and then they parted; that on about December 19th 1956, he had been involved in a collision in Bakersfield with his automobile, which was then wrecked, and he had suffered a broken jaw in the accident for which he was hospitalized for a few days. He further said that on December 27th, 1956, he had borrowed a 1950 or

1951 Plymouth automobile from Frances Leard, who lived in Bakersfield, and that he drove the car alone to Los Angeles on that day and arrived in the city about 4:30 o'clock p. m. His intent, on that occasion, was to commit some robberies in the city, and that he took with him a loaded .22 caliber H and L revolver. At about 5:00 o'clock p. m., he registered at a hotel, using the name Ronald Allard. About 8:00 o'clock p. m. on December 27th, while alone and seated on the driver's side of the Plymouth automobile, and while parked on Sunset Boulevard, facing west, in front of the Sunset Bar, he saw Golland walking on the sidewalk and called to him. The appellant came to the passenger side of the automobile, and he (Neely) told appellant that he was going to "pull" a robbery and asked the appellant to join him. The appellant at first demurred, but ultimately agreed. After that talk the appellant and he went to his (Neely's) room in a hotel where he was registered, and they remained there that night. During the night they tried to decide upon a good place to rob but could not make up their minds. While they were in the room the loaded gun was shown to the appellant and he examined it. Neely also testified that he got up about 5:00 o'clock a. m., December 28, 1956, and went out and stole two license plates from cars in the vicinity of the hotel. He stated that he put one of the stolen license plates on the back of the Plymouth car, covering the license plate which was properly there. He said that while putting the stolen license plate on, he and the appellant had agreed that there was no need to put such a license plate on the front of the car as they would be going away from the place of the robbery and no one would "get" that license number. He said that they drove the Plymouth car "all over" Los Angeles looking for a place to rob, and that about 3:00 or 3:30 o'clock p. m., they went to a Sears store on Santa Monica near Western and bought two hats, one for each of them.

He further stated that about 7:10 p. m., they were driving on Cahuenga toward the "Valley" and then turned onto Wilcox and

drove by the Safeway store where the murder took place. He testified that he and Golland considered and discussed it and concluded that it looked like a good place to rob. He said they then drove up a street a short distance and he put on his hat and put a mask (scarf) around his neck and drove back to the Safeway parking lot and appellant parked the car in the lot. He stated that while Golland waited in the car, he got out and walked past the store and looked in, and after walking a short distance, turned back into the store, pulling the mask up just under his eyes. There were about seven people in the store, and he announced that it was a "stick up" and proceeded to "dip into the cash register." He said he took \$14. At about that time he was struck beside the head with a can which had been thrown at him. He did not see who threw the can, but as he turned the closest man to him "appeared to be the only belligerent in the place," so he fired and shot him. He noted blood running out of the man's head. He stated that he then ran to the parking lot and entered the car from the passenger side while it was moving. They then traveled down some streets and a car approached from their left and the cars nearly collided. The brakes on both cars were applied, and the car in which he, Neely, was riding spun and came to a stop beside the other car. He ducked down, and after traveling over a number of other streets, they went to the "Freeway." He further stated that the Plymouth automobile was stopped in a parking lot off Sunset Boulevard in the Silver Lake area, and Golland got out and returned with a box of band-aids and he, Neely, placed a bandage on the side of his head where the can had struck him. He divided the money which had been taken out of the cash register by giving Golland \$10, and he kept \$4 for himself. He then left Golland at the parking lot and he, Neely, proceeded to drive the Plymouth car to Bakersfield, arriving there about 11:15 o'clock p. m. He was arrested at the home of Frances Leard about midnight. Before he was arrested he had removed the stolen



license plate from the rear number bracket and had placed it in the car with the other stolen license plate.

The defense in the main was that Golland had been in Soledad prison for robbery and had been released on parole on February 14, 1956. The termination date of his parole was October 14, 1962, and conditioned, among other things, that he not associate with ex-convicts. If he did so associate with ex-convicts he was subject to arrest, and if the Adult Authority found a violation of such condition it could direct his return to prison; that he therefore lied to the officers about having been with Neely for fear that the Adult Authority might send him back to prison.

The appellant also caused testimony to be introduced by the store checker to the effect that a check was made of the cash register after Leopold was shot, and the check disclosed that for the entire day the register was \$90 short.

Golland also called Ernest De Palma as a witness. De Palma had known the appellant for a few years. The witness stated that on December 28, 1956, he had left his home on Hollywood and Gramercy, and had gone by bus to Sunset and Alvarado; that at about 6:45 o'clock p. m. he saw Golland drinking coffee and having something to eat in a cafe on the corner of Sunset and Alvarado, and that he then spoke to Golland. He also said that there were a few others in the cafe, but he did not know any of them excepting the owner.

The appellant did not testify. As his counsel advised the court, "he has informed counsel that he will not take the stand."

Appellant now asserts (1) that the evidence is insufficient to sustain the conviction, and in particular that there was insufficient corroboration of the accomplice's testimony; (2) that there is a strong probability that the appellant is innocent and therefore any error, however slight, must have contributed to conviction; (3) that the court erred in sustaining objections to questions of the witness De Palma on direct examination; (4) that the court

erred in the giving of an instruction (CALJIC 30A) on consciousness of guilt; (5) that the court erred in receiving the statements of Neely made outside the presence of appellant, and in overruling the objection that the evidence was hearsay, and (6) that the court erred in denying a motion for a new trial.

[1] Section 1111 of the Penal Code in part provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. \* \* \*" In effect, the Code section provides that the corroborating evidence, without the aid of the testimony of the accomplice, must tend to connect the defendant with the commission of the offense. In *People v. MacEwing*, 45 Cal.2d 218, at page 224, 288 P.2d 257, at page 260, the court stated:

"The most recent decisions have in substance phrased the rule as follows: The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. (Citing cases.)"

[2, 3] It has also been held in substance in this state that it is not necessary that the accomplice be corroborated as to every fact to which he testifies. *People v. Barclay*, 40 Cal.2d 146, 156, 252 P.2d 321; *People v. Trujillo*, 32 Cal.2d 105, 111, 194 P.2d 681; *People v. Henderson*, 34 Cal.2d 340, 342-343, 209 P.2d 785. False and contradictory statements of a defendant in relation to the charge are themselves corroborative evidence. *People v. Simpson*, 43 Cal.2d 553, 564, 275 P.2d 31; *People v. Santo*, 43 Cal.2d 319, 327, 273 P.2d 249.

[4] As to proof of the elements of the crime, as contrasted with proof of the connection of the defendant with the commission thereof, such may rest upon the uncor-



roborated testimony of an accomplice. *People v. Barclay*, supra, 40 Cal.2d at page 156, 252 P.2d at page 326.

[5] We are of the opinion that there is ample corroborating evidence in the record to sustain the contention of the prosecution that the testimony of Neely could be used in the instant case.

[6] The appellant seems to rely upon the rule set forth in the cases that if the corroborative evidence raises only a suspicion of guilt, it is not sufficient under the provisions of section 1111, Penal Code. However, the evidence in this case, in our opinion, amply supports the testimony of the accomplice Neely, and strongly connects Golland with the crimes, and could well have satisfied the jury, as it apparently did, that the accomplice told the truth. It is the combined and cumulative weight of the evidence furnished by non-accomplice witnesses which supplies the test. *People v. Trujillo*, supra, 32 Cal.2d at page 111, 194 P.2d at page 684.

In this case the testimony of Vera Kaloostian, the checker at the store, and the testimony of the autopsy surgeon established the facts that there was a robbery and a murder. Frances Leard testified that she lived in Bakersfield and owned a Plymouth 1951 automobile, license number FER 866; that she knew Neely, and that he had owned a 1951 Ford which was involved in a wreck which accident brought about his hospitalization, and that after December 19, 1956, he stopped driving his Ford car; that Neely never borrowed her car before December 19th, but between that date and December 27th, 1956, he borrowed it two or three times for an hour or so; that on December 27, 1956, he borrowed the Plymouth car to go to Los Angeles and she did not see him again until 11:00 o'clock p. m. the following day. The jury could well have drawn the inference from such testimony that Neely drove Mrs. Leard's automobile to Los Angeles on only one occasion, namely on December 27, 1956.

Mr. Lloyd, the hotel clerk, testified that he worked from 5:00 o'clock p. m. December 27th, to 5:00 o'clock a. m. December 28th, and that late on the afternoon of Thursday, December 27th, Neely registered alone under the name of Ron Allard; that Neely left the hotel about 6:15 p. m. alone and returned about an hour later with Golland; that Neely looked at the telephone book while Golland stood by, and that Golland and Neely went to Neely's room and that he did not see either of them leave the hotel before 5:00 o'clock a. m., December 28th. Certainly the clerk's testimony tends to corroborate the accomplice's testimony that appellant spent the night before the robbery with Neely in his hotel room. It placed the appellant in Neely's company some twenty-four hours before the robbery and murder, and there is a strong inference that they were together fourteen hours prior thereto, and contradicts appellant's extra-judicial statement to the officers that he had not seen Neely at the time in question.

Miss Parker testified that she was riding in an automobile being driven southward on North Wilcox, and as she passed the Safeway store she saw a masked man holding a shining object in his hand run from the store and enter a car headed out of the lot which car started moving before the masked man had gotten into it, and that the car moved toward the exit "rather fast;" she further testified that the car was a greenish-colored 1950 or 1951 model Plymouth, and that the license number on the front was FER 866. Her testimony establishes that Mrs. Leard's automobile was used in the robbery-murder, and the inference is very strong that two persons participated in the crimes; that one person went into the store, and that one person waited in the parked automobile and drove it in the get-away.

The fingerprint expert witness matched the latent fingerprint, found on the inside of the Plymouth car door on the driver's side, with the rolled fingerprint of the appellant taken about January 7, 1957. This

evidence conclusively links the appellant to the Plymouth automobile which was used in the robbery-murder.

The appellant's extra-judicial statements to the police were contradictory in some respects. The appellant stated at one time that he did not know Neely; however, under further questioning the appellant said that the name "did ring a bell with him," but added that he had not seen Neely for a "long time." Still later he said that he had seen Neely six or ten days before. There was also an inconsistency in the appellant's statements as to his mode of travel from the library to his home. The appellant explains the contradiction about knowing Neely by stating, in effect, that he was on parole from the state penitentiary and was forbidden to associate with ex-convicts, hence he could not admit being with Neely for fear of jeopardizing his parole status. We are of the opinion that it was for the jury to determine the real reason for the contradiction, that is, whether it was his parole status or whether he was fearful of being implicated in the robbery-murder which had been committed. *People v. Henderson*, supra, 34 Cal.2d 340, 346-347, 209 P.2d 785.

The witness Orendorf testified that the appellant was with him from 4:00 o'clock a. m. to 9:30 o'clock a. m. on December the 27th, which was contrary to the statement made by the appellant to the officers, namely, that he was with Orendorf from 2:00 a. m. to 8:00 a. m. of December 28th.

The appellant told the officers he went into the Sunset Bar at about 7:30 o'clock p. m. on December 28th, and that he stayed there until arrested. Mr. Berridge, however, testified that he saw the appellant and talked with him at a bus stop near Sunset and Silver Lake or Parkman, after the fights which were shown on television and which ended at 7:39.20 p. m. Also, the bartender said the appellant entered the bar sometime between 8:40 and 9:40 o'clock p. m., by the bar clock. The appellant also stated that he had not been in a 1950-1951 Belvedere Plymouth automobile with Neely. True it is that the fact of the fingerprint

in the car does not directly controvert the appellant's statement that he was not in the automobile with Neely, yet the evidence is clear that Neely took the automobile to Los Angeles on but one occasion, namely on the trip when the robbery-murder occurred. There was no evidence that the latent fingerprint was, or might have been placed in the car other than on December 27th or 28th, 1956. Under the circumstances the jury could well have inferred that the appellant left his fingerprint in the car while driving it or riding with Neely on the robbery-murder trip in question. Taken as a whole, the corroborating testimony tends to connect the appellant to the crimes committed in such a manner as could reasonably satisfy the jury and the trial judge that the accomplice Neely was telling the truth. No more is required.

Appellant points out that there is a conflict between the testimony of Neely and that of the witnesses who said they were with or saw Golland, and that there is a conflict between the testimony of the store checker and Neely as to the amount of money taken in the robbery. Those matters were for the jury to determine and they chose to believe Neely, which, under the circumstances, seems to us to have been perfectly proper.

[7] The second of appellant's contentions is to the effect that the evidence submitted by the prosecution "renders it highly improbable that appellant could have been present at the commission of the crime." We need not comment on this contention more than to point out that in our opinion, the evidence taken as a whole, was such that the jury could, and did find the appellant guilty as charged. Likewise, the learned trial judge, who has had many years of experience on the criminal bench in Los Angeles county, apparently was of the same belief, as he denied the appellant's motion for a new trial.

[8] Coming now to the third contention, namely that the court erroneously sustained an objection to questions put to the witness De Palma on direct examination. De Palma was sworn and testified that he had

previously known the appellant and that he saw Golland "about a quarter to seven" at a cafe at Sunset and Alvarado, drinking coffee and having something to eat, and that he (the witness) said, "hello." The question was then put: "You tell me how you place the time," and an objection thereto was sustained, the court saying, "It is a matter of cross examination." The question was then put: "Is there any particular reason that you have occasion to recall the time having been six-forty-five?" and an objection thereto was sustained.

On cross-examination the witness stated that on December 28th he was living "out on Hollywood and Gramercy" and that he had taken a bus to get to Sunset and Alvarado. He said he knew "about what time; because I left the house about 10 after six, something like that." He was not going to meet anyone, and he saw no one he knew in the cafe at the time, other than the owner of the cafe. The question was then put to the witness: "Now, how did you arrive at the time that Mr. Golland was sitting having coffee at 6:45?" The answer was: "Well, when I went down there I got the bus and I waited for about a little while, about ten minutes, something. I don't know. And I got—takes about a half hour to get down there, I guess. And I went in the cafe." Cross-examination on this point continued as follows:

"Q. So that's how you fix the time?  
A. Yes.

"Q. You're relating back then to an incident of catching a bus and having left home at an approximate time? A. Yes.

"Q. And as you left and you reflect back now, did you see anybody that you talked to on the streets before you saw Norman or passed the time of day or—A. No, I'm sure of that; because I just got off the bus and I went over to the cafe.

"Q. Did you sit with Norman? A. No, I didn't.

"Q. Now, do you wear a watch?  
A. Yes, sir.

"Q. Did you have a watch on that night? A. Yes, sir.

"Q. Did you look at the watch when you saw Norman? A. Well, not right then, no.

"Q. In other words, you had no occasion to be looking at any time, to pinpoint time, is that right? In other words, you didn't have—you weren't trying to correlate—A. Well, I was sure—I was sure I looked at the clock on the wall; but I mean I was sure after the time elapsed.

"Q. In other words, did the little hand, when you saw it, was it 6:45 or was it 7:45? A. Well, when I was—I am sure it wasn't 7:45, or something like that; because I—I know what time it was when I left home.

"Q. You're relating back then to when you left home, is that right? A. Yes, sir.

"Q. Did you look at a clock before you left home? A. I looked at my wrist watch.

"Q. Did you make it a point to see what time it was when you left home that night? A. Well, yeah, just by looking at my wrist watch. I mean I remember it."

The witness also related that he thought the 28th of December was on a Friday night, and that he first knew he was going to be a witness in the present case in about April, 1957, "[a]bout a month and a half ago," and that he had talked with the appellant's brother about when he had seen the appellant.

In our opinion, the question put to the witness on direct examination was in proper form. It is set forth in Wigmore on Evidence, Vol. II, Third Edition, § 655, pages 759-761:

"The party offering a witness may desire to make plain the strength of the witness' grounds of knowledge and the reasons for trusting his belief. This is a legitimate purpose. But, in pursuing it, the witness often will naturally state circumstances which



may give indirectly some unfavorable impressions against the opposite party, —as where the witness is asked, 'What made you notice the defendant's features?' and replies, 'Because he was the same man who stole my wagon last year.' Or he may relate other persons' utterances which would be inadmissible as hearsay, but for their present utility.

"Nevertheless, on the principle of Multiple Admissibility, \* \* \* the general rule is that the witness *may* on direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible; the judge's instruction to the jury must be relied upon for preventing their improper use of the fact: \* \* \*."

However, in the instant case, as heretofore pointed out, substantially the same question was put to the witness on cross-examination and the matter was gone into at some length. Furthermore, the witness was taken on re-direct examination and no questions were put to the witness bearing upon the matter now before us. We are of the opinion, under the circumstances of this particular case, that the error was not prejudicial and we do not believe that a different result would have come about had the witness been permitted to answer the question on direct examination, rather than as he did answer it on cross-examination. Calif.Const. Art. VI, § 4½.

1. "30-A. Consciousness of Guilt—Falsehood

"Evidence, if any, that the [x] defendant, on one or more occasions other than from the witness stand, made false, contradictory or misleading statements concerning the charge against him which now is being tried [or that he endeavored to procure false or fabricated evidence to be produced at the trial] may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine."

[9] Appellant's next contention has to do with CALJIC Instruction No. 30A,<sup>1</sup> given by the court. Appellant insists that there was no evidence to establish that he, the defendant, "endeavored to procure false or fabricated evidence" at the trial. The court also gave CALJIC Instruction No. 8.<sup>2</sup>

It is conceivable that the part of the instruction No. 30A to which the appellant objects could have referred to the witness De Palma, and in appellant's closing brief he himself states:

"If De Palma's testimony was accurate within a matter of minutes it was impossible for appellant to have been in the car that Miss Parker followed. The testimony of De Palma constituted a turning point in the case."

"That testimony might have been true but inaccurate, or *it might have been fabricated*. If true it might have been inaccurate. If true and accurate appellant was innocent. If true and accurate the thumb print on the car would have to be accounted for on some other hypothesis than that it was imprinted on this particular occasion." (Emphasis added.)

In any event, however, assuming that there was no evidence of any fabrication of evidence on the part of the appellant, the giving of the instruction was not harmful under the facts of this case. In *People v. Eggers*, 30 Cal.2d 676, at pages 687 to 688, 185 P.2d 1, at page 7, the court said:

2. "8. All Instructions Not Necessarily Applicable

"The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction."

"It is error to give an instruction which, although correctly stating a principle of law, has no application to the facts of the case. (Citing cases.) To charge the jurors as to an issue not predicated upon some theory logically deducible from the evidence presents for consideration a question not properly determinable by them. However, the giving of such an instruction does not justify a reversal of the judgment unless it is affirmatively shown that the error would prejudice the rights of the defendant. In the present case, considering his admissions and the evidence tending to prove that the killing was wilful, premeditated and deliberate, the record clearly shows that the defendant suffered no prejudice. Accordingly, there is no error justifying a reversal of the judgment. Const. Art. VI, Sec. 4½."

3. "Q. (By Mr. Graves) Mr. Neely, you pleaded guilty to first degree murder; is that correct? A. Yes.

"Q. You pleaded guilty in this courtroom? A. Yes.

"Q. At that time you had pending against you this very charge here of murder in the first degree and robbery; is that right? A. Yes.

"Q. You also had pending against you an escape charge; is that right? A. Yes.

"Q. In which you were arrested, along with Mr. Kostal and Mr. Watson; is that right? A. Yes.

"Q. Did that involve an escape by you out of the courtroom in Department 41? A. Yes.

"Q. Do I understand it is your position now, sir, you are taking the stand in respect to the Court and the honesty of the oath that you are telling us the truth? A. Yes.

"Q. You have respect for the Court, do you? A. Yes, I have respect for the Court.

\* \* \* \* \*

"Q. When you pleaded in this courtroom, you understood that your sentence was to be delayed until a later time, until the determination of this case against Mr. Golland, didn't you. A. Yes.

"Q. Did you hear Mr. Busch say to his Honor at that time that he wanted to have the Court consider the testimony in this case in determining the sentence to be imposed upon you? A. I don't recall.

There is not the slightest affirmative showing that the giving of the instruction in question was prejudicial to the rights of the appellant. Further, on considering the entire cause and taking all of the evidence into consideration, there was no miscarriage of justice in the giving of the questioned instruction. Calif. Const. Art. VI, § 4½.

[10] The next contention of the appellant is that the court erred in admitting two written statements made by the accomplice Neely. Neely testified as a witness for the prosecution as heretofore indicated, and named the appellant as an active participant in the crimes charged. On cross-examination Neely was asked, and he answered many questions concerning his motives in testifying against the appellant.<sup>3</sup>

The first statement was one made by Neely to the officers in Bakersfield at about

"Q. You don't recall that. Isn't it a fact, Mr. Neely, that you had every reason to believe, and do now believe, that you will escape the death sentence penalty and get life imprisonment punishment for the purpose of testifying here now? Just answer that one yes or no. A. I can't answer that yes or no.

"Q. Didn't you say that in the detention room in my presence, that the chances were nine to ten that you would get life imprisonment if you testified? A. I didn't say that, no.

"Q. You didn't? A. No.

"Q. Do you remember saying those very words to Mr. Ward Sullivan? A. No.

"Q. In my presence? A. I believe those were your words.

"Q. My words. Isn't it a fact that your attorney told you that the District Attorney would take a position—recommend life imprisonment if you would testify in this case? A. He said there was a good chance of it, yes.

"Q. Didn't he say to you that he had talked to the Judge in my presence in the chambers? A. Yes.

"Q. And didn't he say his Honor said at that time that he would probably be influenced in sentencing you by the testimony you gave here, but that he was not going to be bound by any deals? A. Yes.

"Q. Didn't you thereafter say, 'Well, it looks pretty good to me; the chances

1:00 o'clock a. m., December 29, 1956. The second statement was made by Neely to the officers in Los Angeles during the morning of December 29, 1956. The appellant was not present at the making of either of the statements. No formal charges had been

made against Neely at the time of either statement, and in each statement Neely named Golland as the person who had participated with him in the robbery-murder. The statements were admitted for the limited purpose of showing that his

are nine to ten for me? A. I didn't make any odds like that.

"Q. You believe, do you not, as you are now testifying, that you will escape the gas chamber by virtue of this testimony, don't you? A. I hope to escape the gas chamber by virtue of this testimony.

"Q. You expect to, do you not? A. Yes.

"Q. You are relying on the statement of Mr. Sullivan, the part that Mr. Busch here, the District Attorney, said that he would recommend that you get life imprisonment for this testimony, aren't you? A. Yes.

"Mr. Graves: We may take the recess, if the Court please, at this time.

"The Court: Yes; we will adjourn until tomorrow morning.

\* \* \* \* \*

"Q. Now, Mr. Neely, you told us last night that you had hopes of getting a life imprisonment sentence by virtue of your testimony here, is that correct? A. That's right.

"Q. And you also have belief, do you not, that the charge of escape with Mr. Kostal and Mr. Watson will be dismissed against you? A. Yes.

"The Court: When you say you have the belief, Mr. Neely, nobody has promised anything in that respect, have they?

"The Witness: No, sir.

"The Court: In other words, it is a hope that arises in your heart?

"The Witness: Yes, sir.

"Q. By Mr. Graves: You answered questions earlier on Wednesday if anybody had promised you anything, and you said no; is that not so? A. Yes.

"Q. But your attorney had informed you that Mr. Busch at the time of sentencing would recommend a life imprisonment sentence for you if you testified, weren't you? A. Yes.

"Q. You were informed by Mr. Sullivan that he had talked to his Honor and his Honor said he would probably be influenced by the statements of Mr. Busch at the time of sentencing, but he was not going to be a party to any deal, weren't you? A. That was my understanding, yes.

"Q. It was on the basis of the probabilities in your mind that you decided

to testify against Norman Golland; isn't that right? A. Yes.

"Q. You were afraid, were you not, of getting the death sentence penalty in this case— A. Yes, sir.

"Q. —before you testified? A. Yes.

"Q. Now, before you agreed to testify was there not a discussion in which Mr. Busch offered a robbery charge against Mr. Golland and a life first degree plea by you, in which Mr. Golland turned it down; did that influence your desire to testify?

"Mr. Busch: I object to that, your Honor; it was never offered.

"Mr. Graves: I will rephrase that.

"The Court: All right.

"Q. By Mr. Graves: Were you informed by me, Mr. Neely, and was Mr. Golland informed by me in your presence that they would probably take a robbery plea as to Mr. Golland if you would plead to first degree with no promise that you would escape the gas chamber; and did Mr. Golland refuse to take that plea, and were those part of the factors that influenced your desire, willingness to testify when you were assured that Mr. Busch would request a life imprisonment penalty for you?

"Mr. Busch: I will object to that as ambiguous, your Honor.

"The Court: The objection is sustained. It is compound, complex, and ambiguous.

"Mr. Graves: All right. May I change the form, if the Court please.

"The Court: Yes.

"Q. By Mr. Graves: There were some preliminary proceedings that influenced you to testify in this case; is that not so? A. That is right.

"Q. One of those preliminary proceedings was some statements about a plea by Mr. Golland to a robbery, and you to a first degree penalty; is that not so? A. Yes.

"Q. In that particular offer which was discussed, it was understood you would not have any assurance by the District Attorney that they would not ask for the death penalty, and both you and Mr. Golland refused to accept it; is that not so? A. That's true.

"Q. And it was only thereafter, when you were assured that the District Attorney would not ask for more than life



naming of Golland was not a "recently contrived statement," and not to prove the truth of the statement contained in the transcript of the conversations with Neely. The jury was instructed concerning their use of the statements.<sup>4</sup>

Appellant insists that the contents of the statements were not consistent with the testimony of Neely, and furthermore that the circumstances do not bring the case within the "recent fabrication" exception to the hearsay rule, for the reason that the motive to fabricate existed at the time the statements were made.

There can be no question that counsel for the appellant, by his questions to Neely, was attempting to intimate and to show that the witness was testifying from improper motives of interest, or improper influences, or that his testimony was recently fabricated. Under the circumstances, prior consistent statements are admissible as tending to show that the witness was not controlled by such influences, or that his testimony was not recently fabricated.

In *People v. Kynette*, 15 Cal.2d 731, at pages 753-754, 104 P.2d 794, at page 806, it was said: "When a witness has been charged with improper motives of interest, or improper influences, or with recent fabrication, the law allows hearsay statements to be introduced for the purpose of showing that the same and consistent statements had been made at a time prior to the alleged fabrication or prior to the time the motive of interest existed. Such evidence is then admitted, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case. *Clark v. Dalziel*, 3 Cal.App. 121, 124, 84 P. 429; *People v. Billings*, 34 Cal.App. 549, 554, 168 P. 396; 27 Cal.Jur. 178, sec. 153. The trial

court both at the time of its admission and at the close of the trial admonished the jury, as required by the authorities, that this particular evidence was limited to the credibility of Sakalis."

Also, in *People v. Walsh*, 47 Cal.2d 36, at pages 42-43, 301 P.2d 247, at page 251, it was set forth:

"It may be assumed that the witnesses' bias and prejudice against the defendants originated at the time of or prior to the time they were forced to pay the bribes. But in addition to showing such bias and prejudice the cross-examination pursued by the defense was designed to create inferences of fabrication which originated after the time of the bribes and after the making of the writings and statements claimed to have been improperly admitted for the purpose of rehabilitation.

\* \* \*

"With reference to the questioned rulings and instructions it is to be noted that it is not necessary that the party desiring to impeach should expressly state that he seeks to prove a fabrication of recent date. It is sufficient if the record indicates a purpose to prove a recent fabrication. (Citing cases.) In the present case inferences of fabrication since the alleged bribes could be fairly drawn by the jurors in addition to those which would tend merely to impeach the witnesses' general reputations or otherwise cast doubt upon their testimony. We find no error in admitting evidence of prior consistent statements for the limited purpose of refuting inferences of subsequent fabrication and to show a prior state of mind consistent with that shown by the witnesses when testifying. However if there was any error in ruling

at the time of your sentence, that you agreed to testify for the People against Mr. Golland in this case; is that not so? A. That's true."

4. "In this trial there were times when certain evidence was admitted relative to conversations and statements made by

the witness Charles Neely to the Bakersfield and Los Angeles Police Officers. These statements and conversations were offered for the limited purpose of showing prior consistent statements of the witness and not for the truth of any of the matters contained in the statements and conversations."

on the admissibility of the evidence a review of the record discloses no miscarriage of justice resulting therefrom."

In the present case the jury could properly infer from the questions asked and the testimony given during the cross-examination of Neely that owing to the promises of the district attorney, the motive to fabricate did arise after the making of the two statements.

We have carefully read each of the statements in question and we have come to the conclusion that they were, almost in

their entirety, consistent with the testimony of Neely on the witness stand. In other words, the statements were in substantial accord with his testimony. See *People v. Billings*, 34 Cal.App. 549, 554, 168 P. 396. Appellant argues that in one of the statements Neely admitted the robbery, but denied the shooting, and attempted to make it appear that Golland had done the killing. The statement made in Bakersfield shows that Neely stated that he did the actual shooting.<sup>5</sup>

The statement made in Los Angeles on the 29th of December, also shows that Neely said that he did the actual shooting.<sup>6</sup>

5. " \* \* \* Will you, in your own words, describe the details of the aforementioned crime to the best of your knowledge and recollection? A. There was no advance plan to rob the place. We were looking for something that looked easy and that might have some money in there that would give us each two or three hundred a piece and we drove around all day. We drove around 12 hours — 13 hours — from 6:30 in the morning till about 7:15 when this occurred, and we drove up Cahuenga at my partner's suggestion and spotted this Safeway Store and there appeared to be only the woman clerk and two or three other women in the place when we went past, and made a 'U' turn on Cahuenga and passed the store again and then went up in the hills there — I don't know what street it was — first street south of the store. We went up that street and I put on a mask and took a pistol out from under the seat. We went back to that place, parked in the parking lot. I walked past the store. I didn't pay too much attention — I just — I was looking for people outside the place at the time. There were several people there so I walked past the store and when the store had cleared to my satisfaction I walked into the store, pulling out my mask at the same time. There were a couple of people around the cash register and I motioned them away with my gun and directed my attention to the cashier. After ordering her to open the cash register I started to reach for the money and was nearly felled by a blow on the head and I realized that someone had thrown something. I turned around and this appeared to be the logical fellow or something. I was groggy and the gun went off. I saw blood spurt; I dropped everything and fled the scene. And there

you have it. We drove, my partner drove down the Freeway and I was crouched in the front seat — on the floor boards — and when he had satisfied himself that we were not being followed he parked and I changed clothes. He procured some band aids for me and I put one on my head. I gave him \$10.00 and he said he was going to get a pad for the night and we parted and I drove forth-with to Bakersfield \* \* \* stopping twice.

\* \* \*  
"Q. Charles, what's the name of your partner? A. Norman Golland.  
\* \* \*

"Q. How much money did you realize on the robbery of this Safeway Store? A. I don't know. I gave Golland \$10 and I had \$4 — I guess we got \$14.

"Q. In other words you had \$14.00? A. Possibly \$14.00."

6. "Q. You parked the car in the Safeway store, did he know you were going to hold the store up? A. Yes.  
\* \* \*

"Q. Did you two have some conversation in the car after the robbery regarding the shooting? A. Yes, we had some conversation.

"Q. Will you tell us what that was? A. It was sort of hysterical. I was really scared, when we ran out of the place, 'I said, 'let's go, I just killed a man'. I didn't know what to do.

"Q. What did he say to that? A. I don't know, don't recall, he was driving so erratically.

"Q. At the time you went into the Safeway Store with the intent to rob it, you had a 22 cal. H & R, was it loaded? A. Yes.

"Q. Was it loaded with live shells? A. Yes.

Appellant's last contention is that the court erred in not granting his motion for a new trial. Under this heading he reasserts all that has heretofore been contended. The trial judge in this cause had the opportunity to see and to listen to the witnesses, and he apparently was well satisfied with the sufficiency of the evidence and with the verdicts. He obviously entertained no serious doubts as to the credibility of the witnesses for the prosecution. It was appropriately said in *People v. Green*, 13 Cal.2d 37, at page 42, 87 P.2d 821, at page 823: "It is the function of the jury in the first instance and of the trial court after verdict to determine what facts are established by the evidence and before the verdict of the jury which has been approved by the trial court may be set aside on appeal for insufficiency of the evidence, it must be made to appear that there is no substantial evidence to support the conclusion of the jury and the trial court. (Citing cases.) A conviction may not be set aside

because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence. (Citing cases.)"

[11] The appellant did not take the witness stand. This he had a perfect right to do, however, by so omitting to testify he left unexplained many important matters which were, in our opinion, to his detriment.

In 1934, the constitution of the state of California was amended (Art. I, § 13) to provide among other things that the defendant's failure to take the witness stand in a criminal case and to explain certain evidence which had been introduced in the cause may be considered by the jury, and the failure to deny or explain may be considered by the jury as tending to indicate the truth of such evidence and as indicating and making permissible the drawing of unfavorable inferences against the defendant as more probably correct than infer-

"Q. Do you recall how many shells were in the revolver at the time? A. Nine.

"Q. How many shots did you fire in the market? A. One.

"Q. Eight live shells, cartridges left which were found in the gun by Bakersfield Police, were they the same cartridges in the gun at the time the robbery was committed? A. Yes.

"Q. And the empty shell, the expended shell was that the shell that was fired in the commission of the robbery? A. Yes.

"Q. Did Golland know at that the time you went into to commit the robbery that the revolver was loaded? A. Yes.

\* \* \* \* \*

"Q. I would like to ask you about the laceration near the corner of your left eye? How did you get that? A. I was struck with a can of what I am told was chili con carne.

"Q. Before or after you fired this shot? A. Before, immediately before.

"Q. At the time you fired the shot did you fire it directly at or toward any individual? A. I fired it where I thought the can was thrown from? I saw that I hit this man. I saw blood on his head.

"Q. Didn't you see him fall? A. I was in a hurry, nervous, and dropped everything and ran out.

"Q. I am going to show you a H & R 22 cal. rev. ser. R 42996 and ask you if you have ever seen this revolver before? A. I am not familiar with the number but I believe this is the one.

\* \* \* \* \*

"Q. I would like to ask you a couple more questions about the robbery at 1921 Wilcox Ave., as you pulled in with the automobile preparatory to committing the robbery, where was the automobile parked. A. In the store's parking lot.

"Q. Next to the building? A. Next to the building, facing outward.

"Q. How far back from the street? A. Fifteen or twenty yards from the street.

"Q. After the robbery and shooting inside the market, what did you do? A. Ran to the car and left in a very erratic manner.

"Q. At the time you fired the shot in the market, and you saw you hit someone, did you stop to see if you had hurt that person seriously or did you leave the scene? A. I was too frightened, I left immediately.

"Q. Did you tell Golland? A. Yes.

"Q. Do you recall what he said to that statement? A. No.

"Q. Did he seem frightened that you had shot someone? A. Yes, he was — his driving indicated he was frightened."



ences favorable to him. See *McBaine*, Calif.Evid.Manual, 1953 Pocket Part, p. 46.

*People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3, was a murder case which resulted in the death penalty. The defendant did not testify in his own behalf. The prosecutor commented upon such failure. The evidence in the case included fingerprints of the defendant at the scene of the murder, some stocking tops and some testimony with reference to a diamond ring which was missing when the deceased's apartment was searched. The court, in sustaining the conviction, said among other things (27 Cal.2d at page 495, 165 P.2d at page 12), "Fingerprints are the strongest evidence of identity of a person and under the circumstances of the present case they were alone sufficient to identify the defendant as the criminal. *People v. Ramirez*, 113 Cal. App. 204, 298 P. 60. \* \* \*" The court in the *Adamson* case also stated, 27 Cal.2d at pages 488-494, 165 P.2d at page 8:

"It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to 'his failure to explain or to deny by his testimony any evidence or facts in the case against him' whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse. (Citing cases and authorities.) 'All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to contradict.' *Mansfield*, C. J. in *Blatch v. Archer*, [1] Cowp. [63, 65] 66, see 2 *Wigmore*, supra, 162 et seq., and cases there cited. The Code of Civil Procedure codifies

this rule by providing that the jury is to be instructed by the court on all proper occasions: '6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict' (Code Civ.Proc., § 2061 (6)); and that it is to be presumed 'That evidence wilfully suppressed would be adverse if produced'. *Ibid.* § 1963(5). The basis in common experience for this rule as applied to criminal cases has been set forth in *State v. Grebe*, 17 Kan. 458: 'The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists.' Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. Respondent cites *People v. Dukes*, 16 Cal.App.2d 105, 109-110, 60 P.2d 197; *People v. Pianezzi*, 42 Cal.App.2d 265, 267-269, 108 P.2d 732 and *People v. Dozier*, 35 Cal.App.2d 49, 59-60, 94 P.2d 598, as holding that failure to testify directly affects the ultimate issue of guilt by raising an 'inference or presumption of guilt.' The instruction refused in the *Dukes* case \* \* \* was in part to the effect that the members of the jury were 'not to consider or

permit [themselves] in anywise to be influenced by the fact that the defendant has not seen fit to offer himself as a witness before you.' A similar instruction was refused in the Pianezzi case. The instruction refused in the Dozier case provided that failure to deny or explain testimony 'should not create a prejudice or unfavorable inference in the minds of the jury; no inference can be drawn against the defendant from his failure to testify.' \* \* \* In these cases the court was clearly correct in holding that the instruction would destroy the effect of the 1934 amendment.

"The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or \* \* \* deny by his testimony' (Art. I, § 13, Cal.Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. *State v. Grebe*, supra; *Mooney v. Davis*, supra [75 Mich. 188], at page 193 [42 N.W. 802]; see Code Civ.Proc., §§ 1963(5), (6), 2061(6), (7). No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' (Code Civ.Proc., § 2061(6)) to explain or deny such evidence. *Ibid.* § 1963(5); *Parker v. State*, 61 N.J.L. 308, 39 A. 651; *Caminetti v. United States*, 242 U.S. 470, 494, 495, 37 S.Ct. 192, 61 L.Ed. 442; *Blatch v. Archer*, supra; *R. v. Burdett*, 4 B. & Ald. 122; see *People v. Albertson*, 23 Cal.2d 550, 585, 145 P.2d 7.

\* \* \* \* \*

"Defendant contends that the rational connection between a fact proved and the fact presumed required by the due process clause of the Fourteenth Amendment (citing cases) does not exist between the failure to deny or explain incriminating evidence and the

inference of the credibility and unfavorable tenor thereof that these provisions permit the jury to draw. Defendant argues that reasons other than lack of power to explain favorably to himself or to deny such evidence, for example fear of disclosure to the jury of prior crimes through impeachment (Code Civ.Proc., § 2051; see 3 Wigmore, supra, 538; *ibid.* 380) or fear of creating a bad impression by being a 'poor witness,' may prompt a defendant not to take the stand. In view of the even poorer impression normally created by not taking the stand (citing case and authorities), fear of creating a bad impression because of being a 'poor witness' is not an impressive explanation of a defendant's silence. (Citing authorities.) It is true that defendants convicted of prior crimes often do not take the stand because of fear that upon cross-examination their criminal record will be given to the jury. (Citing authorities.) Clearly, however, the inference authorized need not be the only plausible one that can be drawn from the proved fact, to be rational under the due process clause. The inference is rational if the proved fact is a warning signal according to the teachings of experience. (Citing cases.) It is common experience that the failure to explain or deny adverse evidence that a defendant may reasonably be expected to explain or deny tends to show the credibility of such evidence and renders more probable the unfavorable tenor thereof. (Citing case and authorities.)

"There has been much criticism of the present state of the law, which places a defendant who has been convicted of prior crimes in the dilemma of having to choose between not taking the stand to explain or deny the evidence against him thereby risking unfavorable inferences, and taking the stand and having his prior crimes disclosed to the jury on cross-examination. (Citing authorities.) In the

present case defendant admitted two prior felony convictions for which he served terms of imprisonment in the Missouri state prison. The fact of the commission of these crimes was not offered or introduced into evidence and would have been inadmissible under the general rule with respect to prior crimes. *People v. Albertson*, 23 Cal.2d 550, 576, 145 P.2d 7, and authorities there cited. Had defendant taken the stand, however, the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony. (Citing case and authorities.) Since fear of this result is a plausible explanation of his failure to take the stand to deny or explain evidence against him (citing authorities), the inference of the credibility and unfavorable tenor of such evidence that arises from this failure is definitely weakened by this rule of impeachment. This weakness, however, could not be revealed to the jury by counsel or court without prejudicing the defendant through the revelation of past crimes. Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature."

In the present case the appellant obviously did not refuse to take the witness stand for fear that it might be disclosed that he was an ex-convict, for he himself affirmatively caused it to be brought out in his defense that he was an ex-convict, and was at the time on parole. He, and he alone, could have explained how his fingerprint got onto the framework of the window on the driver's side of the Plymouth car, and he chose not to do so, and therefore the jury could, and apparently did draw the inference that he, Golland, was in the Plymouth car at the time of the rob-

bery-murder as a participant, and therefore properly convicted him.

Any error committed at the trial was, in our opinion, not prejudicial to the appellant and there was no miscarriage of justice.

The attempted appeal from the "sentences" is dismissed.

The judgments and order are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.



163 Cal.App.2d 336

**Damon JOHNSON, Plaintiff and Appellant,**  
v.

**MATSON NAVIGATION COMPANY, a**  
corporation, Defendant and  
Respondent.  
Civ. 17975.

District Court of Appeal, First District,  
Division 2, California.  
Sept. 4, 1958.

Action under Jones Act for injuries allegedly incurred by bellboy in fall aboard ship. The Superior Court, City and County of San Francisco, Ralph McGee, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Draper, J., held that evidence that plaintiff had had similar accident five years before had not been material on issue of negligence but had been admissible to show that plaintiff's present condition had resulted, in whole or in part, from prior accident.

Affirmed.

1. Seamen  $\S$ 29(5.13)

In action under Jones Act for injuries allegedly incurred by bellboy in fall aboard



ship, evidence that plaintiff had had similar accident five years before was not material on issue of negligence but was admissible to show that plaintiff's present condition had resulted, in whole or in part, from prior accident. Jones Act, 46 U.S.C.A. § 688.

## 2. Trial ⇨48

Evidence admissible for any purpose must be received, even if improper for another purpose.

## 3. Appeal and Error ⇨216(1)

Appellant, who had made no request therefor, could not complain of lack of formal admonition to jury as to the limited purpose for which evidence was admitted.

## 4. Appeal and Error ⇨206(2), 882(8)

In Jones Act case, it may have been error to ask plaintiff whether he had made a claim and received money for injuries sustained in prior accident, and it was clearly error to question plaintiff as to amount of settlement; but since there had been no objection to first question and since second question had been asked by plaintiff's own counsel, reversal of judgment for defendant was not required. Jones Act, 46 U.S.C.A. § 688.

## 5. Seamen ⇨29(4)

Rule of comparative negligence was applicable in action under Jones Act, and in finding for defendant, jury impliedly found that no negligence on part of defendant had contributed to plaintiff's injury. Jones Act, 46 U.S.C.A. § 688.

## 6. Trial ⇨260(8)

In Jones Act case, instructions given clearly informed jury that contributory negligence was not a complete defense unless plaintiff's negligence had been sole proximate cause of injury, and it was not error to refuse requested instructions which were redundant thereto. Jones Act, 46 U.S.C.A. § 688.

## 7. Appeal and Error ⇨216(1)

Having failed to request instruction, appellant could not complain of failure to give it.

Belcher, Bachand & Bloom, Oakland, for appellant.

Brobeck, Phleger & Harrison, San Francisco, for respondent.

DRAPER, Justice.

Plaintiff was employed as a bellboy on the S. S. Lurline. He brought this action under the Jones Act (46 U.S.C.A. § 688) for injuries allegedly incurred in a fall aboard ship. Jury verdict was for defendant, and plaintiff appeals from the ensuing judgment.

[1-3] Appellant's principal injury was to his back. On direct examination, he testified that he had received a back injury in a similar accident five years before. In cross-examination, he was asked about the circumstances of the earlier fall and the extent of the injury then suffered. Appellant objected, and respondent asserted that the evidence was offered for its bearing upon the issue of contributory negligence. In general, evidence of other accidents is not material on the issue of negligence. *Lowenthal v. Mortimer*, 125 Cal.App.2d 636, 640, 270 P.2d 942. However, evidence of the former injury was admissible to show that appellant's present condition resulted in whole or in part from that injury. *Le Blanc v. Browne*, 78 Cal. App.2d 63, 75, 177 P.2d 347. Evidence admissible for any purpose must be received, even if improper, for another purpose. *Daggett v. Atchison, T. & S. F. Ry. Co.*, 48 Cal.2d 655, 665-666, 313 P.2d 557. In overruling appellant's objections, the court repeatedly stated, in the presence of the jury, that this evidence was admitted solely for its bearing upon the issue of injury. Appellant cannot complain of the lack of a formal admonition to the jury as to the limited purpose of the evidence, since he made no request therefor. *Lewis v. Southern Pacific Co.*, 98 Cal.App.2d 358, 363, 220 P.2d 431.

[4, 5] It may well have been error for respondent to ask appellant whether he made a claim and received money for the

previous injury (*Coleman v. Southern Pacific Co.*, 141 Cal.App.2d 121, 133, 296 P.2d 386), but these questions were not objected to by appellant, and the clearly erroneous question as to the amount of the settlement was asked by appellant's own counsel.

Even if there were error in any part of this line of examination, it was not prejudicial. Appellant's argument that the evidence may have been considered by the jury on the issue of contributory negligence is not persuasive. The rule of comparative negligence applies in actions under the Jones Act. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431, 59 S.Ct. 262, 83 L.Ed. 265. Thus contributory negligence is not a full defense, but results only in mitigation of damages. The jury here, in finding for defendant, impliedly found that no negligence on the part of defendant contributed to plaintiff's injury.

[6] Appellant also asserts error in the refusal of an offered instruction that respondent is liable if it "was guilty of any negligence whatsoever" which proximately contributed to appellant's injury, and another that respondent is liable if its failure to provide a reasonably safe place to work was "the proximate or contributing cause of injury." Under the rule of comparative negligence here applicable, it is clear that a defendant is liable, in a proportion to be fixed by the jury, if its negligence contributed in any way to the injury of plaintiff employee. But the jury was instructed that if plaintiff's negligence "contributed only in part to the happening of the accident," then only the proportion in which that negligence contributed was to be deducted from his award, and was instructed in detail on the method of awarding damages according to the percentage contributed to the injury by the negligence of each party. The instructions given clearly informed the jury that contributory negligence was not a complete defense unless plaintiff's negligence were the sole proximate cause of the injury. Thus the instructions requested by appellant were redundant, and their refusal was not error.

*Kent v. First Trust & Savings Bank*, 101 Cal.App.2d 361, 374, 225 P.2d 625.

[7] We are unable to understand appellant's suggestion that the court erred in failing to give BAJI instruction 104-A, to the effect that there may be more than one proximate cause of an injury. Appellant did not request such instruction, and therefore cannot complain of the failure to give it. *Peckham v. Warner Bros. Pictures*, 42 Cal.App.2d 187, 189, 108 P.2d 699.

Judgment affirmed.

DOOLING, J., concurs.



Mary Lou WALBERGH, also known as Mary Lou Francis, Plaintiff and Appellant,

v.

Jessie E. MOUDY, also known as Jessie Moudy Francis, Defendant and Respondent.\*

Civ. 22610.

District Court of Appeal, Second District,  
Division 3, California.

Aug. 29, 1958.

Rehearing Granted Sept. 25, 1958.

Action by landlord against assignee of lease under assignment whereby assignee had agreed to erect 15 units including the four motel units under construction by assignee, for specific performance of contract or in the alternative for damages for breach. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment for assignee and landlord appealed. The District Court of Appeal, Vallée, J., held that where it was patent that the units to be constructed were to be for motel or hotel purposes and that the parties knew and intended the dwellings which assignee agreed to construct were to

be of a type and standard of those under construction, and only testimony as to damages was cost of units under construction at time of assignment, finding that lessor suffered only nominal damages by assignees conceded breach was unsupported by evidence.

Reversed for new trial on issue of damages.

Shinn, P. J., dissented.

#### 1. Landlord and Tenant ⇨79(2)

##### Specific Performance ⇨121(3)

In action by landlord against assignee of lease under an assignment whereby assignee agreed to construct 15 units on property including the four motel units assignee was constructing on property at time of agreement, for specific performance of assignment agreement or in the alternative for damages for breach thereof, evidence sustained finding that assignee, who refused to construct 11 additional units, breached agreement.

#### 2. Damages ⇨189

In landlord's action for specific performance or in the alternative for damages for breach of assignment of lease wherein assignee agreed to construct 15 units including the four motel units which she was then constructing on premises, where testimony showed that cost of units comparable to the one being built by assignee at time of agreement was from \$1,000 to \$5,000 each, finding that landlord suffered only nominal damages and that units constructed were of little if any value was unsupported by evidence.

#### 3. Damages ⇨117

Measure of damages for breach of contract, except where otherwise expressly provided by statute, is the amount that will compensate the party aggrieved for all the detriment proximately caused to him by breach or which in the ordinary course of things will be likely to result therefrom. West's Ann.Civ.Code, § 3300.

#### 4. Landlord and Tenant ⇨79(1)

Assignment of lease creates privity of estate between original lessor and assignee

on acceptance by latter of assignment, but no contractual relation comes into existence between them by mere force of assignment.

#### 5. Landlord and Tenant ⇨79(2)

Assignee holding merely by virtue of an assignment of lease without any contractual relation with landlord to fulfill covenants of lease, is bound only for obligations arising from actual possession or privity of estate as distinguished from privity of contract.

Stegman & Stegman and Edwin B. Stegman, Los Angeles, for appellant.

L. A. Lewis, Larwill & Wolfe, and Charles W. Wolfe, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment in favor of defendant in an action for specific performance, or, in the alternative for damages for breach, of a contract to construct improvements on plaintiff's realty.

On December 18, 1946, James H. Francis, as lessor, and Willard F. Jones and Agnes E. Jones, as lessees, executed a lease of improved realty in Tecopa, Inyo County, California, known as "Tecopa Auto Court." On May 1, 1950, with lessor's consent the lessees assigned the lease to defendant Jessie E. Moudy and she took possession of the property on that date. Francis died on March 12, 1953. Plaintiff Mary Lou Walbergh, daughter of Francis, is the owner of the leased property, it having passed to her on his death.

The lease of December 18, 1946, was for a term of 23 years, ending October 31, 1969. The lessor owned a total of 880 acres. The lease covered 26 acres. The consent to the assignment of the lease reads:

"Assignment of Lease  
And  
Agreement.

"This Agreement, made and entered into this day of May, 1950, by and between



James H. Francis, hereinafter called 'First Party,' and Jessie E. Moudy, a widow, hereinafter called 'Second Party,'

"Witnesseth:

"That in consideration of the mutual covenants and agreements herein contained, it is hereby agreed between said parties, as follows:

"First party, as lessor in that certain lease dated December 18, 1946, between James H. Francis, as lessor, and Willard F. and Agnes E. Jones, as lessees, hereby consents to the assignment of said lease between James H. Francis and Willard F. and Agnes E. Jones to Jessie E. Moudy, second party herein.

"It is hereby agreed that said lease dated the 18th day of December, 1946, shall be extended for a period of four (4) years and six (6) months from and after the termination of said lease, to wit, until April 30, 1975; the rental thereof to be the same as set forth in said original lease. The last four (4) years and six (6) months of said lease the rental shall be One Hundred and Fifty Dollars (\$150.00) per month.

"In consideration of second party building or erecting fifteen (15) dwellings or units on said property during the next five (5) years, first party agrees that he will not execute any lease for motel or hotel purposes to any other person, firm or corporation other than second party for a period of five (5) years from and after the date of this agreement. In this connection, it is agreed that second party obligates herself to erect said fifteen (15) dwellings or units during said period of five (5) years, and at least three (3) units are to be completed each year, but that the four units or dwellings now being constructed by second party shall be considered as a part of fifteen units, and in the event that second party shall erect a total of fifteen units, including the four now being constructed, at any time prior to the expiration of said five years, then second party shall be relieved of any further obligation to build units on said property."

On April 29, 1951, the lessor signed this instrument:

"I the undersigned owe Jessie E. Moudy \$1,000.00 cash.

"I also grant Jessie E. Moudy the extension of Two years on building more courts as lease calls for 3 courts to be built each year."

Defendant paid the rental under the lease and has remained in possession at all times, but except for four units constructed in May 1950 she did not construct any units or dwellings on the property.

Plaintiff brought the action to compel defendant to specifically perform the agreement to construct 11 additional units or dwellings or, in the alternative, for damages for breach of the agreement.

The court found: the agreement of May 1950 provided that defendant would erect 15 dwellings or units on the leased property during the years from May 1950 to May 1957 comparable to those already situated or which were then being constructed upon the premises in or about May 1950; the agreement was not subject to specific performance; "[t]he defendant Jessie Moudy Francis has breached said Agreement of May, 1950, in that she has failed to erect and place upon said premises all of said fifteen (15) units or dwellings, but the plaintiff has sustained no damage as a result thereof"; "[p]laintiff is the owner of other real property in Tecopa, County of Inyo, California, near the aforesaid leased premises. The said dwellings or units already erected or constructed on the said leased premises have failed to enhance or add to the value of the property which is the subject matter of said lease, or to the value of plaintiff's other said property. Additional buildings of the same kind and character as those already erected or constructed on said leased premises likewise would add nothing to enhance the value of the property which is the subject matter of said lease, or to the value of plaintiff's said other property, at the present time or at any subsequent time, up to and including

the expiration of the lease term, to wit: April 30, 1975, nor thereafter; likewise the failure so to erect or construct said dwellings or units has not, nor will it, detract from, nor reduce, the value of said premises which are the subject matter of the said Lease or of plaintiff's said other property"; "[i]t is untrue that the cost of construction of dwellings or units in Tecopa, County of Inyo, California, as contemplated in said Lease and Amendment or Modification thereof would be \$5,110.00 per dwelling or unit, and in view of the type of sub-standard construction of said dwellings and units already on said premises, which were shack-like structures of little, if any, value, the cost, if any, of similar type buildings would be merely nominal only."

The court concluded that plaintiff "is not entitled to specific performance of the said Lease Agreement, for the reason that an adequate remedy at law was, and has been, available to her."

Judgment was for defendant. Plaintiff appeals. Her only assignment of error is the insufficiency of the evidence to support the finding that no damages resulted to her by reason of defendant's breach of the agreement of May 1, 1950. This is the only question before this court. Plaintiff argues that the measure of damages is the reasonable cost of constructing the additional dwellings or units.

Defendant merely asserts: 1. the agreement of May 1, 1950, between Francis and defendant is not subject to specific performance (plaintiff does not contend that it is); 2. no damages were sustained by plaintiff. She argues that even if it were held that the cost of constructing the contemplated units is the proper measure of damages, plaintiff would not prevail in view of the court's finding such cost would be nominal only. Defendant makes no contention that an action for damages will not lie because of uncertainty as to the type of dwellings or units which were to be constructed. The question is not mentioned in the briefs.

[1] The finding that defendant breached the agreement is amply supported by the evidence. Defendant does not complain of that finding. Indeed, she could not for in 1953 she said to plaintiff: "If you kids think I am going to build any of those buildings called for in the lease, you are crazy."

[2] The finding that no damages resulted from the breach of defendant's agreement to construct the additional buildings is contrary to the evidence. The evidence is uncontradicted that plaintiff sustained substantial damages from defendant's breach of the agreement.

At the time the agreement to construct 15 dwellings or units was executed defendant was constructing four units on the leased premises. They were motel units. She had acquired two officers' barracks in Tonopah, Nevada, and had them moved to the leased property. She had had tie foundations laid. Both parties tried the case on the theory the buildings were affixed to the soil. The outside dimensions of each of the two buildings were 20 feet 4 inches by 50 feet 4 inches. There was a 1 by 6 subfloor on which there was a tongue and groove Douglas fir floor and, on that, asphalt tile throughout each building. The floors were on 2 by 6 joists. The roofs were composed of 1 by 6 solid sheathing nailed on with batting, with asphalt rags, and stone topping. Each unit had three rooms: a living room and kitchen combined, a bedroom, and a bath. Each unit had two doors. The inside walls were in part ¼-inch Douglas fir plywood and in part ½-inch plasterboard. The outside walls were 1- by 12-inch Douglas fir boards. The ceilings were ½-inch plasterboard. Each unit had seven electrical outlets, a floor furnace, a cooler, a bath or stall shower, a toilet, a washbasin, and a medicine cabinet. Three units each had a 25-gallon water heater. The units were connected to a cesspool. The photographs in evidence show the interiors of the four units to be modern in every respect and to compare favorably with the average motel unit. The



agreement was executed about May 1, 1950 and the four units were completed by the first week in June 1950.

Defendant testified the cost of constructing the four units she erected in May 1950 was about \$4,000, exclusive of furnishings. Plaintiff's witness, a general building contractor who had examined the four units in 1956, testified that in his opinion the cost at that time of erecting structures comparable to the four units in Tecopa was about \$5,117.10 a unit. There was no other evidence on the question of damages.

[3] The measure of damages for a breach of contract, except where it is otherwise expressly provided by statute, is the amount that will compensate the party aggrieved for all the detriment proximately caused to him by the breach, or which, in the ordinary course of things, will be likely to result therefrom. Civ.Code, § 3300. In *Sprague v. Fauver*, 71 Cal.App.2d 333, 162 P.2d 865, this court held that where a lessee covenants in a lease to construct improvements on leased realty and breaches the contract, the lessor is entitled to recover the reasonable cost of construction. Also see *Turner v. Howze*, 28 Cal.App. 167, 172-173, 151 P. 751; *Fabian v. Lammers*, 3 Cal.App. 109, 113, 84 P. 432; *Taylor v. North Pac. Coast Ry. Co.*, 56 Cal. 317, 319; *Trainor Co. v. Aetna Cas. & S. Co.*, 290 U.S. 47, 54 S.Ct. 1, 78 L.Ed. 162, 164. The Restatement says that for a breach by one who has contracted to construct a specified product the other party can get judgment for "the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste." Rest., Contracts, 573, § 346.

It is patent from the agreement of May 1, 1950, that the dwellings or units were to be for motel or hotel purposes. It is further unmistakable that the four units or dwellings then under construction were part of the 15 units to be constructed; and it is also manifest that the parties knew and intended that the dwellings or units which defendant agreed to construct were

to be of the type and the standard of those under construction, which were for motel purposes.

We find no reasonable ground for holding, under the finding that defendant breached the contract, that the cost of constructing similar buildings would be nominal only and defendant's failure to construct them resulted in no damage to plaintiff.

[4, 5] We are not concerned with any provision of the lease between Francis and the Joneses. It is the written agreement between Francis and defendant, and that agreement only, with which we are concerned. The assignment of a lease creates a privity of estate between the original lessor and the assignee on the acceptance by the latter of the assignment. No contractual relation comes into existence between them by the mere force of the assignment. 30 Cal.Jur.2d 370, § 224. Defendant did not assume the contractual obligations of the lease or agree to be bound by any of its provisions. In the absence of a new contractual stipulation there is no privity of contract between the assignee and the lessor. An assignee who holds the demised property merely by virtue of an assignment of the lease, without any contractual relation with the lessor to fulfill the covenants of the lease, is bound only for obligations arising from actual possession or privity of estate, as distinguished from privity of contract. 30 Cal.Jur.2d 371, § 227. The only contractual stipulations between Francis, the original lessor, and defendant are to be found in the agreement of May 1, 1950.

We conclude the finding that plaintiff suffered only nominal damages by defendant's breach and that the units constructed in May 1950 were of little, if any, value, is unsupported by the evidence.

The judgment is reversed for a new trial on the issue of damages only. Appellant shall recover her costs on appeal.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. The buildings which Mrs. Moudy purchased from Jones were rested



upon railroad ties and were chattels, the property of Jones. The "barracks" buildings which defendant placed upon the land were rested upon railroad ties, were understood to be and were the property of defendant, and this would be true of any additional buildings to be provided by defendant. The lease to Jones so provided, in the following clauses "(f)-1. Interest in ownership of all buildings and improvements on Lessee's lease shall start reverting to the Lessor at the rate of 4% per year *from the time they are built.* 2. Present buildings on lease to B. Elias shall start reverting to Lessor at the rate of 4% per year November 1, 1947. 3. Lessee shall report date and value of all buildings as constructed to Lessor." (Italics ours.)

The majority opinion reverses the judgment for a retrial of the issue of damages only. Under that opinion, upon a retrial, the evidence being the same, the following propositions would be the law of the case:

1. Francis and Mrs. Moudy understood and agreed that all additional buildings would be the equivalent of the two "barracks" buildings that defendant had placed upon the land.

2. If more barracks buildings were unavailable (and there was only one more) Mrs. Moudy would have to duplicate them with new construction.

3. The buildings which defendant agreed to provide would be permanently affixed to the soil and the property of the lessor.

4. It is wholly immaterial that under express provisions of the lease the buildings would be chattels in which the lessor would acquire an interest only at the rate of 4% a year.

5. It is immaterial whether the barracks buildings, which defendant provided and which the majority opinion holds were to be duplicated, were chattels, and the property of defendant, subject to the provisions of the lease.

6. That the proper measure of damages would be the cost of new construction,

duplicating the barracks buildings, namely, \$10 per square foot, without taking into consideration the age of the barracks buildings or the fact that the lessor would not acquire full ownership or use of the buildings for 25 years, both of which facts would necessarily require application of the factor of depreciation.

Under the holding of the majority opinion the trial court would be required to find that defendant agreed to duplicate the barracks buildings with new construction, and that expert testimony that new construction would cost \$10 or \$12 or \$14 per square foot was competent to prove plaintiff's damage. Therefore, since there was no other evidence of the cost of new construction, and no evidence of the cost of duplicating the barracks buildings in their obsolescent condition, the trial court would be justified in finding that each unit in the barracks building, which was approximately 20 by 25 feet square, would cost new at least \$5,000 per unit, and that plaintiff had been damaged in the sum of at least \$55,000. That would be a shocking result in a case in which plaintiff could establish, under proper evidence, no more than nominal damages.

The problems I have mentioned are interrelated but they all flow from the same basic errors.

I shall discuss first the nature of plaintiff's interest in the buildings that were to be provided. The agreement required defendant to "erect" (not construct) additional units. In attempting to establish a claim for damages for defendant's failure to "erect" eleven more "dwellings or units" it was necessary for plaintiff to prove what her interest in the buildings would have been if they had been erected. She proved this, but without realizing that she had proved it, by placing the Francis-Jones lease in evidence. She assumed that the buildings when erected would be affixed to the soil as a part of the realty and that she would own them. Her proof established that this was not so, but that the buildings and five trailers which Mrs. Moudy had

acquired from Jones, and any additional buildings were and would be and remain chattels. *There was no provision in the lease or in the agreement between Francis and Mrs. Moudy that the units would be affixed to the soil or that they would become the property of Francis as they were placed on the land, or even that they would be left on the land.* In May, 1950, at the time of the Francis-Moudy agreement Francis had acquired something less than a 12 per cent interest in the old buildings and five house trailers. Mrs. Moudy provided four units in 1950, leaving two to be provided in 1952 and six by May, 1957. If the units had been erected as agreed Francis would have had a 100 per cent interest in them at varying times between 1975 and 1982.

The majority opinion disregards these provisions of the lease by misapplying the rule that the assignee of a lease does not, without special agreement, assume all the obligations of his assignor. No one has contended to the contrary. No one is attempting to enforce the lease as against Mrs. Moudy. It is manifest that the rule relied upon in the majority opinion could not operate to transfer from Mrs. Moudy to Mr. Francis title to additional units which would be erected under an express provision of the lease that Francis would acquire an interest in the chattels only at the rate of 4 per cent per year from the time each building was erected. Francis, and consequently plaintiff, had no interest in the buildings other than that to be acquired under the foregoing provisions of the lease. Plaintiff is bound by those provisions, equally with the defendant.

The majority opinion disregards facts that lie at the very foundation of the controversy. These are that it was conclusively established by the evidence that all the old buildings were personal property and were sold by Jones to Mrs. Moudy as such; it was a covenant of the lease that additional buildings would be personal property, and the barracks buildings were rested upon ties and were personal property.

Mrs. Moudy, as assignee of the lease, had a right to rely upon the provisions of the lease with respect to ownership of additional units. Francis had a right to rely upon those same provisions, and Mrs. Moudy could not have denied him the right to acquire ownership in the chattels as provided in the lease. These propositions are elementary. 30 Cal.Jur.2d 367.

How then, can this court say that additional dwellings or units would belong to the lessor as soon as they were placed upon the land? And how can it be said, as plaintiff contends and as the majority opinion holds, that the two barracks buildings belong to the lessor and that additional buildings would be real and not personal property?

The cost of new construction was a false base for the ascertainment of plaintiff's damages. Plaintiff, assuming that she had proved that she would own the buildings as they were erected, introduced the testimony of a contractor. He described the barracks buildings and testified that new construction of the same size, class and type would cost, at Tecopa, at least \$10 per square foot. Each of the four units in the two barracks buildings was approximately 20 by 25 feet and accordingly the cost of each unit would be \$5,000. The witness also testified that if each unit were built separately the cost would be \$12 or \$14 per square foot. This testimony was objected to and the objection was overruled; it should have been sustained. Mrs. Moudy testified that the four units had cost her approximately \$1,000 each. She had acquired and transported the two buildings for \$1,950. Altogether it cost \$1,000 per unit to complete them, or \$4,000 less per unit than the cost of new construction. There was no other evidence relevant to the issue of damage.

Regardless of the type, size, class or cost of units that the parties had in mind (if they had anything definite in mind), plaintiff would have had no possession or use of any of the buildings except at various intervals between 1975 and 1982. Defend-



ant would have had the exclusive use of each of them for 25 years. Plaintiff's damage for failure to erect eleven more buildings, if she had adopted that theory of damage, could have been no more than the value of the buildings after they had been in use for 25 years. In ascertaining this value the court would have been required to determine the normal rate of depreciation of the type and class of buildings defendant was required to erect. That would have been impossible for the trial court to do for two reasons, first, as I shall presently point out, there was no agreement as to the type or class of buildings that were to be erected, second, there was no evidence as to the annual rate of depreciation of a building of any type or class. Obviously this was not a matter that was judicially known to the court, and it is not known to this court. (If what is generally used as a normal rate of depreciation should be applied the buildings would be 100 per cent depreciated by the time plaintiff acquired full ownership in them.) There is no need to resort to any rule of law for the proposition that the element of depreciation could not be ignored. Common everyday practices in business and trade tell us that when defendant was obligated to erect eleven buildings and surrender possession and title to plaintiff at the expiration of 25 years she had no duty in order to meet that obligation to pay plaintiff presently the cost of new construction.

An additional point that is fatal to plaintiff's case is that there was never any meeting of the minds of Mr. Francis and Mrs. Moudy as to the type, class, size or cost of the buildings that were to be provided. Plaintiff alleged that it was the understanding that the buildings would be just the same in every particular as the barracks buildings. The answer denied this allegation and alleged there was no agreement with respect to the kind or type of "dwellings or units" that were to be erected. This defense was urged upon the trial with respect to the claim for specific performance and also the claim for damages. This was a vital factual question presented to

the trial court which, upon the evidence, could reasonably have been resolved against the plaintiff and I think that properly interpreted the court's findings did determine the issue against her. The majority opinion amounts to a finding of the factual issue in favor of plaintiff, as if it were a pure question of law.

The majority say "it is also manifest that the parties knew and intended that the buildings or units which defendant agreed to construct were to be of the type and the standard of those under construction, [and] which were for motel purposes."

By treating this factual issue as if it presented a mere question of law the majority opinion not only purports to impose upon defendant an obligation to construct new buildings at \$10 per square foot, but it also is a holding that the contract was definite, certain and capable of enforcement. The opinion proceeds upon this erroneous premise.

The court found that Mrs. Moudy obligated herself to "erect or place upon the property" fifteen buildings comparable to the old buildings that she had acquired from Jones *or* to the barracks buildings which she had placed upon the property. This could only mean that the trial court was unable to decide, and did not decide, what type or class of buildings were agreed upon, but inferentially decided that there had been no meeting of the minds upon that point. Plaintiff does not complain of the failure of the court to make a more definite finding, nor does she show that she objected to the finding or requested a better one. It therefore stands as a finding that plaintiff's proof failed to establish that there was a meeting of the minds as to the type or class of buildings to be erected or placed upon the property. Nevertheless this court holds as a matter of law that it was the understanding of Francis and Mrs. Moudy that the latter was required not only to duplicate the barracks buildings but to duplicate them with new construction. Not only is this holding gravely in error, but there was no evidence whatever of any discussion between the parties with respect to the type or class of



buildings to be provided. Moreover, in their agreement care was taken to use the word "erect" instead of "construct". There cannot be read into the agreement an obligation to "construct" anything.

Some time after May of 1950, Mr. Francis married Mrs. Moudy. Some two months after the barracks buildings had been moved on but before the parties were married, Mr. Francis and Mrs. Moudy discussed placing more buildings upon the property. Mrs. Moudy testified as follows:

"A. At that time there was still one more of these buildings available at Tonopah, and I had considered getting another one, but we had a discussion and my son was for getting another one, but Mr. Francis said no, that those five houses that I had taken over very definitely needed the money spent on them, so that is what I did.

"Q. Did he ask you not to spend it on any more units? A. He persuaded me not to get any more units but to take care of those five houses, because they needed to be done over completely.

"Q. Did you then spend money on those five houses? A. Yes, I did.

"Q. How much money did you spend on those five houses?

"Mr. Stegman: I object as being incompetent, irrelevant and immaterial as to how much money she spent on the five houses on a separate lease, your Honor.

"The Court: Overruled.

"A. Actually how much I spent on them I don't know, but at least a thousand dollars a house, I should say, I spent on them because they had to be practically new-roofed and some of them floored and partitions put in them and, of course, furnished, and flush toilets—there were no toilets. One house had a toilet in it; the rest of them none had flush toilets."

Mrs. Moudy's son died in 1952 and Mr. Francis died in 1953. There was no evidence whatever of any conversation between Mr. Francis and Mrs. Moudy with re-

spect to additional buildings except the one to which she testified as above. Mr. Francis never suggested that Mrs. Moudy bring in or erect any more buildings. The trial judge was so discouraged with plaintiff's attempt to prove an agreement as to the type, size and class of buildings that were to be erected that he found himself unable to make that determination. Wherefore, he found only that they were to conform *either* to the barracks buildings *or* to the old ones.

It is manifest that the plaintiff could not prove an agreement to bring in more old "barracks" buildings and that the trial court could not have found there was such an agreement. There was only one more available and Mr. Francis did not want it brought in. How, then, can this court hold, in view of the absence of any obligation to "construct" anything, in view of the equivocal finding of the trial court, and as a matter of law, that Mrs. Moudy was obligated to "construct" eleven more *new* dwellings or units comparable to the barracks buildings?

The reasons for the inability of the court to make a more definite finding will appear in my discussion of the next point.

The trial court properly refused to make a contract for the parties where they had made none that was enforceable.

I have made note of the fact that the agreement was to "erect" (not construct) additional dwellings or units. The words "erect" and "units" are significant. By "erect" the parties no doubt had in mind that used structures would be brought in and that defendant was not obligated to construct new ones.

There were five houses and five house trailers which defendant had purchased from Jones. Some trailers were on wheels, others on railroad ties. They were rental "units". They served the same purpose as the houses, and were superior to some of them. Bringing in more trailers would be erecting units.

I doubt that there could be found, except, perhaps, in some desert ghost town, a more heterogeneous and nondescript collection of so-called dwellings.

In all the cases of construction contracts in which the thing to be built was not described with reasonable certainty enforcement has not been decreed except upon competent evidence of an understanding of the parties which supplements the contract by removing its uncertainty and thus rendering it susceptible of enforcement. There has been evidence of some standard which the parties understood would be met. In the present case there was none. Some of the five buildings were very ancient but they were used as rental units. Two of them were built on railroad ties. Plaintiff's expert contractor ridiculed these, and perhaps some of the others, which he said were constructed of 1 by 12 planks, as having been put together not by a carpenter but by a handyman. It appears that the buildings had rough cement floors and that some of them had aluminum roofs with no sub-roof; these buildings the witness said, with an excess of moderation, would become "warm" in summer under the desert sun. In fact as to the several buildings he expressed doubt that anyone would want to live in them. Some buildings consisted of one room each, others of two rooms. Some had plumbing, others had none. Some had plywood partitions, others had wallboard partitions. Some had built-in cabinets, others had none. One was built of artificial stone and had double doors but no windows in front. Another was built of heavy planking with no windows in front. No two were alike as to size, and except for those that were built of railroad ties, no two were the same with respect to exterior construction. There was no uniformity of interior construction. Only one had a flush toilet. And yet all were "dwellings or units", and duplication of any of them with old buildings brought in could be held to be performance upon defendant's part.

I have found no case, and am sure none can be found in the books, in which enforceability was decreed of a contract so lacking in essentials as the present one. I have found many in which contracts considerably less uncertain than the one be-

fore us were held unenforceable for uncertainty.

Defendant's obligation to erect units was an inseparable part of the lessor-lessee relationship, since the erection of additional units was a matter that was in material respects controlled by the provisions of the lease. It is not necessary to decide whether defendant's agreement was within the statute of frauds. No question is presented as to the right to supply any essential of the contract by extrinsic evidence. Plaintiff offered none.

In *Ellis v. Klaff*, 96 Cal.App.2d 471, 216 P.2d 15, 17, an action for damages, the agreement was to build a "building or buildings as soon as building conditions reasonably shall permit. \* \* \* Any building or structure constructed by the lessee shall comply strictly with the Building Code of the city of Buenaventura." Of that contract we said (96 Cal.App.2d at page 478, 216 P.2d at page 20): "The construction clause in the lease, as written, however, is too vague and uncertain to give rise to a contractual duty. Aside from the requirement that the 'building or buildings' comply with the city building code, and the implication that it (or they) be sufficiently substantial to be a valuable asset after expiration of the term, the lease is manifestly incomplete in failing to specify whether the lessee was to construct one or more buildings and is wholly silent as to the size, type, materials, location, cost, appearance, or any other details of construction. The language of the construction clause thus shows that, at the time of the execution of the lease, the parties expected to supplement it by a future agreement with respect to the improvement of the property. Although the terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages. 12 Am.Jur., sec. 64, p. 554. Tested by these

settled rules, the construction clause in the present lease upon its face is manifestly unenforceable."

In *Ferrara v. Silver*, 138 Cal.App.2d 616, 292 P.2d 251, the agreement was to build a "banquet hall". The court wrote (138 Cal. App.2d at page 619, 292 P.2d at page 253): "How large was the building to be? How much of the lot was to be covered? How much was it to cost? Was it to be of concrete, brick or wood? How many stories? How finished inside and out?" I do not quote more of the opinion that followed. It is illuminating and I suggest that anyone interested in a sound statement of the law should read it.

The majority say that defendant does not argue in her brief that the agreement is so uncertain as to be unenforceable in damages. This is true. She argues only against specific performance. This is no reason for reversing the judgment. The point was strongly urged at the trial; it will be urged again upon a retrial, and in my opinion, will be sustained. If the judgment is to be reversed because defendant has not argued all available reasons for affirmance of the judgment, all I can say is that if counsels' "missing the boat" in this lawsuit is to be taken as a reason for penalizing the innocent parties, neither of them would have got closer to court than the courthouse steps. The merits of this appeal cannot be determined without deciding whether the contract sued on is enforceable by way of damages. If plaintiff should prevail upon a retrial there will be another appeal and the question of enforceability will be for decision.

It is a fact that the parties overlooked and continue to overlook the provisions of the lease with respect to the lessor's requiring an interest in the buildings at the rate of 4 per cent per year. The significance of those provisions, as they affect the plaintiff is that if she does not rely upon them she has not established any interest in the units that have been erected or the missing ones. From the standpoint of the defendant those provisions destroy

plaintiff's contention that she is entitled to the cost of present construction, without consideration being given to the factor of depreciation.

It is evident that the trial court had in mind the possible condition of the units "up to and including the expiration of the lease term, to wit: April 30, 1975." The court found "Additional buildings of the same kind and character as those already erected or constructed on said leased premises likewise would add nothing to enhance the value of the property which is the subject matter of said lease, or to the value of plaintiff's said other property, at the present time or at any subsequent time, up to and including the expiration of the lease term, to wit: April 30, 1975, nor thereafter; likewise the failure so to erect or construct said dwellings or units has not, nor will it, detract from, nor reduce, the value of said premises which are the subject matter of the said Lease or of plaintiff's said other property. It is untrue that the cost of construction of dwellings or units in Tecopa, County of Inyo, California, as contemplated in said Lease and Amendment or Modification thereof would be \$5,110.00 per dwelling or unit, and in view of the type of substandard construction of said dwellings and units already on said premises, which were shack-like structures of little, if any, value, the cost, if any, of similar type buildings would be merely nominal only."

Plaintiff by her complaint elected to claim as damages the detriment she allegedly sustained in the loss of the appreciation in value of her land which she would have realized had all the buildings been placed upon the land. This would have been one measure of damage had the buildings been permanently affixed to the land. She introduced no evidence in support of her theory of damage. Therefore the court found that she had sustained no damage, consisting of the alleged appreciation in value of her land. What else could the court have found. If a plaintiff seeks damages and proves none the court has to find that no damage has been sustained. The court



found that all the buildings were sub-standard, the old ones, and the barracks as well. So they were. But sub-standard or not, the court could not find, in the absence of all evidence on the subject, what value, if any, the contemplated buildings would have added to the value of the land, as of April 30, 1975.

I could have placed this dissent upon the sole ground of the unenforceability of the contract. But if the majority opinion

should prevail and be given full effect as the law of the case the consequences to Mrs. Moudy would be ruinous. In any event it would be a grave injustice to her to reverse the judgment for the purpose of allowing the plaintiff to revise her theory of damages, and to supply competent evidence, which she miserably failed to do when she had the opportunity. One trial of this case is enough.

I would affirm the judgment.

50 Cal.2d 736

**WYOMING PACIFIC OIL COMPANY, a  
corporation, Plaintiff and Appellant,**

**v.**

**Edward J. PRESTON, also known as E. J.  
Preston; Ralph Arnold; George B. Bush;  
Fred Thompson; Intermountain Produc-  
tion Company, a corporation; et al., De-  
fendants.**

**George B. Bush, Respondent.**

**L. A. 24332.**

**Supreme Court of California,  
In Bank.**

**Sept. 12, 1958.**

Action for cancellation of instruments. From orders of the Superior Court, Los Angeles County, Aubrey N. Irwin and A. A. Scott, JJ., dismissing an action as to defendant and a subsequent order denying the plaintiff's motion to vacate the dismissal, the plaintiff appealed. The Supreme Court, Spence, J., held that where defendant was served only one week after the expiration of the three year period provided for service by the statute and the defendant was concealing himself to avoid service and the court ordered service by publication and it was only through repeated efforts personal service on defendant was finally accomplished, dismissal of the action against the defendant for failure to service within the three year period constituted an abuse of discretion.

Orders reversed.

Opinion, 321 P.2d 154, vacated.

#### **1. Process ☞97**

In making an order for service by publication the judge acts judicially upon the evidence which the code requires to be presented to him for that purpose and can act upon no other evidence than such as is prescribed by the code, and his decision is regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination. West's Ann.Code Civ.Proc. § 412.

329 P.2d—31½

#### **2. Motions ☞59(1)**

A valid order made ex parte may be vacated only after a showing of cause for the making of the latter order, that is, that in making of the original order, there was inadvertence, mistake, or fraud, and such order may not be set aside simply because the court concludes differently than it has upon its first decision.

#### **3. Process ☞98**

Where there was no showing that the judge making an order for publication of summons against defendant acted inadvertently or through mistake or that he was imposed upon and the order was fully supported by affidavits furnished by plaintiff prior to its making, it stood as a binding adjudication and the court could not set aside the order on the theory that the defendant had not in fact concealed himself to avoid constructive service.

#### **4. Dismissal and Nonsuit ☞60(1)**

The statute imposing the duty upon court to dismiss an action where the summons has not been served and returned within three years except no dismissal can be granted where failure to serve occurs during defendant's absence from the state or he has secreted himself, is designed to encourage promptness in prosecution of an action and, by its enactment, the trial court's inherent discretionary power to dismiss for lack of diligent prosecution was modified by a mandatory provision for dismissal. West's Ann.Code Civ.Proc. § 581a.

#### **5. Dismissal and Nonsuit ☞60(3)**

The statute requiring dismissal of actions not brought to trial within five years after being filed may not be used to compel a dismissal of actions where the plaintiff has not had a reasonable opportunity to proceed to trial. West's Ann.Code Civ. Proc. § 583.

#### **6. Dismissal and Nonsuit ☞60(1)**

Statute imposing upon court duty to dismiss an action where summons has not been served and returned within three years except that no dismissal can be granted where failure to serve occurs during defendant's absence from the state or

while he secreted himself vests the trial court with discretion in applying the exceptions comparable to the discretion vested in it in applying the exceptions to section 583 which discretion must be exercised in accordance with the spirit of the law and with a view of subserving rather than defeating the ends of substantial justice and each case must be decided on its own particular facts. West's Ann.Code Civ. Proc. §§ 581a, 583.

#### 7. Dismissal and Nonsuit — 60(6)

Where defendant was served only one week after the expiration of the three year period provided for service by the statute and the defendant had been found to have been concealing himself to avoid service and the court ordered service by publication and it was only through repeated efforts personal service on defendant was finally accomplished, dismissal of the action against the defendant for failure to serve within the three year period constituted an abuse of discretion. West's Ann.Code Civ.Proc. §§ 581a, 583.

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Henry C. Clausen and Richard G. Burns,  
San Francisco, for appellant.

No appearance for respondent.

SPENCE, Justice.

Plaintiff appeals from two orders: (1) the order dismissing its action as to defendant Bush; and (2) the subsequent order denying its motion to vacate the dismissal. It contends that the dismissal was improper because of a prior binding adjudication that defendant Bush was concealing himself to avoid service of summons during the final days of the three-year period provided for such service (Code Civ.Proc. § 581a) and because thereafter Bush was served within a reasonable time, that is one week, following the expiration of said three-year period. We have concluded that plaintiff's contention must be sustained.

Plaintiff filed its action against several defendants on December 15, 1952, and sum-

mons was issued on that date. The first defendant was served in February, 1955. During the next several months plaintiff was engaged in making a change of counsel, and nothing further was done in completing the service of process. On December 1, 1955, new counsel advised plaintiff that the three-year period for service and return of the summons would soon expire, and thereafter feverish attempts were made to serve defendant Bush. According to the affidavits of several process servers, many visits were made to Bush's home and office between December 12 and December 15, but he could not be located. Upon the basis of these affidavits, plaintiff obtained on December 15, 1955, an order authorizing service by publication, premised on the finding that defendant Bush was concealing himself to avoid service. Continued efforts were made, however, to effect personal service on Bush through repeated visits to his home and office, and finally on December 22, 1955, he was personally served.

On December 28, Bush filed a notice of motion to quash service. The hearing was set for January 3, 1956, but plaintiff's counsel obtained a continuance to January 12 because of the holidays. The day before the hearing on his motion, Bush filed an "amended and supplemental notice of special appearance and motion to quash summons and service thereof together with motion to dismiss action" as to him for failure to serve and return the summons within the three-year limit provided in section 581a of the Code of Civil Procedure. Bush also filed an affidavit stating that he was readily accessible at his home and office on the days immediately prior to December 15, 1955, and was not concealing himself in any way. The court granted his motion to dismiss and entered an order of dismissal. Thereafter plaintiff made a motion to vacate the dismissal, but its motion was denied.

[1] Initially, we must consider the effect, in the proceedings to dismiss the action, of the prior order authorizing service on Bush by publication. Section 412 of



the Code of Civil Procedure provides that "Where the person on whom service is to be made \* \* \* can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; \* \* \* and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; \* \* \* such court, or judge, may make an order that the service be made by the publication of the summons." In *Rue v. Quinn*, 137 Cal. 651, at pages 655-656, 66 P. 216, at page 217, 70 P. 732, it is said: "In making the order for the service by publication, the judge *acts judicially upon the evidence* which the Code requires to be presented to him for that purpose, and can act upon no other evidence than such as is prescribed by the Code. \* \* \* [His] *decision* \* \* \* *is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination.*" (Emphasis added.) Here the order expressly recites that "upon reading and filing the affidavits [of five named persons] and it satisfactorily appearing therefrom to me that the Defendant George B. Bush \* \* \* conceals himself to avoid service of the Summons \* \* \*." It thus appears that at the time of making the order for publication, the court was satisfied, and therefore found, that defendant Bush was concealing himself to avoid service.

[2,3] It is settled law in California that "a valid order made *ex parte* may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud." *Sheldon v. Superior Court*, 42 Cal.App.2d 406, 408, 108 P.2d 945, 946. Such order may not be set aside simply because "the court concludes differently than it has upon its first decision." *Klokke Inv. Co. v. Superior Court*, 39 Cal. App. 717, 720, 179 P. 728, 729; see also *Wiggin v. Superior Court*, 68 Cal. 398, 402, 9 P. 646; *Sullivan v. Superior Court*, 185 Cal. 133, 139, 195 P. 1061. Here there has been no showing that the judge who

made the order for publication of summons against Bush acted inadvertently or through mistake, or that he was imposed upon. Bush has never directly challenged the finding of concealment as contained in the order; he has never moved to set the order aside; and the order, being fully supported by the affidavits furnished by plaintiff prior to its making, stands as a binding adjudication. See *Matchett v. Ryerson*, 156 Cal.App.2d 52, 54-55, 318 P.2d 792. Although the record does not reflect the trial court's reasoning in granting Bush's motion to dismiss, that court could not have proceeded, in the light of the prior binding adjudication, upon the theory that Bush had not in fact concealed himself to avoid service. The question is therefore presented of whether the trial court properly dismissed the action under section 581a of the Code of Civil Procedure when personal service upon Bush was actually accomplished within a relatively few days following the making of the prior order.

[4] Section 581a of the Code of Civil Procedure imposes upon the court the duty to dismiss an action where the summons has not been served and returned within three years after commencement of the action, *except* that no dismissal can be granted where the failure to serve the defendant occurs "during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him." This is a rule "designed to encourage promptness in prosecution of actions." *Gonsalves v. Bank of America*, 16 Cal.2d 169, 172, 105 P.2d 118, 120. By its enactment, the trial court's inherent discretionary power to dismiss for lack of diligent prosecution (*Ordway v. Arata*, 150 Cal.App.2d 71, 74, 309 P.2d 919; *Lieb v. Lager*, 9 Cal.App.2d 324, 326, 49 P.2d 886) was modified by a mandatory provision for dismissal, which provision was qualified, however, by certain exceptions.

[5] Similar both in general purpose and language are the provisions of section 583 of the Code of Civil Procedure requiring the dismissal of actions not brought to

trial within five years after being filed. Despite the apparently mandatory language of that section, this court has found many "implied exceptions" where it was "impracticable and futile" to bring the action to trial within the designated five-year period. *Rose v. Knapp*, 38 Cal.2d 114, 117, 237 P.2d 981, 983, with cases cited. Thus, discretion has entered into the application of this provision so as to prevent it from being used to compel the dismissal of actions where the plaintiff has not had a reasonable opportunity to proceed to trial. See *Ojeda v. Municipal Court*, 73 Cal.App. 2d 226, 232, 166 P.2d 49.

[6] We are therefore of the view that notwithstanding the mandatory language of section 581a, the trial court is vested with discretion in applying the exceptions comparable to the discretion with which it is vested in applying the exceptions to section 583. As with the exercise of the court's other inherent and statutory powers to dismiss actions for want of diligence in either serving the summons or bringing the action to trial, the discretion permitted must be "exercised in accordance with the spirit of the law and with a view of subserving, rather than defeating, the ends of substantial justice." 16 Cal.Jur.2d, Dismissal, Continuance, and Nonsuit, § 30, p. 179. Each case must be decided on its own particular facts, and no fixed rule can be prescribed to guide the court in its exercise of this discretionary power under all circumstances.

[7] Here it appears that defendant Bush was finally served on December 22, 1955, only one week after the expiration of the three-year period provided for service by section 581a. During the last few days of that period, Bush had been found by the trial court to have been concealing himself to avoid service, and consequently on December 15 it had ordered service by publication of summons. It was only through repeated efforts during the following week that personal service on Bush was finally accomplished on December 22. Thus, it is clear that Bush

was served within a reasonable period after the time that the trial court had found that he had been concealing himself to avoid service. We therefore conclude that the trial court's dismissal of this action as to defendant Bush constituted an abuse of discretion under the circumstances, since plaintiff was thereby denied a reasonable opportunity to effect service of process following the judicial determination that Bush had been concealing himself.

The above conclusion makes it unnecessary to discuss other points raised by the parties.

The orders are reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



163 Cal.App.2d 502

**C. A. BAIRD, Plaintiff,**

**v.**

**W. B. BARTON, Defendant.**

**W. B. BARTON, Cross-Complainant and Appellant,**

**v.**

**C. A. BAIRD, Wesley G. Baird, Viola M. Baird and Doris Baird, Cross-Defendants and Respondents.**

**Civ. 9350.**

**District Court of Appeal, Third District, California.**

**Sept. 12, 1958.**

**Rehearing Denied Oct. 6, 1958.**

**Hearing Denied Nov. 5, 1958.**

Action by purchaser of timber for money due and for reasonable value of services performed on the land before cancellation of contract by seller and resale of the timber to a third person. From adverse judgment of the Superior Court, Del Norte County, Samuel F. Finley, J.,

the seller appealed. The District Court of Appeal, Schottky, J., held that purchaser, while entitled to restitution for reasonable value of benefit conferred upon seller by building roads and felling and bucking timber less value of use of land, was not entitled to profit from use of land.

Judgment affirmed in part and remanded in part.

#### 1. Logs and Logging ⇨3(15)

In action by purchaser of timber against seller for money due and for reasonable value of services performed in building roads to and upon property and felling timber on land pursuant to contract which was canceled by seller who entered into a timber contract with another person in March and who conveyed the land to such other person in July for \$45,000, evidence of value of timber in July was some evidence of its value in March and sustained determination that fair market value of property in March was \$45,000.

#### 2. Logs and Logging ⇨3(15)

Where time was not made of essence of contract for sale of timber, seller, who never tendered performance on his part, repudiated contract by sending notice advising purchasers that he had canceled contract for failure to make payments before a specified date and ordering purchasers not to remove any more logs from land, and he also breached contract by entering into an agreement with another party to remove timber, and upon such repudiation purchaser was entitled to maintain an action for restitution.

#### 3. Vendor and Purchaser ⇨148, 170

In contract for sale of land where performance is due on a certain date, even if time is of the essence, a party who fails to perform is not in default until other party places him in default by making a tender.

#### 4. Vendor and Purchaser ⇨58

A promise to pay and a promise to convey are mutually dependent and condition-

al, and until one has offered to perform, the other party cannot be placed in default.

#### 5. Logs and Logging ⇨3(15)

In action by purchaser of timber for money due and for reasonable value of services performed in constructing roads to and upon timber land and for timber felled thereon, evidence sustained finding that purchaser, who had felled, bucked and peeled over one and a half million feet of timber at total labor cost of over \$5,700 and who had used two caterpillar tractors having a rental value of \$14 and \$10 per hour for a minimum of 211 hours in constructing access roads, conferred a benefit on the property in the amount of \$10,096.13.

#### 6. Logs and Logging ⇨3(15)

In action by purchaser of timber for money due and for reasonable value of services performed on land before cancellation of contract by seller and resale of timber to a third person, purchaser, while entitled to restitution for reasonable value of benefit conferred upon seller by building roads and felling and bucking timber less the value of the use of land, was not entitled to profit from use of land.

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Burton, Lee & Hennessy, Yreka, for appellant.

Falk & Falk, Eureka, for respondent.

SCHOTTKY, Justice.

[1] In June, 1954, appellant Barton and the Bairds entered into a contract entitled "Contract for Sale of Timber." By the terms of the contract Barton agreed to sell all the merchantable timber on 240 acres of land owned by him for \$50,000. The purchasers made a down payment of \$10,000. The balance was to be paid for at the rate of \$20 per thousand for all peeler logs and \$12 per thousand for all saw logs sold by the Bairds. Full payment was to be made in six months with all deferred payments to bear interest. When the entire sum was paid, Barton agreed to convey the land to the Bairds.



The Bairds entered into possession of the property and then started construction of access roads to connect the property with public roads. Four miles of road were constructed of which three miles were on U. S. Forest Service property and one mile on the timber property. The construction involved 211 man and tractor hours. The access roads were partially rocked. The Bairds then commenced logging operations. A strike hampered operations in July. Normal operations were conducted from August until October 6th when the Board of Supervisors of Del Norte County closed a suspension bridge across the Smith River to all truck traffic. The closure prevented any egress for logging trucks from the timber land. In December, 1954, a toll road was opened. To use the road required the payment of a toll of \$1.50 per thousand feet caried and the posting of a large bond, which the Bairds claimed made it economically impossible to continue operations, so they stopped. During the period the Bairds were able to remove logs from the property Barton received \$15,096.13 for logs sold. In addition, at the time the bridge was closed the Bairds had felled and bucked over one and one-half million feet of fir and redwood at a cost of \$5,782.63.

On February 10, 1955, Barton sent the Bairds a document labeled "Notice of Cancellation." Thereafter, on March 23, 1955, Barton entered into a timber contract with one Dean calling for stumpage payments at a certain price. The agreement provided that if and when all the timber had been cut and removed and the total stumpage had amounted to \$20,000 or more, Barton would convey the lands to Dean. On July 14, 1955, Barton conveyed the property to Dean and on the same date Dean transferred the timber to a plywood company for \$45,000.

C. A. Baird, the assignee of the Bairds, then brought suit against Barton to recover \$10,000 for money due, and \$12,227.72 for the reasonable value of services performed. Barton cross-complained and asked that the court determine that the con-

tract with the Bairds was terminated because of the alleged breach of the Bairds in not making the payments on the contract when due. Upon the trial of the case two questions were submitted to the jury for its special verdicts. The jury was asked to determine the value of the property on July 14, 1955, and March 23, 1955, and to determine whether Baird had ever told Barton he would not or did not intend to pay the balance on the contract. The jury found that the value of the property was \$45,000 on both dates and that Baird had never repudiated the contract.

The court made findings which incorporated the findings made by the jury and found further that Barton did not at any time serve written notice upon respondent reestablishing a time limit for forfeiture if full payment was not made therein; that on March 23, 1955, Barton entered into a timber sales contract with Claude W. Dean and Levinna Dean to sell the said land and timber for \$20,000 at a time when the land and timber were worth \$45,000, and on July 14, 1955, deeded said property to the Deans. The court found further that respondent was entitled to the return of the down payment of \$10,000 and was entitled to be reimbursed for monies expended in building roads to and upon the property, and for down timber remaining thereon. The court further found that the reimbursement should be calculated as follows:

|                                                                                                        |              |
|--------------------------------------------------------------------------------------------------------|--------------|
| "Contract price for sale of timber by defendant to plaintiff,                                          | \$50,000.00  |
| "Loss of value on account of logs removed,                                                             | 15,096.13    |
| <hr/>                                                                                                  |              |
| "Bare remaining value after removal of logs by plaintiff,                                              | \$34,903.87  |
| "Value of property at time of sale by defendant to Deans as fixed by jury,                             | \$45,000.00  |
| "Less value (from above) after removal of logs,                                                        | \$34,903.87  |
| <hr/>                                                                                                  |              |
| "Benefit conferred upon property by the felling and bucking of the trees and by the building of roads, | \$10,096.13" |

Judgment was entered in favor of respondent in the sum of \$20,096.13. Barton was denied any relief on his cross-complaint.

Barton has appealed from the judgment and contends that the material findings of fact are not supported by the evidence adduced at the trial, and that the findings do not support the conclusions of law and judgment entered.

Appellant's first contention is that there was no evidence to support the finding that the property was worth \$45,000 on March 23, 1955, which was the time the Barton-Dean contract was made. There was evidence that Dean sold the timber on July 14, 1955, for \$45,000. This would tend to establish its value as of that date. Sutherland in his work on damages (Vol. 2, p. 1214) states: "Where the price or value at the time in question can not be directly proved it may be inferred from circumstances; and among those which may be proved are sales at other times near that date, especially if the property is such as bears a stable, rather than a fluctuating, price." McCormick in his work on damages (section 46) states: "The value of land may be proved by \* \* \* evidence \* \* \* of the prices paid on sales of similar land in the neighborhood within a reasonable time before or after the time of valuation." We believe that evidence of the value of the timber on July 14, 1955, is some evidence of its value on March 23, 1955, and that we would not be justified in holding that the determination of the court that the fair market value of the property on March 23, 1955, was \$45,000 is not supported by the record.

[2-4] Appellant also attacks the finding that he did not at any time serve respondent Baird with notice of default and points to the notice of cancellation of contract served on respondent on February 10, 1955. This was not a notice of default. While the contract called for payments in six months or on December 1, 1954, time was not made of the essence. In a contract for the sale of land where performance is due on a certain date, even if time is of the essence a party who fails to perform is not in default until the other party places him in default by making a tender. The promise to pay and the promise to

convey are mutually dependent and conditional. Until one has offered to perform, the other party can not be placed in default. (3 Corbin on Contracts, sec. 663.) Barton never tendered performance on his own part. When Barton sent his notice advising the Bairds that he had cancelled the contract and ordering them not to remove any more logs from the land, he repudiated the contract. He also breached the contract by entering into the agreement with the Deans. Once Barton repudiated the contract the Bairds were entitled to maintain an action for restitution. 4 Corbin on Contracts, sec. 979; Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026; Duncanson v. Walton, 111 Cal. 516, 44 P. 174.

[5,6] Appellant Barton challenges the finding of the trial court that Baird conferred a benefit on the property in the amount of \$10,096.13. The method used by the trial court supports this finding but the figure can be supported another way. There is evidence that the respondent had felled, bucked and peeled 1,577,978 board feet of redwood and fir at a total labor cost of \$5,782.63. The testimony shows that a minimum of 211 hours were spent on constructing the access roads and that two caterpillar tractors were used, a D-8 and a D-6. The testimony shows that the reasonable rental value of a D-8 was \$14 per hour and a D-6, \$10 per hour. These figures were without regard to the cost of rocking the road. The above figures alone amount to over \$10,096.13. The trial court, however, did err in its determination of the amount due. While the Bairds were entitled to restitution of the reasonable value of the benefit they conferred upon Barton by their acts of building roads and felling and bucking timber less the value of the use of the land, they were not entitled to profit from their use of the land. The Bairds removed some timber from the land. They paid Barton for the timber at the stumpage rate provided for in the contract. This rate may well have been below the market value of the timber. This should be deter-

mined by the court, and any profit made by the Bairds on the timber removed should be deducted from the amount of recovery allowed. *Wagner v. McConnell*, 141 Cal.App.2d 370, 296 P.2d 915.

The cause is remanded to the trial court for a determination of the profit made by the Bairds on the timber removed by them. In all other respects the judgment is affirmed. Each party shall bear his own costs on appeal.

VAN DYKE, P. J., and PEEK, J.,  
concur.



163 Cal.App.2d 406

**Robert CRIMMINS, Individually and In a representative capacity in behalf of the members of Local 13-433, CIO-IWA, Plaintiff and Appellant,**

**v.**

**RALPH L. SMITH LUMBER COMPANY, Bristow Hood, Walter Hansen, Herbert Johnston, et al., Defendants and Respondents.**

Civ. 9339.

District Court of Appeal, Third District,  
California.

Sept. 10, 1958.

Rehearing Denied Oct. 2, 1958.

Hearing Denied Nov. 5, 1958.

Action by business agent of local union on behalf of members of the union and himself, against an employer and certain of its agents for breach of a collective bargaining agreement. The Superior Court, Shasta County, Eaton and Ross, JJ., sustained defendants' demurrer to a second amended complaint, as amended, without leave to amend, and entered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Peek, Acting P. J., held that where plaintiff's complaint failed to allege that a person employed by de-

fendant-employer was afforded an opportunity of membership in union on the same terms and conditions as were available to other employees, and that employee failed to tender initiation fees and dues, complaint failed to allege facts showing occurrence of conditions precedent to employer's duty to discharge such person under contract in question, and therefore, complaint failed to state a cause of action for breach of such contract which included a provision that every employee represented by union, as a condition of employment, would become and remain a member of the union, subject to the terms and conditions of the Labor Management Relations Act.

Judgment affirmed.

#### 1. Labor Relations Ⓒ255

Under the Labor Management Relations Act, duty on the part of an employer to discharge an employee on demand of union is conditioned upon availability of membership in the union to the employee on the same terms and conditions as are available to other employees, and the failure of the employee to tender initiation fees and dues. National Labor Relations Act, § 8(b) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(b).

#### 2. Labor Relations Ⓒ777

Where union business agent's complaint failed to allege that a person employed by defendant-employer was afforded an opportunity of membership in union on the same terms and conditions as were available to other employees, and that employee failed to tender initiation fees and dues, complaint failed to allege facts showing occurrence of conditions precedent to employer's duty to discharge such person under contract in question, and therefore complaint failed to state a cause of action for breach of such contract which included a provision that every employee represented by union, as a condition of employment, would become and re-



main a member of the union, subject to the terms and conditions of the Labor Management Relations Act. National Labor Relations Act, § 8(b) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(b).

### 3. Labor Relations ☞777

Allegation by union agent that employer failed to require a certain employee to join union could not be considered as an allegation of breach of collective bargaining agreement requiring every employee represented by union, as a condition of employment, to become and remain a member of the union, subject to provisions of the Labor Management Relations Act, since under such Act employer is under no duty to require his employees to join the union, but is merely under a duty to discharge an employee after a proper demand has been made by the union. National Labor Relations Act, § 8(b) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(b).

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Halpin & Halpin, Redding, for appellants.

Chenoweth & Leininger, Redding, Rogers & Clark, San Francisco, for respondents.

PEEK, Acting Presiding Justice.

Plaintiff, as business agent of Local 13-433 CIO-IWA, brought this action for damages on behalf of all the members of the union and on his own behalf, against defendant Ralph L. Smith Lumber Company and certain of its agents for breach of a collective bargaining agreement. Defendants' demurrer to the second amended complaint, as amended, was sustained without leave to amend upon counsel's statement that no further amendment would be filed, and a judgment of dismissal was thereafter entered.

The allegations of the second amended complaint, as amended, pertinent to the issues on appeal were that the union and the lumber company were parties to a

collective bargaining agreement which in part provided, in Article IIA thereof, that:

"The National Labor Relations Board having certified that a majority of the employees have voted to authorize the Union to seek a clause requiring membership in the Union as a condition of employment, the following clause shall become a part of this agreement:

"Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the Union, as a condition of employment, shall become and remain a member of the Union. This clause is subject to the terms and provisions of Section 8 of the Labor Management Relations Act, 1947."

The complaint further alleged that on October 18, 1954, Charles R. Hatfield was employed by defendant company as a choke setter, a position coming within the bargaining unit represented by the union; that on May 6, 1955, the union requested in writing that the company discharge Hatfield, but that it unlawfully refused said request; that on May 17, 1955, after a second request by the union, Hatfield was discharged; that defendants' failure to discharge Hatfield from November 18, 1954, to May 17, 1955, was the proximate cause of plaintiff's damages where were alleged to be (a) loss of dues and initiation fee from November 18, 1954, to May 17, 1955, in the amount of \$36; (b) loss of services of Hatfield in the amount of \$10,000; and (c) \$10,000 damages caused by defendants' breach, in that the union was weakened and made to seem without economic power and thus unable to deal effectively for the economic betterment of its members. Plaintiff further alleged that Hatfield refused to become a member of the union during the period he was employed by the defendant company.

By the amendment to the second amended complaint, plaintiff further alleged that defendants knew that the question of

Hatfield's joining the union was of great importance to the members of the union, to the general public and to other employers in the area; that it had become a matter of common knowledge, known to defendants, that the union needed the services of Hatfield as a member on or before May 5, 1955, in order to negotiate successfully with defendants for better wages and working conditions during the years 1955 and 1956; that defendants knew that if said union was unsuccessful in bringing about the immediate discharge of Hatfield after his refusal to join the union on or before May 5, 1955, the union would not be in a position to secure economic conditions of benefit to said membership; that with knowledge of said facts the defendants deliberately and intentionally refused to discharge Hatfield immediately upon the lawful demand of May 5 and refused to require him to join the union on or before May 5, but instead informed him that he did not have to join the union; and that because of the alleged facts, Hatfield as an individual had a unique value to said union during the period from November 18, 1954, to May 5, 1955.

Section 8 of the federal act, National Labor Relations Act, specifically incorporated in the agreement of the parties, provides in part:

"\* \* \* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b) of the act provides:

"It shall be an unfair labor prac-

tice for a labor organization or its agents \* \* \* (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) [supra] of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; \* \* \*". 29 U.S.C.A. § 158(b).

[1,2] It is apparent from the express terms of the Labor Management Relations Act that the duty on the part of the employer to discharge an employee on demand of the union was conditioned upon the availability of membership in the union to the employee on the same terms and conditions as are available to other employees and the failure of the employee to tender initiation fees and dues. It is also apparent from plaintiff's complaint as summarized that there has been a failure to allege facts showing that all of the conditions precedent to the defendants' duty to discharge Hatfield have happened or have been excused. It necessarily follows that defendants' demurrer was properly sustained.

[3] The allegation by plaintiff that defendants failed to require Hatfield to join the union could in no way be considered as an allegation of breach of the contract since under the incorporated statute, the employer is under no duty to require his employees to join the union. He is merely under a duty to discharge an employee who fails to join after a proper demand has been made by the union. *Silva v. Mercier*, 33 Cal.2d 704, 707, 204 P.2d 609.

In view of our conclusion that plaintiff's complaint is insufficient for the causes heretofore stated, it becomes unnecessary to discuss defendants' further contention that there is not sufficient causal connec-

tion between the breach and the damages alleged.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.



163 Cal.App.2d 590

**PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Jesus RAMIREZ and Ernest Frias Izzo,**  
Defendants,

**Ernest Frias Izzo, Defendant and**  
Appellant.

Cr. 1185.

District Court of Appeal, Fourth District,  
California.

Sept. 17, 1958.

Defendant was convicted of the unlawful sale of narcotics and from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial, Edward P. Fogg, J., the defendant appealed. The District Court of Appeal, Griffin, P. J., held that the evidence was sufficient to carry the case to the jury on the question of identity of the defendant as the offender, that the venue was sufficiently established and that the verdict was not inconsistent.

Affirmed.

#### 1. Criminal Law §741(2)

In prosecution for the unlawful sale of narcotics, evidence of identity of the defendant as the offender was sufficient for the jury. West's Ann.Health & Safety Code, § 11500.

#### 2. Criminal Law §564(1)

In prosecution for the unlawful sale of narcotics, where the evidence established

that part of the acts constituting the sale took place in San Bernardino County, jurisdiction in that county was sufficiently established. West's Ann.Pen.Code, § 781.

#### 3. Criminal Law §1144(14)

Error in giving or refusing claimed instructions cannot be presumed.

#### 4. Criminal Law §814(20)

In prosecution for the unlawful sale of narcotics where the evidence indicated that if defendant was guilty at all he was guilty of a higher offense of sale, court properly refused to instruct on any claimed lesser offense. West's Ann.Pen. Code, § 1159.

#### 5. Criminal Law §877

In prosecution for the unlawful sale of narcotics, claim that because the evidence as to sale by defendant and as to possession by codefendant was exactly the same inconsistent verdicts were rendered because codefendant was found guilty of possession was not sustainable where the sale was negotiated by the defendant without the aid of the codefendant and the possession of the codefendant though temporary appeared to be an independent transaction.

Joseph A. Katz, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant Ernest Frias Izzo and defendant Jesus Ramirez were charged in count one of an indictment with selling a narcotic (heroin) [in violation of section 11500 of the Health and Safety Code] on August 9, 1957. In the second count the same charge is made against appellant as occurring on August 16, 1957. Both defendants pleaded not guilty. Ramirez admitted a prior conviction of a felony (possession of narcotics) and that he served a term therefor in prison. Appellant admitted two prior felonies (burglary and



robbery). A jury trial resulted in a conviction of appellant as charged and he was sentenced to state's prison. Defendant Ramirez was found guilty of possession of narcotics under count one, a claimed included offense. Motions for new trial were denied. Appellant alone appeals and claims: 1, that the evidence is insufficient to establish (a) his identity; and (b) that the crime was committed in San Bernardino County; 2, that the court gave inconsistent instructions in reference to lesser and included offenses; and 3, that the verdict is contrary to law and inconsistent in that the jury found Ramirez guilty of a claimed included offense (possession of narcotics) and appellant guilty of sale, upon evidence which was exactly the same as to both defendants.

One Edward Nunez, the people's chief witness, a special deputy sheriff, was, on August 9, 1957, at about 7 p. m., on duty in Cucamonga. While driving down 24th street appellant stopped him and asked him what he was doing. Nunez replied he was looking for one Elias. Appellant stated he did not know where he was but if Nunez was looking for "junk" (heroin) he knew where he could obtain some in Pomona. Defendant Ramirez approached them about that time and asked Nunez what he was doing there. Nunez replied he was invited by appellant to obtain some "junk" in Pomona and Ramirez stated he was going with them. After some discussion Nunez agreed to drive his car. They drove to Pomona and parked near a supermarket at appellant's direction. Nunez was then asked by appellant: "How much do you want?" and Nunez replied "two caps" (capsules of heroin). Appellant said: "Why don't you give me \$12.00 and I will get you 3"? Nunez then gave him \$12 and he left. Several minutes later Nunez and Ramirez picked up appellant. They obtained two paper cups and some water and started back to Cucamonga. En route, appellant sterilized a hypodermic needle, broke a capsule and dropped it into a paper cup. Both defendants injected themselves. Ramirez assisted appellant. Nunez de-

clined to "fix" himself. At one stage of the proceedings Ramirez called appellant "Panadero" (Spanish word for baker,—appellant's trade). Appellant, seated in the back seat, gave the two "caps" to Ramirez, who was seated in the front seat with Nunez, and said: "Give it to him" (Nunez), and defendant Ramirez did so in San Bernardino County, about five miles east of the Los Angeles County line, near Cucamonga. These "caps" were contained in a cellophane bag. After leaving appellant and Ramirez in Cucamonga, Nunez contacted the officers in San Bernardino and the capsules obtained by him from defendants were marked and sealed in an envelope and subsequently identified by Nunez at the trial. A chemist made an analysis of them and found them to contain heroin.

On August 16th Nunez again saw appellant in Cucamonga, San Bernardino County, and purchased "two caps" of heroin from him which were contained in two aluminum foil papers, for which he paid appellant \$10. The "caps" were turned over to the officers and a like analysis was made with the same result. After proper identification they were received in evidence.

Appellant testified he did not sell narcotics to Nunez at any time and did not see him at Cucamonga; that appellant wore a mustache in August, 1957 (Nunez did not recall this fact). (He said he believed appellant did wear a light jacket.) Appellant claimed he never had a light jacket. He said he probably was in Cucamonga on August 9th and August 16th. He acknowledged that on occasions he had been called "Panadero" and that he had known Ramirez five or six years.

[1] Appellant's wife testified that appellant helped his father in the bakery on the nights here involved and said appellant wore a mustache during all of August. On rebuttal an officer testified he had known appellant three or four years, and had also known him as "Panadero". Some discrepancy existed between the testimony of Nunez and that of appellant as to the

kind and color of appellant's car when they first met in Cucamonga on the night of August 9th. The testimony as to the identification of appellant and his presence at the times indicated was a factual question for the determination of the jury. *People v. Mazza*, 135 Cal.App.2d 587, 596, 287 P.2d 798; *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836.

[2] The evidence sufficiently shows that the negotiations for the sale of the heroin was commenced in San Bernardino County. Although the consideration was not passed in that county, the delivery of the heroin to Nunez occurred in San Bernardino County. There were ample facts authorizing the jury to believe that part of the acts constituting the sale took place in San Bernardino County and jurisdiction in that county was sufficiently established. Penal Code, section 781.

[3,4] Appellant argues that the trial court should also have given an instruction that appellant could be convicted of a claimed lesser offense of possession and it erred in not submitting a verdict to the jury to this effect. No instructions, given or refused, have been brought to us in the record on appeal. Error in refusing or giving such claimed instructions cannot be presumed. *People v. McClure*, 133 Cal. App.2d 631, 633, 284 P.2d 887; *Thomas v. Laguna*, 113 Cal.App.2d 657, 660, 248 P.2d 929. Since the evidence against this appellant clearly indicates that if he was guilty at all he was guilty of the higher offense of sale, the court was justified in refusing to instruct on any claimed lesser offense even assuming, arguendo, that appellant was in a position to urge that possession is a lesser offense contained within the charge and that he was entitled to an instruction on the subject. *People v. McCoy*, 25 Cal.2d 177, 187, 153 P.2d 315; Section 1159 Penal Code.

[5] The claim that the evidence as to the sale by appellant and as to possession by defendant Ramirez was exactly the same and accordingly inconsistent verdicts were reached, is not borne out by the record.

Appellant cites *People v. Talbot*, 220 Cal. 3, 17, 28 P.2d 1057, and *People v. Angelopoulos*, 30 Cal.App.2d 538, 549, 86 P.2d 873, in support of his contention. The sale was negotiated by and between Nunez and appellant without the aid of Ramirez. Ramirez's possession of the heroin, although temporary, appeared to be an independent transaction and the jury concluded he did not participate in the sale. The verdict rendered against Ramirez, whether justified or not, was not inconsistent with the verdict rendered against appellant to the extent that appellant was thereby prejudiced. *People v. Talbot*, supra; *People v. Edwards*, 81 Cal.App.2d 655, 661, 185 P.2d 74; *People v. Lamb*, 134 Cal.App.2d 582, 585, 285 P.2d 941.

Judgment and order denying a new trial affirmed.

MUSSELL, J., and COUGHLIN, J.  
pro tem., concur.



163 Cal.App.2d 480

**F. D. ROSE, E. W. Anspach, O. W. Childs Company, a corporation, and Leo G. MacLaughlin Co., a corporation, Plaintiffs,**  
v.

**John B. PEARMAN and Margaret B. Pearman, Defendants and Appellants,**  
**F. D. Rose and O. W. Childs Company,**  
**Respondents.**  
**Civ. 22788.**

District Court of Appeal, Second District,  
Division 2, California.  
Sept. 12, 1958.

Rehearing Denied Oct. 2, 1958.

Action for deceit in sale of certain stock, and for declaratory relief. Defendants counterclaimed for payments of salary allegedly due under agreement in question, and had attachments levied upon property of plaintiffs. The Superior Court, Los Angeles County, Leon T. David, J.,

entered an order granting certain plaintiffs' motion to discharge the attachments, and defendants appealed. The District Court of Appeal, Ashburn, J., held that where contract for sale of certain stock in a corporation provided that in part consideration thereof buyers agreed that they would cause corporation to employ seller and his mother as consultants and in consideration of such services, buyers agreed to cause corporation to pay a certain sum of money to seller and his mother, buyers occupied the position of guarantors of such salary payments by the corporation, and therefore, attachment could be brought against buyers based on such agreement.

Order reversed.

#### 1. Attachment ⇨4

A counterclaim will support an attachment.

#### 2. Attachment ⇨5 Guaranty ⇨1

Where contract for sale of certain stock in a corporation provided that in part consideration thereof buyers agreed that they would cause corporation to employ seller and his mother as consultants and in consideration of such services, buyers agreed to cause corporation to pay a certain sum of money to seller and his mother, buyers occupied the position of guarantors of such salary payments by the corporation, and therefore, attachment could be brought against buyers based on such agreement.

#### 3. Attachment ⇨5

An attachment will lie upon an employment contract.

#### 4. Attachment ⇨5

The phrase, "contract, express or implied, for the direct payment of money" as used in statute providing for attachment in certain actions, embraces a guaranty. West's Ann.Code Civ.Proc. § 537.

#### 5. Attachment ⇨246

Affidavits submitted in support of a motion to discharge an attachment become pertinent where the issue is a factual

one as to whether the writ has been issued in a case not provided by statute, exemplified by questions of whether the debt was secured, whether the security has become worthless, or whether the defendant is a nonresident. West's Ann.Code Civ. Proc. § 537.

#### 6. Attachment ⇨246, 248

Affidavits cannot be used to negative existence of alleged cause of action upon which an attachment rests, and the sufficiency of the complaint or the existence of merit in the attaching creditor's claim cannot be canvassed upon a motion to dissolve or discharge an attachment. West's Ann.Code Civ.Proc. § 537.

#### 7. Appeal and Error ⇨863

Upon appeal from an order granting a motion to discharge an attachment arising out of a certain employment agreement, question of whether there was fraud in the negotiation of the agreement was not pertinent. West's Ann.Code Civ.Proc. § 537.

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Dolley, Jessen & Painter, Los Angeles, for appellants.

William Strong, Beverly Hills, for respondent F. D. Rose.

Alvan M. Palmer, Los Angeles, for respondent O. W. Childs Co.

ASHBURN, Justice.

Appeal from order discharging or dissolving attachments. Plaintiffs Rose, Anspach and O. W. Childs Company sued defendants John B. Pearman and Margaret B. Pearman for deceit in the sale to them of all the outstanding stock of Leo G. MacLaughlin Company, a corporation, seeking damages in the sum of \$75,000; in a second count of the complaint they sought declaratory relief. Leo G. MacLaughlin Company is a co-plaintiff and joins in seeking declaratory relief. Defendants answered, denying the alleged fraud and asserting counterclaims for payments in the nature of salary alleged to be due them under the terms of the said agreement which plaintiffs allege



to have been fraudulently induced. Attachments were levied by defendants upon property of the plaintiffs other than the MacLaughlin Company, later released as to Anspach, and the other plaintiffs, Rose and O. W. Childs Company, moved to discharge same upon the grounds that there was no contract for direct payment of money made by them with defendants, and that the allegations of the attachment affidavits were untrue. Upon conflicting affidavits the trial judge granted the motion and this appeal attacks that order.

The contract is in writing, dated June 26, 1956, John B. Pearman being named as seller and plaintiffs Rose, Anspach and O. W. Childs Company as buyers. Pearman agreed to sell to buyers 2,775 shares of capital stock of the MacLaughlin Company for the sum of \$100,000. The contract contains certain representations and warranties upon which the fraud action is based, provides that the purchase price be paid through escrow, and includes an agreement for employment of seller John B. Pearman and his mother, Margaret B. Pearman, by said MacLaughlin Company upon the following terms: "In part consideration hereof, *the Buyers agree that they will cause MacLaughlin to employ*, and MacLaughlin by its signature hereto appended does hereby employ the Seller and Margaret B. Pearman, who have been with MacLaughlin for many years, as Consultants in connection with the business and affairs of MacLaughlin for a period commencing July 1, 1956, and ending December 31, 1962. \* \* \* In consideration of said services, *The Buyers agree that they will cause MacLaughlin to pay*, and MacLaughlin by its signature hereto appended does hereby agree to pay to the Seller and Margaret B. Pearman the sum of \$100,000 in the following manner: An amount equal to 10 per cent of the gross sums received by MacLaughlin as insurance commissions commencing at July 1, 1956, and continuing until there shall have been so paid the aggregate sum of \$100,000; provided that irrespective of the amount of insurance commissions received,

*the Buyers agree that MacLaughlin will*, and MacLaughlin hereby agrees to pay to said parties not less than \$7,500 during the period from July 1, 1956, and ending December 31, 1956, and not less than \$15,000 during each calendar year thereafter until said entire sum of \$100,000.00 shall have been paid." (Emphasis added.) It is also provided that the minimum annual payments be made in monthly instalments of \$350 to Margaret B. Pearman and \$900 to John B. Pearman. It is further agreed that in the event of death or incapacity of either of the Pearmans prior to December 31, 1962, the payments required by the employment agreement shall continue to be made to the incapacitated employee or the estate of the deceased employee until the entire amount of \$100,000 is fully paid. The Pearmans also agree not to engage in insurance or securities business in any form or manner except on behalf of the MacLaughlin Company, and not to disclose its customer lists. Emphasis in the foregoing quotation has been supplied because those words form the heart of the present controversy.

[1] No claim of formal defect in attachment affidavit or any procedural aspect of the attachment is made, nor is it claimed that a counterclaim will not support an attachment. See, *Allers v. Beverly Hills Laundry, Inc.*, 98 Cal.App. 580, 583-584, 277 P. 337; *Interlocking Stone Co. v. Scribner*, 19 Cal.App. 344, 347-348, 126 P. 178; 1 *Witkin California Procedure*, § 46 (c), p. 889; 5 *Cal.Jur.2d* § 6, p. 601.

[2] The argument is that plaintiffs did not agree to employ and did not employ defendants; that they merely undertook to cause the MacLaughlin Company to do so and had discharged their entire obligation when it signed the agreement in question and therein stated that it "does hereby employ" defendants and agreed to pay to them the specified sums of money. The writing will not bear this narrow construction. The employment therein provided was for a term extending from July 1, 1956 to December 31, 1962. MacLaughlin Company did employ them for that period

and when that was done plaintiffs had performed part of their undertaking. But MacLaughlin also agreed to pay defendants a total of \$100,000 in monthly instalments, and plaintiffs agreed to cause MacLaughlin to do so. That undertaking could not be performed completely until the end of the employment term. Plaintiffs occupy the position of guarantors (Civ.Code, § 2787; *Beck v. Shepherd Fruit Co., Inc.*, 19 Cal. App.2d 590, 597, 66 P.2d 188).

[3,4] An attachment will lie upon an employment contract (*Lewis v. Steifel*, 98 Cal.App.2d 648, 650, 220 P.2d 769); it is conceded by respondents that the writ would run against the MacLaughlin Company. It is equally well established that the statutory phrase, "contract, express or implied, for the direct payment of money" (Code Civ.Proc., § 537), embraces a guaranty. *Hathaway v. Davis*, 33 Cal. 161, 167-168; *Karn v. Wills*, 50 Cal.App.2d 604, 609, 123 P.2d 640; *Tyson v. Reincke*, 25 Cal.App. 696, 701, 145 P. 153; *Anderson v. Fidelity Union Casualty Co.*, 137 Cal.App. 37, 41, 29 P.2d 865; *Dunn v. Mackey*, 80 Cal. 104, 109, 22 P. 64; *County of Monterey v. McKee*, 51 Cal. 255; 1 *Witkin California Procedure*, § 51, p. 893; 5 *Cal.Jur.2d*, § 21, p. 620. In *Bringas v. Sullivan*, 126 Cal.App.2d 693, 697, 273 P.2d 336, 339, it is said: "All that is required is that the action be based on a contract calling for the payment of money. The word 'direct' as used in section 537 of the Code of Civil Procedure is surplusage, for every contract for the payment of money would be a contract for the direct payment of money. [Citations.] Direct has been defined as meaning an amount ascertainable with reasonable certainty. [Citations.] The essential and material allegation is that the money sued on is due on a contract."

[5,6] Respondents argue that the ruling should be sustained upon the theory that the affidavits warranted the trial judge in concluding that appellants have no valid counterclaim. However, this is a situation

in which the affidavits have no proper place. They become pertinent where the issue is a factual one as to whether the writ has been issued in a case not provided by statute (*Kohler v. Agassiz*, 99 Cal. 9, 13, 33 P. 741); exemplified by questions of whether the debt was secured (*Goldman v. Floter*, 142 Cal. 388, 390-391, 76 P. 58; *Fisk v. French*, 114 Cal. 400, 403, 46 P. 161); or whether security has become worthless (*Barbieri v. Ramelli*, 84 Cal. 174, 176, 24 P. 113); or whether the defendant is a non-resident (*Sparks v. Bell*, 137 Cal. 415, 419, 70 P. 281). But affidavits cannot be used to negative the existence of the alleged cause of action upon which the attachment rests. The sufficiency of the complaint or the existence of merit in the attaching creditor's claim cannot be canvassed upon a motion to dissolve or discharge an attachment. *Pacific Electrical & Mechanical Co. v. Hardiman*, 101 Cal.App.2d 699, 226 P.2d 65; *Western Title Insurance & Guaranty Co. v. Bartolacelli*, 124 Cal.App.2d 690, 696, 269 P.2d 165; *Lewis v. Steifel*, *supra*, 98 Cal.App.2d 648, 220 P.2d 769; 1 *Witkin, California Procedure*, § 93, p. 926. In the *Lewis* case it is said, at page 651 of 98 Cal.App.2d, at page 771 of 220 P.2d: "An attaching plaintiff may claim in his affidavit the maximum amount of the alleged liability of the defendant, and the fact that within these limits the claim appears to be exaggerated, does not furnish a ground for discharging the attachment, nor does the fact that there appears to be but slight prospect that plaintiff will recover anything."

[7] For these reasons we have assumed as a basis of this opinion that defendants have a good counterclaim, which means an absence of fraud in the negotiation of the agreement. The question of whether such is actually the case is not pertinent upon this appeal.

The order under review is reversed.

FOX, P. J., and HERNDON, J., concur.

163 Cal.App.2d 43C

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**John D. IVY, Defendant and Appellant.**  
Cr. 6137.

District Court of Appeal, Second District,  
Division 3, California.  
Sept. 11, 1958.

Prosecution on two counts of selling heroin. The Superior Court of Los Angeles County, Allen T. Lynch, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Vallée, J., held that there was no error by trial court in questioning defendant during his direct examination as to fact that defendant had entered plea of guilty as to one of the counts in information and had later withdrawn such plea.

Affirmed.

**1. Criminal Law** ⇨406(4)

In prosecution on two counts for selling heroin, there was no error by trial court, in a nonjury trial, in inquiring of defendant on his direct examination as to circumstances surrounding entry of subsequently withdrawn plea of guilty to one of the counts. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1018.

**2. Criminal Law** ⇨406(4)

Where defendant entered, at preliminary examination, a subsequently withdrawn plea of guilty as to one of the counts in the information, plea of guilty was an

admission on defendant's part which, while not conclusive, was competent evidence, and weight and sufficiency thereof was for trier of fact. West's Ann.Pen.Code, § 1018.

Fredric A. Spindell, Los Angeles, for appellant under appointment of the District Court of Appeal.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted of two counts of selling heroin. Health & Safety Code, § 11500. He appeals from the judgment.

At the time of his arraignment defendant pleaded not guilty to the two counts charged in the information. Thereafter, defendant, with counsel present, pleaded guilty to count I.<sup>1</sup> At that time at defendant's request further proceedings as to count I and disposition of count II were continued. Later defendant, with counsel present, withdrew the plea of guilty to count I and pleaded not guilty thereto. The trial was had, and defendant was found guilty as charged in both counts.

Defendant testified in his own behalf and denied selling heroin, as charged in count I. In the course of his direct examination the following occurred:

"The Court: Now, on June 10th you appeared before me? The Defendant: Yes, sir, I did.

"The Court: You do that because you are in fact guilty of it? The Defendant: Yes, your Honor.

"The Court: Has anyone promised you anything if you entered a plea of guilty? The Defendant: No, your Honor.

"The Court: You do this freely and voluntarily? The Defendant: Yes, your Honor.

"The Court: All right.

"Mr. Woodmansee: John D. Ivy, under information number 189579, how do you now plead under count 1 thereof to violation of section 11,500 Health and Safety Code, a felony, guilty or not guilty? The Defendant: Guilty."

1. The following took place at the time defendant pleaded guilty to count I: "Mr. Klynn [attorney for defendant]: Your Honor, this is more or less of an associate case to the prior case of Mr. Thomas, and it is also the defendant's desire in this case to enter a plea as to count 1. Is that correct, Mr. Ivy? The Defendant: Yes.

"The Court: Mr. Ivy, you are charged with a violation of section 11,500 Health and Safety Code, selling heroin. Now, do I understand you wish to enter a plea of guilty to that charge? The Defendant: Yes, sir, your Honor.



"The Court: At that time I asked you whether or not you were guilty of Count II which charges the sale of this particular—

"Mr. Chandler: Pardon me, I believe that was Count I.

"The Court: Count I? The Witness: Yes, sir.

"The Court: You told me you were guilty of that charge? The Witness: Yes, sir.

"The Court: Why did you tell me you were guilty of the charge? The Witness: Because the counselor I had at that time, he advised me if I did, it would be more lenient punishment put on me for one count than two.

"The Court: Do you remember my asking you if anybody promised you anything? The Witness: Yes, sir.

"The Court: You told me no one promised you anything? The Witness: Yes, sir, I did say that.

"The Court: Why did you say that if it wasn't true? The Witness: Because it was due to my inexperience and I was somewhat excited. He didn't promise me anything. He said it would be considered and I would have a chance of more lenient punishment if I did plead guilty to one count rather than be found guilty of two; and not having been in Superior Court before, why, I counted on his advice and accepted his advice, being a lawyer, that he would give me the best advice."

Defendant was then examined further by his counsel. In the course of this examination the following occurred:

"The Court: You stated to the Court awhile ago that the reason you pleaded guilty to the one count was because your attorney told you it would be easier for you if you had one count rather than two. But if you were not

guilty of any of the counts why did you agree to enter a plea of guilty to one?

The Witness: Judge, your Honor, he was telling me that I was charged with this narcotics, and that there was this public sentiment against it, and the average citizen would look down on it and consider me guilty without any explanation because of the word narcotic. People are prejudiced against the subject.

"The Court: You mean to tell me he told you the Court would find you guilty simply because of public sentiment; the Court would find you guilty regardless of what the truth was? The Witness: More or less, yes, sir, that is what he meant, that my chances were very slim because it involved narcotics; and there was being so many arrests, and people were going to prison for it, and my chances would be very slim, according to the transcript we had read over together."

Defendant's only point is that the court committed prejudicial error in the examination with respect to his plea of guilty to count I. *People v. Ryan*, 82 Cal. 617, 23 P. 121, held that after a plea of guilty has been withdrawn by permission of the court, and the plea of not guilty substituted, as provided by section 1018 of the Penal Code, the plea of guilty becomes *functus officio*, and cannot be proved on the trial as an admission or confession of the defendant; that to receive the evidence would defeat the privilege granted by section 1018 of the Penal Code.<sup>2</sup> *People v. Boyd*, 67 Cal.App. 292, 227 P. 783, was a prosecution for obtaining money by false pretenses. The defendant's offer to plead guilty to one offense charged if the court would continue the case was admitted in evidence over objection. The District Court of Appeal held that the trial court erred in overruling the objection but that the error was not preju-

2. Penal Code, section 1018, in pertinent part reads: "On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the

time of the plea to court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

dicial. In denying a hearing the Supreme Court said (67 Cal.App. at page 302, 227 P. at page 786):

"We deem it proper, however, to say that we disagree with that portion of the opinion which holds that it was error for the trial court to overrule the objection of the defendant to the admission in evidence of the offer on his part to plead guilty to one offense charged in the information. The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. *People v. Jacobs*, 165 App.Div. 721, 151 N.Y.S. 522. Such an admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely; its weight and sufficiency being proper subjects for consideration by the jury. *State v. Bringgold*, 40 Wash. 12, 17, 82 P. 132. When the fact was established that the admission had been made by the accused, the admission was not before the jury as testimony by him establishing the truth of all or any part of the allegations of the information, but the fact that he had made it was before them, and was relevant as being inconsistent with his claim to the jury that he did not obtain any money under false pretenses from the complaining witnesses, and was not guilty. *State v. Carta*, 90 Conn. 79, 96 A. 411. The defendant's own admission, voluntarily made, was clearly competent evidence against him. That he made the admission in court can detract nothing from its relevancy or its competency. *Ehrlick v. Commonwealth*, 125 Ky. 742, 102 S.W. 289, 128 Am.St.Rep. 269; *People v. Gould*, 70 Mich. 240, 38 N.W. 232, 14 Am.St.Rep. 493.

"The opinion of this court in *People v. Ryan*, 82 Cal. 617, 23 P. 121, in which it was held to be error to introduce in evidence a plea of guilty after it had been withdrawn by permission of the

court and a plea of not guilty substituted, seems to be out of harmony with what we believe to be the correct and the better rule. It should be noted, however, that the court was there dealing with a case in which there could have been no conviction without the plea of guilty being considered as a 'confession,' and the conviction was accordingly reversed."

The court in *People v. Sanderson*, 129 Cal. App. 531, at page 532, 18 P.2d 982, at page 983, said:

"Over the objection of appellant's counsel that it was incompetent, irrelevant, and immaterial, a witness was asked if he heard the defendant make a statement at the preliminary examination with reference to pleading guilty, to which the witness answered, 'I did.' The asking of this question was also cited as misconduct. Thereafter the witness stated that defendant stated at the time in question that 'he wished to waive his entire preliminary and plead guilty in the superior court.' Such evidence would seem very competent to be considered, with the other evidence, on the question whether or not appellant committed the burglary. The statement seemed to be voluntarily made by defendant himself, and it had a direct bearing on the issue raised by the plea of not guilty."

Also see, *People v. Snell*, 96 Cal.App. 657, 662-663, 274 P. 560.

[1, 2] The effect of the ruling of the Supreme Court in *People v. Boyd*, supra, 67 Cal.App. 292, 227 P. 783, was to disapprove *People v. Ryan*, supra, 82 Cal. 617, 23 P. 121, insofar as the latter case held that a plea of guilty which has been withdrawn is inadmissible. In *Boyd* the evidence held admissible by the Supreme Court was an offer on the defendant's part to plead guilty to one offense charged in the information. At bar the evidence was a plea of guilty to one of the offenses charged. We think it follows that if an offer to plead is admissible in evidence, a plea of guilty is likewise admis-

sible. Defendant's plea of guilty to count I was an admission on his part of the truth of the charge. The admission was not conclusive evidence against him. It, together with his explanation, was competent evidence, its weight and sufficiency being for the consideration of the trier of fact. From the record, the plea of guilty appears to have been made voluntarily and it had a direct bearing on the issue raised by defendant's plea of not guilty. As said by the Supreme Court in *Boyd*, the fact that defendant made the admission in court does not affect its admissibility.

Affirmed.

SHINN, P. J., and PARKER WOOD, J.,  
concur.



163 Cal.App.2d 460

**PEOPLE of the State of California,**  
**Plaintiff and Respondent,**  
**v.**

**Jack PIERCE, also known as Orson F.**  
**Pierce, Defendant and Appellant.**  
**Cr. 1369.**

**District Court of Appeal, Fourth District,**  
**California.**  
**Sept. 11, 1958.**

**Hearing Denied Nov. 5, 1958.**

Prosecutions for conspiracy to commit crime of bookmaking. The Superior Court of San Diego County, William A. Glen, J., entered judgments of conviction and one of the defendants appealed. The District Court of Appeal, Griffin, P. J., held that there was no error in admitting scratch sheets of days on which alleged bets were made with defendants by police officer, since sheets were otherwise admissible to show that horses did run at track mentioned on those dates and it could not be considered prejudicial error to admit sheets

with added notations of police officer, and there was no error in denying new trial on ground of newly discovered evidence consisting of testimony to impeach prosecution witness' reputation for truth and veracity.

Affirmed.

#### 1. Criminal Law Ⓒ1169(1)

In prosecution for conspiracy to commit crime of bookmaking, since scratch sheets of days on which police officer made alleged bets were otherwise admissible to show that horses did in fact run on those dates, it could not be said that prejudicial error resulted in admitting sheets into evidence with officer's notations. West's Ann. Pen.Code, §§ 182, subd. 1, 337a and subd. 5; West's Ann.Code Civ.Proc. § 1953f.

#### 2. Witnesses Ⓒ257

Where one uses a writing made by him at time for sole purpose of refreshing memory, writing does not of itself become admissible in evidence in corroboration of witness' testimony.

#### 3. Criminal Law Ⓒ1144(15)

It is ordinarily presumed that jury followed court's instruction to disregard testimony.

#### 4. Criminal Law Ⓒ1169(5)

In prosecution for conspiracy to commit crime of bookmaking, fact that prosecution witness had testified that she telephoned bets in to defendant for another individual who could not be located, was not prejudicial in view of fact that court struck entire testimony and instructed jury to disregard it.

#### 5. Criminal Law Ⓒ696(3)

In prosecution for conspiracy to commit crime of bookmaking, where prosecution witness, who was defendant's sister-in-law, testified to defendant's acquaintance with a codefendant, failure to strike testimony on ground that it involved transactions at time prior to date of claimed overt acts was not error since testimony as to nature and duration of codefendant's acquaintanceship could be admissible as long as it had some bearing on or could prove



formation of conspiracy charged. West's Ann.Pen.Code, §§ 182, subd. 1, 337a and subd. 5.

#### 6. Criminal Law §942(1)

In prosecution for conspiracy to commit crime of bookmaking, there was no abuse of discretion in denying defendant's motion for new trial based upon newly discovered evidence consisting of testimony of alleged bad reputation for truth and veracity on part of prosecution witness. West's Ann.Pen.Code, §§ 182, subd. 1, 337a and subd. 5.

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Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Arthur C. de Goede, Deputy Attys. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant Jack Pierce was indicted in count one with defendant James Springer on a charge of conspiracy to commit the crime of bookmaking (Penal Code, section 182, subdivision 1; and Penal Code, section 337a.) Three overt acts are charged: One, that about June 22, 1957, one Schrader met with defendant Springer at Tony's Newport Cafe and Bar at 5034 Newport Boulevard in Ocean Beach; second, that on or about June 22, 1957, Schrader placed a horse race bet with Springer and he accepted it in the presence of appellant Pierce; and third, that about June 26, 1957, Schrader placed a race horse bet with defendant Springer who then and there accepted it. The fifth count charges appellant Pierce with the crime of permitting the use of premises for bookmaking (Penal Code, Section 337a, subdivision 5), i. e., that about June 22, 1957, while the owner or occupant of a building, to wit, Tony's Newport Cafe and Bar, he permitted same to be used and occupied for the purpose of bookmaking. Both defendants were found guilty of these charges by a jury. Appellant was granted conditional probation. He ap-

pealed from the judgment of conviction and order denying a new trial. The first claim is that the verdict was against law and evidence mainly because the verdict was based upon incompetent and irrelevant evidence.

Appellant operated, as the owner, Tony's Newport Cafe and Bar, at the address alleged. An investigator by the name of Schrader was employed in making investigations in reference to bookmaking activities in the county. He testified generally that in June, 1957, he met one Jackson in a bar in San Diego and went to appellant's place of business; that there Jackson introduced him to appellant; that in the course of the conversation appellant informed him that "Herb, the bookie" (defendant Springer) was one of the best around and that Herb would take a bet from just about anyone, probably even from the law; that generally they became interested in horse racing talk and appellant offered to take him to the Tijuana race track; that he said he knew his way around there and knew the right people; that appellant told him about Herb, "the bookie out there"; that several people came in while he was in the restaurant and talked to appellant; that he left appellant's place of business and returned on June 21st alone; that some conversation ensued about him wanting to place a couple of bets; that appellant told him Herb, the bookie, was around and shortly thereafter appellant left the bar and returned with Herb and introduced him to Schrader; that Schrader told Herb, in appellant's presence, that he wanted to make a couple of "investments"; that he (Schrader) made two \$5.00 bets on horses running at Hollywood Park, which Herb accepted; that he handed Herb a twenty-dollar bill and said "\$5.00 to win on Larks Music running in the fourth race at Hollywood and \$5.00 to win on The Pie King running in the seventh race \* \* \*"; that he took the names of the horses from the entries in the National Daily Reporter of that date which he subsequently marked

showing the horses and the amounts bet with the notation "Herb" (Exhibit No. 1, received in evidence over appellant's objection); that Herb handed him back \$10 and said if he was not around to collect his winnings, if any, he would leave them there with appellant; that Herb told him that he would always be around there or in the card room near-by if he cared to locate him again; that on June 26th, he saw defendant Springer in a card room a few doors from Pierce's bar, sitting at a card table; that in the presence of Jackson he handed him \$5 to win on Jaylpee, Jr., eighth race, at Monmouth, and showed him the entry on the scratch sheet he had so marked with the notation "Herb"; and that Herb said "Okay". This scratch sheet (Exhibit No. 2), thus marked and initialed by him was also received in evidence over objections. These horses did not win.

[1] The first objection involves the question of the admissibility of the two exhibits 1 and 2, offered in evidence by the prosecution. These exhibits were identified as scratch sheets of the days on which the alleged bets were made. Appellant contends that the notes placed thereon by Schrader were hearsay evidence and were inadmissible. Respondent concedes these notes were hearsay as to this appellant but contends they were otherwise admissible under the Uniform Business Records as Evidence Act (Sec. 1953f, Code Civ. Proc.), or that the reception of those notes in evidence along with the properly identified scratch sheet was harmless error.

[2] It appears that Schrader testified to the facts related without the aid of the notes, but on cross-examination he did look at them when he attempted to refresh his memory as to the bets in answer to a question propounded by appellant's counsel. It is the general rule that where one uses a writing made by him at the time for the sole purpose of refreshing his memory, the writing does not of itself become admissible in evidence by the prose-

cution in corroboration of the witness's testimony. It has been held, however, that where the witness testified fully, without refreshing his memory by the use of a memorandum, that although it was error, it was not prejudicial error to later admit the memorandum as evidence. *People v. Allen*, 37 Cal.App. 180, 188, 174 P. 374; *In re Estate of Packer*, 164 Cal. 525, 129 P. 778. It does not appear that section 1953f of the Code of Civil Procedure would authorize the receipt of such notes in evidence if they were used merely for the purpose of bolstering or corroborating the testimony of the witness. Since the witness did testify to the facts set forth without the aid of the notes to refresh his memory and since the form chart was otherwise admissible to show that the horses indicated did run at the tracks mentioned on those dates, it cannot be said that it was prejudicial error to admit the exhibits into evidence with the added notations.

[3,4] A Mrs. Motto testified that during July, 1957, she was engaged in book-making and had been convicted of this crime; that she knew defendant Springer and that he called at her home two or three times; that in placing bets she called Atwater 44-722; that she telephoned in bets for "Tommy", the barber, whom she was then unable to locate. A motion to strike this entire testimony was continued for the purpose of allowing the prosecution to connect it up with the appellant. Schrader testified that in the meantime he endeavored to locate Tommy, the barber, but was unable to find him, and the prosecutor remarked in the presence of the jury that he desired a continuance for this purpose although he did not know what his testimony would be, but if called to testify he would be under oath. The court denied the continuance and subsequently granted the motion with definite instructions to the jury to disregard it. It is ordinarily presumed that the jury followed the court's instruction in this respect. *People v. Prather*, 134 Cal. 436, 66 P. 589, 863. Appellant

claims that this error was of the exceptional type and was not cured by the order. It does not affirmatively appear that prejudicial error resulted.

One Myrtle Garvin, sister-in-law of Springer, testified she had known Springer for many years; that within the past three years she was at his home two or three times a week and that he was making books on horse racing by telephone and bragging about it; that appellant Pierce came by there three or four times. On cross-examination she testified that she did not get along with her "in-laws" or other relatives very well and had not spoken to them for some time; that she had not been at Springer's home since the property was sold in 1956. A motion was then made by appellant to strike her entire testimony on the ground that it involved a time prior to the date of the claimed overt acts; that it was therefore inadmissible, but if admissible, it involved a separate conspiracy; that the witness was prejudiced and her testimony was unworthy of belief; and to allow this testimony to remain in evidence after appellant's motion to strike it was prejudicial error of the highest degree, citing such authority as *Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196; *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; and *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931.

Defendant Springer testified in reference to Mrs. Garvin's prejudice against him and his family, denied her testimony in general, but said that if she did see anything that looked like bookmaking going on at his home at the time indicated, there was a possibility that she overheard him placing a bet, which he has done for himself on many occasions; that he had played cards in a place a few doors from Pierce's bar; that he did not recall seeing Schrader before the day of trial, but that he may have been in appellant Pierce's bar on June 22nd, 1957. He then testified that appellant Pierce had never been in his home but he had played cards with him at this particular card room.

Appellant Pierce denied seeing Schrader at the time indicated and denied generally his testimony. He particularly claimed that he never permitted defendant Springer to use his place of business as a place to conduct bookmaking of any kind.

[5] It does appear from the testimony of Mrs. Garvin that prior to the time of the alleged overt acts appellant Pierce and defendant Springer were acquainted. The testimony as to the nature and duration of their acquaintanceship was admissible so long as it had some bearing on or tended to prove the formation of the conspiracy charged. *People v. Stevens*, 78 Cal.App. 395, 248 P. 696; *Bompensiero v. Superior Court*, 44 Cal.2d 178, 185, 281 P.2d 250; *People v. Gordon*, 71 Cal.App.2d 606, 628, 163 P.2d 110. While the question of the witness's prejudice against Springer was very well shown, the question of the weight of her testimony was one for the jury. (19 Cal.Jur.2d 230-231, sec. 467.)

[6] The last point involves the denial of appellant's motion for a new trial on the ground of claimed newly discovered evidence. Apparently this is predicated upon some affidavits filed by appellant stating that the witness Mrs. Garvin was possessed of a generally bad reputation for truth and veracity, and upon a new trial her sisters, brothers, mother and others would so testify, and that he had no reason to believe she was going to be a witness at his trial because he did not know her. The record on appeal does not include the affidavits mentioned. Even assuming they would show what appellant contends, such evidence would only amount to possible impeachment of her testimony and it is not believed that a different result would follow. No prejudicial error resulted in the denial of the motion. *People v. Vukojevich*, 25 Cal.App. 459, 460, 143 P. 1058; *People v. Long*, 15 Cal.2d 590, 103 P.2d 969.

Judgment and order denying a new trial affirmed.

MUSSELL, J., concurs.



163 Cal.App.2d 453

The PEOPLE of the State of California,  
Plaintiff and Respondent,  
v.

Carl E. GIGUIERE, Defendant and  
Appellant.  
Cr. 2854.

District Court of Appeal, Third District,  
California.

Sept. 11, 1958.

Rehearing Denied Oct. 10, 1958.

Hearing Denied Nov. 5, 1958.

Prosecution for forgery. The Superior Court, Lassen County, Ben V. Curler, J., denied accused's motion for new trial, denied probation and pronounced judgment on verdict of guilty, and accused appealed. The District Court of Appeal, Schottky, J., held that where ten checks allegedly forged by accused with word "forged" written on them and letter written by accused when in prison were offered in evidence to show handwriting of accused, district attorney was not required to accept accused's stipulation that he wrote checks and letter, but introduction of entire checks with word "forged" on them was improper, however, evidence of accused's guilt was so strong that no miscarriage of justice resulted.

Judgment and order affirmed.

#### 1. Forgery §44

Evidence sustained conviction for forgery of indorsements on checks. West's Ann.Pen.Code, § 470.

#### 2. Forgery §6

Even if accused had authority to sign checks received in course of business, to sign employer's name to gas receipts and to indorse employer's name on checks for groceries for employer, he exceeded his authority by indorsing employer's name to checks for gasoline, oil change and lubrication job, and accepting change from checks.

#### 3. Forgery §44(1)

In prosecution for forgery with intent to defraud employer "and/or" service station owner, even if evidence did not disclose intent to defraud employer, reversal

of conviction was not required where there was ample evidence of intent to defraud service station owner.

#### 4. Indictment and Information §196(2)

If information alleging intent to defraud employer "and/or" service station owner was uncertain on account of use of term "and/or," that defect was waived by accused's failure to demur.

#### 5. Criminal Law §1167(1)

Where information for forgery alleged that accused intended to defraud employer "and/or" service station owner, accused was not prejudiced by form of information or verdict which followed form of information, as single offense of forgery was alleged.

#### 6. Forgery §48

In prosecution for forgery, instruction that law only requires that jury find as fact either that accused falsely forged indorsement knowing same to be forged with intent to defraud, or, that accused attempted to pass as true and genuine check bearing forged indorsement, knowing same to be forged with intent to defraud another, to arrive at verdict of guilty, and that, before bringing in verdict of guilty jury must be convinced beyond reasonable doubt and to moral certainty that accused committed crime of forgery in one or other of two ways just enumerated, was correct.

#### 7. Criminal Law §369(4), 1186(4)

In prosecution for forgery, district attorney was not required to accept accused's stipulation that he wrote exemplar checks and letter, but introduction of entire checks with word "forged" on them was improper; however, evidence of accused's guilt was so strong that no miscarriage of justice resulted. West's Ann.Const. art. 6, § 4½.

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Harold L. Abbott, Susanville, for appellant.

Edmund G. Brown, Atty. Gen., by Lloyd Hinkelman, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was charged by information with a violation of section 470 of the Penal Code. The information charged in Count I that appellant, on or about February 22, 1957, "did, with intent to defraud, sign the name of another person to a check, knowing that he had no authority so to do, and falsely forged an endorsement on a bill of exchange, promissory note or check and attempted to pass as true and genuine a check bearing a forged endorsement, knowing the same to be forged, with intent to prejudice, damage or defraud one Merl H. Fincher and/or Ray Randall." The information also charged appellant in Counts II through IV with four prior felony convictions for which he had served a sentence in a state or federal penal institution.

Defendant pleaded not guilty to the offense charged in Count I and admitted the four prior convictions charged. The case went to trial and the jury returned a verdict of "guilty of a violation of Section 470 of the Penal Code of the State of California, as charged in the information."

The court denied defendant's motion for a new trial, denied probation and pronounced judgment. Defendant has appealed from the judgment and from the order denying his motion for a new trial.

Appellant urges several grounds for a reversal of the judgment, but before discussing these we shall give a brief summary of the evidence as shown by the record.

On or about February 22, 1957, while in possession of an automobile belonging to Ray Randall, appellant presented to Charles Edwards, Jr., an employee of the White Eagle service station in Susanville, California, a check for \$32 (People's Exhibit No. 1) for payment of a service station bill. The check was drawn by appellant on the First Western Bank and Trust Company, Susanville, California, and made payable to Ray Randall. The check was endorsed on the back with the name "Ray Randall." Edwards, mistakenly believing appellant was Ray Randall, accepted the check as payment for an oil change and

lube job performed on a gray Hudson automobile. Edwards gave appellant the money difference between the lubrication bill and the amount of the check.

On the following day appellant again visited the White Eagle service station where he procured gas for the gray Hudson automobile and gave Edwards another check (People's Exhibit No. 2) drawn by appellant on the First Western Bank and Trust Company, Susanville, California, made payable to Ray Randall and endorsed on the back with the name "Ray Randall," for the amount of \$36. Edwards, still operating under a mistaken belief as to appellant's identity, gave appellant change for the difference in the amount of gasoline purchased and the amount of the check. The two checks were forwarded to the bank for deposit and returned marked "cannot locate account." Mr. Fincher, the owner of the White Eagle service station, has never received payment on the \$32 check cashed by appellant on or about February 22, 1957.

During the month of January and part of February appellant helped Ray Randall deliver and collect Bee newspaper subscriptions. Appellant on occasion was given authority by Randall to endorse Randall's name on the back of checks for the purpose of purchasing groceries for the Randall family. Appellant also had authority to procure gasoline on credit by signing Randall's name to such credit receipts. Appellant was not authorized by Randall to endorse or cash People's Exhibits Nos. 1 or 2. Appellant at no time mentioned said checks to Randall, nor did Randall receive any money obtained by appellant from the issuance of said checks.

In November, 1957, Officer Delbert L. Gorbet of the Susanville Police Department flew to Fresno, California, to take appellant into custody. On the return trip Officer Gorbet showed appellant People's Exhibit No. 1 and asked appellant if he had written the check. Appellant responded that he had written People's Exhibit No. 1. Sometime thereafter, while in Susanville, appellant was asked by Officer Elerick if appellant thought People's Exhibits 1 and 2 were in

his handwriting. Appellant responded that the checks were not in his handwriting and that the officer could ask appellant's wife and she would verify it.

It was ascertained during the trial by expert testimony that the endorsement on the back of People's Exhibit 1 was in appellant's handwriting and not Ray Randall's.

The appellant did not testify during the trial nor did he introduce any witnesses in his behalf, but limited his defense to the cross-examination of the prosecution's witnesses.

[1] Appellant's first contention is that the evidence is insufficient to support the judgment of conviction. There is no merit in this contention.

[2] Appellant argues that the evidence discloses that he had authority to sign Randall's name to checks and therefore he could not be guilty of forging an endorsement. While the evidence disclosed that the appellant had an implied authority to sign checks received in the course of appellant's business and that Randall or his wife gave appellant authority to sign Randall's name to certain specific checks, there was no authority to sign the check in question. It was not a check received in the course of business nor was it a check for which specific authority was given. Even if it can be said that appellant had authority in certain instances this authority would not exonerate him where it was exceeded. See *People v. Caldwell*, 55 Cal.App.2d 238, 130 P.2d 495; 38 C.J.S. Forgery § 8.

Appellant contends also that the verdict of the jury is so uncertain and ambiguous as to warrant a reversal. The information charged appellant with forgery with intent to defraud Merl H. Fincher and/or Ray Randall. The jury brought in a verdict of guilty as charged. Appellant contends that since there was no evidence from which an inference of intent to defraud Randall may be drawn, the verdict is void for uncertainty. Appellant argues that the check was never intended for Randall, that he owed Randall no money and that Randall did not see it until after it was passed.

[3] It may be that the evidence does not disclose an intent to defraud Randall, but this would not require a reversal of the judgment because there is ample evidence that appellant intended to defraud Fincher, the owner of the service station. In *People v. Ruiz*, 103 Cal.App.2d 146, 229 P.2d 73, it was held that failure of proof as to intent to defraud one person named in the information was immaterial where there was proof to sustain the finding as to the others. The court said at page 149 of 103 Cal. App.2d, at page 74 of 229 P.2d:

"The evidence was thus sufficient to establish that the check was forged and uttered by defendant with intent to cheat and defraud Eastern Cabinet and Furniture Company and Bank of America. The fact that the evidence did not establish that defendant intended to cheat and defraud Aurora Romero, who was named in the information as one of the persons he intended to cheat, is immaterial."

[4] The verdict followed the form of the information. The appellant was represented by counsel at all stages of the proceedings. Neither appellant nor his attorney demurred to the information nor did they move to dismiss the information. The appellant failed to make any attempt to perfect the alleged possible defect in the pleading. If it be deemed that the information was uncertain on account of the use of the term "and/or," that defect was waived by appellant's failure to demur. *People v. Pryor*, 17 Cal.App.2d 147, 61 P.2d 773; *People v. Schoeller*, 96 Cal.App.2d 61, 214 P.2d 565; *People v. Waid*, 127 Cal.App.2d 614, 274 P.2d 217; *People v. Murphy*, 17 Cal.App.2d 575, 62 P.2d 592; *People v. Yant*, 26 Cal. App.2d 725, 80 P.2d 506.

[5] While it is true that our courts have on occasion criticized the use of the term "and/or" in pleadings, we do not believe that appellant suffered any prejudice in the instant case because of the form of the information or the verdict.

[6] Appellant next contends that the court erred in giving the following instruction:



"The law only requires that you find as a fact either that the defendant falsely forged an indorsement knowing the same to be forged with intent to prejudice, damage, or defraud another, or, that the defendant attempted to pass as true and genuine a check bearing a forged indorsement, knowing the same to be forged with intent to prejudice, damage, or defraud another, to arrive at a verdict of guilty.

"However, before bringing in a verdict of guilty you must all be convinced beyond a reasonable doubt and to a moral certainty that the defendant committed the crime of forgery in one or the other of the two ways heretofore just enumerated."

We do not believe that the court committed error in giving this instruction, which is in the language of CALJIC 401-B.

It should be noted that pleading the offense of forgery in the conjunctive, as was done in the instant matter, has met with approval by our courts. *People v. Keene*, 128 Cal.App.2d 520, 275 P.2d 804; *People v. McDonald*, 16 Cal.App.2d 687, 61 P.2d 66. Although such pleading charges appellant with doing a series of acts, such allegations allege the single offense of forgery and is therefore proper. *People v. Keene*, *supra*.

In the case of *People v. Mitchell*, 92 Cal. 590, 28 P. 597, 788, the appellant was charged in the information with making and forging a certain check *and* with uttering and publishing and passing said forged check. The lower court instructed the jury that it was their duty to convict the appellant if the evidence sufficiently disclosed there was a forgery of the check *or* an uttering and passing of the check. The court held that the instruction was proper if the two elements of the charge had been properly pleaded.

In the case of *People v. Pauli*, 58 Cal.App. 594, 209 P. 88, the appellant was charged in the information with the making, forging and uttering of a false check. The appellant requested an instruction to the jury to acquit the appellant if they should find that

he made and forged said check but did not utter same. The court held that the lower tribunal properly refused appellant's instruction since the commission of either of said acts constituted a crime; hence, the instruction sought by appellant was *contra* to the law.

[7] The final and most serious contention of appellant is that the district attorney committed prejudicial error by introducing in evidence, for the limited purpose of showing the handwriting of the appellant, a series of checks admittedly forged by the appellant and a letter written by the appellant when he was incarcerated in Preston. Appellant's counsel offered to stipulate that the exemplars were written by the defendant. The offer was refused. The district attorney then proceeded to offer in evidence 10 checks, allegedly forged by appellant in Fresno in 1949, as exemplars of appellant's handwriting. Although appellant's counsel pointed out that on each of these checks the word "Forged" was written in red and objected that the introduction of the checks was highly prejudicial, the court permitted their introduction in evidence and admonished the jury as follows:

"I will admonish the jury at this time that these checks are being offered not as evidence of this crime directly, or the commission of any other offense, but are only being offered for the limited purpose of giving exemplars of the handwriting in this trial."

While the district attorney was not required to accept appellant's stipulation that the exemplars were written by him, we believe it was highly improper for the district attorney to introduce in evidence the entire check with the word "Forgery." It would have been a simple matter to have made use of the signatures on the checks as exemplars, without permitting the jurors to see the entire check. We can only conclude that the district attorney, in proceeding as he did, desired to get before the jury the fact of these earlier forgeries by appellant. We doubt that the admonition of the court could erase the effect of these checks upon the jury, and were the case a close one on

the evidence we would be constrained to hold that the manner in which the 10 checks were introduced was so prejudicial as to require a reversal of the judgment. However, a careful study of the entire record convinces us that the evidence of appellant's guilt was so strong that we cannot say that the improper conduct of the district attorney resulted in a miscarriage of justice. Therefore, bearing in mind the provisions of section 4½ of Article VI of our state Constitution we conclude that no miscarriage of justice has resulted.

The judgment and the order are affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



163 Cal.App.2d 496

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**William Harold LANE, Defendant and**  
**Appellant.**  
**Cr. 5932.**

District Court of Appeal, Second District,  
Division 3, California.

Sept. 12, 1958.

Defendant was convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., for murder in the second degree, and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence supported conviction and finding that defendant had been sane at the time he committed offense.

Affirmed.

#### 1. Criminal Law Ⓒ741(4)

In homicide prosecution, weight to be accorded to doctor's opinion respecting cause of death was question for jury.

#### 2. Homicide Ⓒ254

Second degree murder conviction was sustained by evidence.

#### 3. Criminal Law Ⓒ740

Whether defendant had been legally sane at time of offense was matter properly submitted to same jury which tried criminal charge. West's Ann.Pen.Code § 1026.

#### 4. Criminal Law Ⓒ48

Whether defendant had been legally sane at time of offense would depend upon whether he had then been suffering from such a defect of reason, caused by disease of the mind, as not to know nature and quality of act he was doing, or if he had known it, whether he had known that what he was doing was wrong. West's Ann.Pen. Code, § 1026.

#### 5. Criminal Law Ⓒ311

A person charged with a crime is presumed to be sane until contrary is shown by preponderance of evidence.

#### 6. Criminal Law Ⓒ1159(5)

Where finding of sanity is based upon substantial evidence in record, it may not be disturbed on appeal.

#### 7. Homicide Ⓒ237

Evidence sustained finding that defendant had been sane at time he committed homicide.

Al Matthews, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, William Harold Lane was convicted of the second degree murder of Casimir Buda. A separate trial was held on Lane's plea of not guilty by reason of insanity; the jury found that defendant was sane at the time the offense was committed. Lane made a motion for new trial, which was denied. Probation was likewise denied, and defendant was sentenced to state prison for the term prescribed by law. Lane appeals from the judgment.

The conviction was based upon evidence of the following facts. Defendant and Buda were patients in the Krueger Sanitarium in Lancaster, which houses about sixty men suffering from tuberculosis. The patients live in cabins; near the cabins is a recreational area provided with tables and chairs. One of the patients, Manuel Carpio, was walking across the recreational area shortly after noon on August 2, 1956. He looked up and noticed Buda on the ground in a half-seated position about 75 feet away from him; Buda was attempting to lift himself up by his hands. Defendant was standing about 5 or 6 feet in front of Buda, whose back was toward Carpio; Lane was holding an ax. Buda took a handkerchief out of his pocket, wiped his forehead, then backed up as defendant followed him. A moment later, defendant walked around a nearby building. Lane was then seen entering his cabin by Paul Mikes, who was also a patient. Defendant was carrying an ax. Mikes was shown a hatchet by the deputy district attorney and stated that it was the same one he had seen in defendant's hand.

Alvin Krueger, manager of the sanitarium, was summoned by Carpio. Krueger assisted Buda to his office and telephoned for an ambulance. Buda was in a state of shock and was bleeding from several lacerations on his head. Krueger searched Buda's clothing, but found no weapons. Shortly thereafter, Krueger had a conversation with defendant outside the office. When asked by Krueger what had happened, Lane said: "Well, I got him; I got him, he got what was coming to him." Krueger attempted to question him further, but defendant replied: "I got my rights; I got my rights, I don't have to say anything."

F. W. Dornberger, a Los Angeles County sheriff's deputy, arrived at the sanitarium at 1 o'clock. Someone handed him an ax that was wrapped in a piece of blue flannel; he examined the ax and the wrapping for blood stains, but found no traces of blood. The hatchet had been retrieved from defendant's cabin by a patient named Taffin-

der. Taffinder testified that he went to Lane's cabin and found the ax resting against his bedside table. He wrapped it in a pajama top and took it to the office. There was no blood on the ax when he saw it in the cabin. He identified an ax shown him by the prosecutor as the one he gave to Officer Dornberger.

After examining the ax, Dornberger went to the recreational area and discovered blood stains on the ground about 5 or 6 feet away from a table and some chairs; a trail of blood led back to the office. Dornberger then had a conversation with defendant. He asked Lane what had happened and Lane replied that he had an argument with Buda over a woman. When asked where the argument took place, defendant said "Over there," but did not indicate any particular place. In response to further questioning, Lane said: "I hit him with a hatchet, it was self-defense, and he pulled a knife on me."

Defendant was arrested and taken to the sheriff's station, where he was questioned later that afternoon by H. A. Waldrip, who was one of the investigating officers in the case. When asked whether he had struck Buda, defendant replied that he did not want to talk and that he would only talk to the district attorney. Buda died August 11th. Waldrip had another conversation with defendant on the following day. The officer asked Lane if he killed Buda and defendant again answered that he did not want to talk.

An autopsy was performed on the body of Casimir Buda shortly after his death. Dr. Chapman, the autopsy surgeon, testified that death was caused by a skull fracture, with cerebral laceration and hemorrhage. In the doctor's opinion, the fracture was probably caused by a blow struck by a hard object; the ax identified by Mikes and Taffinder could have produced the injury. On cross-examination, Chapman admitted that Buda could possibly have struck his head against a hard object, though that was very unlikely. The doctor also admitted that Buda had a collapsed lung and his life expectancy was poor.



Defendant testified in his own behalf that he did not know Casimir Buda and had never heard of him. On August 2nd he had breakfast in the mess hall at 8 a. m. He took a short walk, then returned to his cabin and read a newspaper and a magazine. Around 10 o'clock, he "blacked out" and did not recover consciousness until sometime in the afternoon, when he found himself sitting in a police car. He had suffered previous blackouts, the last one occurring in 1954 at another sanitarium. He did not tell anyone about losing consciousness on August 2nd. Lane denied having a conversation with Officer Dornberger at the sanitarium and denied having met Officer Waldrup. He did not talk to Krueger and did not tell him he hit Buda with an ax.

As mentioned earlier, defendant was convicted of murdering Buda and the jury determined the offense to be murder of the second degree. At the commencement of the sanity proceeding, Lane's attorney moved that the matter be heard by a different jury upon the ground that the jurors were prejudiced against his client and could not try the question fairly; the motion was denied by the court.

The evidence at the sanity trial consisted of the testimony of Lane, of Krueger, who was called as a defense witness, and of Doctors Smith, Olsen and McGinnis, three psychiatrists who had been appointed by the court to examine defendant. It was stipulated that the jury might also consider the evidence introduced with respect to the criminal charge.

Krueger testified that Lane had lived in the sanitarium for a year prior to August 2, 1956. He had spoken to defendant on several occasions and had observed his conduct. In his opinion, Lane had the capacity to distinguish between right and wrong on the date of the offense. Defendant was bitter and resentful toward everyone because of his confinement in a sanitarium. On one occasion, he heard Lane say: "When I am emperor of this universe, I am going to change all of these things." Defendant kept a club and a piece of iron

pipe on his bedside table; he told Krueger that he did so for protection.

Lane testified that he had been suffering from tuberculosis since 1930 and had spent considerable time in various sanitariums; Carpio and Mikes appeared as witnesses for the People because they hated him as he was a police informer; when he was in other cities, he informed the police about "crimes in general"; he had asked his attorney to excuse one of the jurors, who was Chinese, because he had many enemies among the Chinese. Ever since childhood he had suffered from symptoms of insanity, such as having hallucinations and hearing voices. He did not tell the psychiatrists about the hallucinations but he told them about his blackouts. On cross-examination Lane was asked if he realized that it was wrong for one person to take a human life without any justification; defendant replied that it was wrong.

Dr. Smith testified that he examined defendant on two occasions while he was in custody. In the opinion of the witness, Lane's mental condition was good, although he had paranoid and schizophrenic tendencies, and he knew the difference between right and wrong on August 2, 1956. Dr. Olsen testified that he had examined Lane twice in December, 1956. In his opinion, defendant was legally sane on August 2nd, although he "deviated from the normal mentally" and was exceptionally suspicious and apt to interpret the behavior of others as hostile or unfriendly toward him. These are characteristics of a paranoid personality. Dr. McGinnis examined defendant once in October, 1956. He gave his opinion that Lane was suffering from an emotional disorder, but was legally sane both at the time of the examination and at the time he committed the offense. In the doctor's opinion, Lane had either a personality disorder with a paranoid state or was afflicted with schizophrenia of a paranoid type.

[1,2] The first contention to be considered is the insufficiency of the evidence to sustain the conviction. In support of this contention, defendant urges the follow-

ing points: (1) Buda had a poor life expectancy on August 2, 1956, hence his death on August 11th was probably due to tuberculosis or other natural causes; (2) No blood stains were found on the ax that was claimed to be the murder weapon; (3) Lane denied knowing Buda. The argument is without merit. The weight to be accorded to Dr. Chapman's opinion respecting the cause of death was a question for the jury. *People v. Tucker*, 88 Cal.App. 2d 333, 340, 198 P.2d 941. The jurors were warranted in giving credence to his testimony that Buda died as the result of being struck on the head by a hard object and that the ax defendant was seen holding could have produced the fatal injuries. The jury could reasonably infer from this testimony, together with the testimony of the other patients in the sanitarium, the evidence of Lane's statements to Krueger and to Officer Dornberger, and the evidence of his failure to deny the commission of the crime when questioned by Officer Waldrip, that defendant was guilty of murdering Buda. Lane's denials of guilt merely created a conflict in the evidence, which was resolved against him by the triers of fact. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

[3,4] The remaining contention to be considered is the insufficiency of the evidence to support the finding that defendant was legally sane at the time of the offense. The matter was properly submitted to the same jury which tried the criminal charge. Penal Code, § 1026. Under well-established rules, which we may not question, the jury had to determine whether Lane was suffering from such "a defect of reason, from disease of the mind \* \* \* as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." *People v. Wells*, 33 Cal.2d 330, 350, 202 P.2d 53, 65. See, also, *People v. Berry*, 44 Cal.2d 426, 433, 282 P.2d 861.

[5-7] A person charged with crime is presumed to be sane until the contrary is shown by a preponderance of the evidence. *People v. Hickman*, 204 Cal. 470, 477, 268

P. 909, 270 P. 1117; *People v. Daugherty*, 40 Cal.2d 876, 901, 256 P.2d 911. And where a finding of sanity is based upon substantial evidence in the record, it may not be disturbed on an appeal. *People v. Greig*, 14 Cal.2d 548, 553, 95 P.2d 936. The testimony of the three psychiatrists called by the People, together with the testimony of Krueger, amply sustains the conclusion of the jury that defendant was sane at the time he committed the offense.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



163 Cal.App.2d 466

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Alphonso MIKE, Defendant and Appellant.**

**Cr. 1371.**

District Court of Appeal, Fourth District,  
California.

Sept. 11, 1958.

Defendant was convicted of felonious possession of marijuana. The Superior Court, San Diego County, Gerald C. Thomas, J., rendered judgment, and defendant appealed. The District Court of Appeal, Mussell, J., held that where defendant's pockets contained particles of marijuana, admission of testimony of officer to effect that he had investigated a great number of cases involving possession of marijuana and that in all except two of such cases, where defendant admitted possession of marijuana on his person, dregs and particles of marijuana were found in pockets of accused, was not improper.

Affirmed.

**1. Criminal Law** ⇨1023(10)

Although no appeal lies from a verdict, notice of appeal of defendant, who was acting in propria persona, stating that he would take appeal from verdict would be liberally construed to permit an appeal.

**2. Criminal Law** ⇨1081

Notices of appeal should be liberally construed to permit, if possible, a hearing on the merits.

**3. Criminal Law** ⇨1130(5)

Contention that was not supported by any argument, citation of authority, or transcript reference would be disregarded.

**4. Criminal Law** ⇨1119(4)

If conversation, in which district attorney allegedly prejudicially erred in commenting on evidence, took place, it was incumbent upon defendant to have included it in record in order for it to be considered on appeal.

**5. Criminal Law** ⇨1144(14)

Instructions that were not contained in record on appeal would be presumed correct and would not be reviewed.

**6. Criminal Law** ⇨480

In prosecution for felonious possession of marijuana, by defendant whose pockets contained particles of marijuana, testimony of officer to effect that he had investigated a great number of cases involving possession of marijuana and that in all except two of such cases, where defendant admitted possession of marijuana on his person, dregs and particles of marijuana were found in pockets of the accused, was not improper. West's Ann.Health & Safety Code, § 11500.

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E. Werden Conway, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

[1,2] Appellant was charged with the wilful, unlawful and felonious possession of

the narcotic marijuana in violation of section 11500 of the Health and Safety Code. He admitted two prior felony convictions charged in the information. He was found guilty by a jury of possession of narcotic, to wit, marijuana, and it was adjudged that he be punished by imprisonment in the State's prison. It is stated in appellant's notice of appeal that "he will take, appeal in forma pauperis, from the verdict of the Superior Court of San Diego county \* \* \*." No appeal lies from a "verdict". People v. Goldstein, 136 Cal.App.2d 778, 793, 289 P.2d 581. However, appellant was acting in propria persona and notices of appeal should be liberally construed to permit, if possible, a hearing on the merits. Collins v. City & County of San Francisco, 112 Cal.App.2d 719, 722, 247 P.2d 362. We will, therefore, in the interest of justice, review the merits of defendant's appeal. People v. Robinson, 43 Cal.2d 143, 146, 271 P.2d 872.

On October 26, 1957, Champion Williams entered a room which he had previously rented to the appellant and found therein, under the seat of a chair, three packages containing marijuana. The packages were wrapped in a newspaper bearing the date October 20, 1957, which was the date on which appellant had rented the room. Williams telephoned the police and when they arrived, appellant ran from the dining room into the kitchen and attempted to leave the premises through the back door. He was placed under arrest and his room was searched by the officers. In addition to the packages found by Williams, the officers found an empty tobacco can which appellant stated that he had used to "put things in". Particles of marijuana were found in this can, in the debris removed from the pockets of the clothing worn by appellant at the time of his arrest, and in the debris removed from the pockets of clothing hanging in appellant's room. Appellant stated that no one else had worn the clothing since he had acquired it a few months previously and that it had all been cleaned several times since its acquisition. He also stated he had not used any marijuana since



he "got out of the pen", where he had smoked some during his term. Appellant also claimed that he was being "framed" by his landlady, Mrs. Williams.

[3] Appellant first contends that the trial court was guilty of prejudicial misconduct in permitting the District Attorney to make inflammatory statements and prejudicial misconduct in referring to alleged actions of the appellant prior to the alleged commission of the present offense, imputing to appellant a disposition of idleness, disposition toward falsehoods and association with alleged criminals and persons of ill repute. This contention is not supported by any argument, citation of authority, or transcript reference, and will, therefore, be disregarded. *People v. Serpa*, 67 Cal.App.2d 327, 333, 154 P.2d 6; *People v. Van De Wouwer*, 91 Cal.App.2d 633, 641, 205 P.2d 693.

[4] Appellant's next contention is that the trial court and the District Attorney prejudicially erred in commenting on the evidence during the trial and before the jury. It is claimed in this connection that such conversation was at the bench and concerned a request by defense counsel for withdrawal. However, we are unable to find any reference in the transcript to such a conversation and appellant has not set forth in his brief, or otherwise, the remarks, if any, upon which he predicates error. As was said in *People v. Rocha*, 130 Cal.App.2d 656, 663, 279 P.2d 836, 840:

"The law is clear that 'any irregularity in the conduct of the trial court, and its possible effect on the outcome of the case, can only be considered on appeal to the extent that the facts in relation thereto are clearly set forth in the record.' 4 Cal.Jur.2d, sec. 468, p. 298. If defendant desires this point considered, it was incumbent upon him to present a supplementary record which would lay an appropriate foundation therefor."

If such a conversation took place, it was incumbent upon appellant to have it in-

cluded in the record. *People v. Simeone*, 132 Cal.App.2d 593, 595, 282 P.2d 971.

[5] It is further argued that the court gave improper instructions to the jury. However, the instructions are not contained in the record on appeal and the correctness of instructions not incorporated in the record must be presumed and will not be reviewed on appeal. *People v. Brickman*, 119 Cal.App.2d 253, 264, 259 P.2d 917; *People v. Denne*, 141 Cal.App.2d 499, 514, 297 P.2d 451.

[6] Finally, appellant claims that the court committed prejudicial error in admitting the testimony of an officer to the effect that he had investigated a great number of cases involving possession of marijuana and in all except two of such cases, where the defendant admitted the possession of marijuana on his person, it was found in the investigation that dregs and particles of said marijuana were found in each of said cases to be in the pockets of the accused. There was no reversible error in admitting this evidence. As is said in *People v. Geibel*, 93 Cal.App.2d 147, 176, 208 P.2d 743, 760:

"The examination of an expert witness as to his qualifications and competency before he gives his opinion is a question of procedure which lies within the discretionary power of the trial court. Unless there is an obvious abuse of discretion an appellate tribunal will not interfere with the ruling."

The sufficiency of the evidence to support the judgment in the instant case is not argued as a ground of appeal and counsel for appellant concedes that the first three contentions on appeal do not constitute reversible error. We have examined the entire record, including the reporter's transcript of the proceedings at the trial, and find no reversible error in the rulings made by the trial court.

Judgment affirmed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem, concur.

163 Cal.App.2d 339

**Lowry B. McCASLIN, Individually and doing business as "McCaslin Materials Company," Plaintiff and Respondent,**

**v.**

**CITY OF MONTEREY PARK, a municipal corporation, George Brown and J. Y. Cordill, Defendants and Appellants.**

Civ. 22739.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 4, 1958.

Rehearing Denied Sept. 30, 1958.

Hearing Denied Oct. 28, 1958.

Action for judgment declaring unconstitutional zoning ordinances expressly designed to compel discontinuance of use of plaintiff's property as a decomposed granite quarry. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence would sustain findings that (1) plaintiff had established a lawful nonconforming use of his land prior to enactment of ordinances and (2) that use did not constitute a nuisance.

Affirmed.

#### 1. Municipal Corporations ☞601(23)

A nonconforming use is a lawful use existing on effective date of zoning restriction and continuing after that time in nonconformance to ordinance.

#### 2. Municipal Corporations ☞601(19)

General rule against interpretation of statute or ordinance to give it retrospective operation, and especially where vested rights are affected, is applicable to construction of zoning laws.

#### 3. Constitutional Law ☞278(1)

Zoning ordinance which requires discontinuance forthwith of a nonconforming use existing when ordinance was adopted is a deprivation of property without due process of law, unless use is a public nuisance.

#### 4. Declaratory Judgment ☞346

In action for judgment declaring unconstitutional zoning ordinances expressly

designed to compel discontinuance of use of plaintiff's property as a decomposed granite quarry, evidence would sustain findings that (1) plaintiff had established a lawful nonconforming use of his land prior to enactment of ordinances and (2) that use did not constitute a nuisance.

#### 5. Municipal Corporations ☞601(7)

The very nature and use of an extractive business contemplates continuance of such use of entire parcel of land as a whole, and where operation of quarry did not constitute a nuisance, and quarry had been in operation prior to adoption of zoning ordinance, ordinance could not validly limit quarrying operations to immediate area excavated at time when ordinance was passed.

#### 6. Nuisance ☞3(5)

Operation of quarry is not a nuisance per se.

#### 7. Municipal Corporations ☞625

Purpose or motive of city officials in passing ordinance is irrelevant to any inquiry concerning reasonableness of ordinance.

LeSage & Bowman and Thomas LeSage, Pasadena, for appellants.

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, and Hudson B. Cox, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff permanently enjoining defendants from enforcing the provisions of two zoning ordinances expressly designed to compel the discontinuance of the use of plaintiff's property as a decomposed granite quarry. The question is the validity, as applied to plaintiff's operations, of provisions of zoning ordinances of the city of Monterey Park.

Plaintiff, since 1937, has been the owner of a large tract of land in the city of Monterey Park, called the city, of which a portion comprising about 70 acres is now and since 1944 has been used as a site

for mining decomposed granite. The property is located on the southeast boundary of the city limits. Substantially throughout its entire area the property is comprised of decomposed granite. The structures on the land used in connection with the operation consist of a roofed screening plant and several small buildings, all of which were on the land prior to 1950.

Contiguous to the northeasterly portion of plaintiff's property is a rifle range used by the city's police. On the east boundary line and just over the city boundary is a 10-acre nursery. Traversing the easterly portion in the city are high tension lead-in wires and poles of the Edison Company leading to the company's substation located immediately adjacent to plaintiff's property to the south, but separated by a street known as Potrero Grande. The Edison Company substation occupies about 80 acres. Immediately to the south of the Edison Company property is a dump and salvage operation, established in 1949; and in this same area to the southwest is a gravel pit and dump, which operation began in 1953. West of plaintiff's property is a residential area of single family dwellings which developed during the years 1947 to 1954. Contiguous to the property there is a ready-mix concrete plant. To the southeast there is a 145-acre cemetery, established about 1950.

The property was purchased by plaintiff in 1937. From that time until early in 1944 it was used exclusively for grazing purposes. The first zoning ordinance passed by the city was ordinance 349, approved March 12, 1938, which zoned plaintiff's property "R-5" (residential-agricultural). Early in 1944 plaintiff leased the property to Dwain O'Neal for the purpose of mining decomposed granite under a contract he had with the Maywood Air Services Supply Depot to furnish them with base material. The Board of Adjustments of the city granted O'Neal a variance on July 17, 1944 permitting the processing and removal of decomposed granite from the property. This was followed early in 1945 by another lease of

the property to Bryce for one year for mining decomposed granite under a similar variance granted the lessee by the city's Board of Adjustments on April 10, 1945.

On June 25, 1945 the city enacted ordinance 448 repealing the 1938 ordinance. Plaintiff's property was again zoned "R-5"; however, under section 11(a) it was provided that "Any existing use of any building, structure or premises at the time this ordinance or any amendment thereto becomes effective may be continued, providing such existing use is not in violation of any other ordinance or law."

At the expiration of the year's lease Bryce continued operating the quarry on a month-to-month basis. Plaintiff returned from the service about September 1945 and continued the same type operation under the name "McCaslin Materials Company."

Some time in 1947 plaintiff was approached by the then mayor of the city, three councilmen, and an official of the Edison Company with respect to the sale of a portion of his land to the Edison Company for the erection of an electrical substation. Plaintiff advised them that as his property was zoned residential-agricultural, the locating of a substation would require rezoning and he could agree to sell some of the land to the Edison Company only if the property were zoned industrial. It was thought that the Edison Company's improvements would be advantageous to the city in realization of about \$15,000 a year in taxes therefrom. At the mayor's suggestion plaintiff retained an industrial real estate salesman who worked with the city attorney in drafting an industrial ordinance.

On March 24, 1947 the city council enacted ordinance 477 amending the 1945 ordinance (448) creating, among other things, an industrial district zone which included all but a 200-foot strip on the westerly side of plaintiff's property. Plaintiff then sold about six acres to the Edison Company, in addition to two and a frac-



tion acres previously granted as rights of way; and the electrical substation was built.

On December 8, 1947 an urgency ordinance (494) was adopted limiting the operation of gravel pits and quarries to daylight hours and declaring the operation of a gravel pit or quarry then operating within the city on Sunday and late and unusual hours of the night constituted a nuisance. Substantially the same type ordinance (524) was adopted November 8, 1948.

Effective January 19, 1950 the city council adopted a city-wide zoning ordinance (556), as a result of which plaintiff's property was rezoned from industrial to residential-agricultural. This ordinance eliminated all reference to industrial zones within the city and substituted therefor certain limited "M-1" zones for light manufacturing. Section 9220 provided for continuance of nonconforming buildings and for continuance of their use for a period of their normal life, but in no event less than 20 years from their original construction. Section 9221 provided for the continuance for not more than two years of nonconforming uses of land where no structure thereon is employed therefor,<sup>1</sup> and that no nonconforming use of land should be expanded or extended on the same property. Section 9226<sup>2</sup> declared the production and development of natural resources to be a special use permitted in any zone on condition that a permit for the location and operation thereof be obtained under the procedure set forth in the chapter relating to variances. Ordinance 556 is one of the two

ordinances the validity of which is attacked by plaintiff as applied to him.

Plaintiff was not aware of this rezoning of his property to residential-agricultural until some time in 1953. On February 11, 1954 he filed an application for a special use permit and on March 4, 1954 the application was heard and denied by the city planning commission. On April 12, 1954 the city council denied plaintiff's application for the permit and the action of the planning commission was affirmed.

Despite these actions of the planning commission and the city council in denying the special use permit, during the entire period of plaintiff's mining operations he was issued each year a business license by the city for the operation of the gravel pit, including the calendar year 1956.

On January 9, 1956 sections 9221 and 9226 of ordinance 556 were amended by ordinance 727. Ordinance 727 is entitled: "An Ordinance of the City Council of the City of Monterey Park Amending Certain Sections of the Monterey Park Municipal Code Relating to the Excavation and Processing of Decomposed Granite, Sand, Rock and Gravel." It expressly prohibits the expansion or extension of nonconforming use of land to the same or adjoining property, limits the mining of decomposed granite under special use permits status to M-1 and M-2 zones only, provides for discontinuance of existing nonconforming uses within 60 days after the date such use becomes nonconforming, and declares that such mining operations in any zone other than M-1 and M-2 zones shall constitute a public nuisance.<sup>3</sup>

1. There was no provision relating to the use of land where structures thereon were employed therefor, as in the present case.
2. Section 9226 in pertinent part reads: "Location and operation of all of the following, and all matters directly related thereto, are declared to be special uses permitted in any Zone provided and on condition that a permit for the location and operation thereof shall be granted and obtained under the procedure set forth in this Chapter relating to variances. This declaration is based on the

fact that all of the uses here enumerated possess characteristics of such unique and special forms as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined. \* \* \*

"6. Natural resources, production and development of, together with necessary buildings, apparatus or appurtenances incident thereto."

3. Pertinent parts of ordinance 727 are:  
 "Section 9221. *Non-conforming Uses.*  
 (a) The non-conforming use of land where no structure thereon is employed

The effect of the amending ordinance was to declare plaintiff's further operation of the quarry a public nuisance 60 days after its passage.<sup>4</sup>

Plaintiff filed this action praying that ordinances 556 and 727 be declared unconstitutional and void as applied to him, and that their enforcement be enjoined. The city filed a cross-complaint praying that the ordinances be declared constitutional; that plaintiff be enjoined from using the land for mining decomposed granite; and that such use be declared a nuisance.

The trial court found: ordinance 727 "was directed specifically at plaintiff's operations and business and at no other business"; use of the property by plaintiff for mining decomposed granite is a permitted use under ordinance 477 which zoned the property "industrial" in 1947; and such use does not constitute a public nuisance. The court concluded that ordinances 556

and 727 are unconstitutional as applied to plaintiff in that they prohibit the continuance of the mining operations and business which existed at the time they were passed, thereby taking from plaintiff a valuable property right without the payment of compensation. Judgment was in favor of plaintiff, and defendants were permanently enjoined from enforcing or attempting to enforce the ordinances as to him. Defendants appeal.

Defendants contend that ordinance 556 and amendatory ordinance 727, requiring the mandatory discontinuance of the non-conforming use after a period of 60 days, constitute a reasonable exercise of the police power under the facts and that such legislation is a valid exercise of such power as applied to plaintiff.

Plaintiff contends the ordinances may not be constitutionally applied to him so as to prohibit the continuance of his lawful business which was in existence at the time the ordinances were enacted.

therefor, existing at the time this Chapter becomes effective may be continued for a period of not more than two years therefrom, provided:

"1. That no non-conforming use of land shall in any way be expanded or extended either on the same or adjoining property.

"2. That if the non-conforming use of land existing at the time this Chapter became effective is thereafter discontinued or changed, any future use of such land shall be in conformity with the provisions of this Chapter.

\* \* \* \* \*

"(c) Notwithstanding any other provision of this Section or of Section 9220, the non-conforming use of land in any zone other than an M-1 Zone or an M-2 Zone for the excavation, extracting, production or processing of decomposed granite, sand, rock or gravel shall be discontinued and completely terminated within sixty days after the date such use becomes non-conforming; and the use of land for the excavation, extracting, production or processing of decomposed granite, sand, rock or gravel in any zone other than an M-1 Zone or an M-2 Zone is hereby found and declared to be a public nuisance.

\* \* \* \* \*

"Section 9226. *Special Uses. Permit.*  
The location and operation of all of the  
Cal.Rep. 329-330 P.2d-21

following, and all matters directly related thereto, are declared to be special uses permitted in any zone (except as hereinafter expressly set forth) provided and on condition that a permit for the location and operation thereof shall be granted and obtained under the procedure set forth in this Chapter relating to variances. This declaration is based on the fact that all of the uses here enumerated possess characteristics of such unique and special forms as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined.

\* \* \* \* \*

"6. Natural resources, exploration, production and development of, together with necessary buildings, apparatus or appurtenances incident thereto; *provided, however, that the excavation, extracting, production, or processing of decomposed granite, sand, rock or gravel shall not be permitted in any zone other than in an M-1 Zone or M-2 Zone, and no such permit shall be issued or granted therefor in any zone other than an M-1 Zone or an M-2 Zone.*" (Italics added.)

4. It appears to be conceded that ordinance 727 was expressly aimed at plaintiff's quarrying operations.

[1-3] The use of plaintiff's property for quarrying decomposed granite existed at the time ordinance 556 was enacted in 1950 and has continued at all times since. A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance. *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 453, 274 P.2d 34. The general rule against the interpretation of a statute or ordinance to give it a retrospective operation, especially where vested rights are affected, is applicable to the construction of zoning laws. "The rights of the users of property as those rights existed under prevailing zoning conditions are well recognized and have always been protected." *Livingston Rock & Gravel Co. v. County of L. A.*, 43 Cal.2d 121, 127, 272 P.2d 4, 8; *City of La Mesa v. Tweed & Gambrell Mill*, 146 Cal.App.2d 762, 768-771, 304 P.2d 803. A zoning ordinance which requires the discontinuance forthwith of a nonconforming use existing when the ordinance was adopted is a deprivation of property without due process of law unless the use is a public nuisance.<sup>5</sup>

In *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, at page 340, 175 P.2d 542, at page 548, Mr. Chief Justice Gibson, writing for the court, stated:

"An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. [Citations.] 2. Where the restrictions create a monopoly. [Citations.]

5. *Dobbins v. City of Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, 176; *Jones v. City of Los Angeles*, 211 Cal. 304, 310, 295 P. 14; *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 340, 175 P.2d 542; *Village of Mill Neck v. Nolan*, 233 App.Div. 248, 251 N.Y.S. 533; *Adams v. Kalamazoo Ice & Fuel Co.*, 245 Mich. 261, 222 N.W. 86, 87. Cf. *People v. Hawley*, 207 Cal. 395, 412, 279 P. 136;

3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. [Citation.]

4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses."

It is held that when a sand and gravel pit has been in operation prior to the passage of a zoning ordinance and continuously thereafter, a nonconforming use existed and operation of the pit cannot be enjoined. *Town of North Hempstead v. De Pasquale Bros.*, 280 App.Div. 991, 116 N.Y.S.2d 564; *Town of Somers v. Camarco*, Sup., 126 N.Y.S.2d 154, 156; *Marple Township v. Tarquinio*, 81 Pa.Dist. & Co.R. 210, 38 Del.Co. 362.

Plaintiff had a vested property right in the use of his property as a quarry of decomposed granite of which he could not be constitutionally deprived without due process of law. The legislation in question does not attempt to regulate plaintiff's operations but prohibits the continuance of the prior nonconforming use altogether. Such legislation can be sustained under the police power only if it is reasonably related to the object sought to be accomplished and is not arbitrary and discriminatory in its application to plaintiff. 35 Cal.Jur. 2d 70, § 247.

Applying the above principles to the present case, the trial court correctly found the legislation in question constitutes an unwarranted and arbitrary interference with plaintiff's right to carry on a lawful busi-

In re *Smith*, 143 Cal. 368, 371, 77 P. 180; In re *Kelso*, 147 Cal. 609, 612-613, 82 P. 241, 2 L.R.A.,N.S., 796; *Byers v. Colonial Irrigation Co.*, 134 Cal. 553, 555, 66 P. 732; *Vowinkel v. N. Clark & Sons*, 216 Cal. 156, 162, 13 P.2d 733; *Wheeler v. Gregg*, 90 Cal.App.2d 348, 368, 203 P.2d 37; *Morton v. Superior Court*, 124 Cal.App.2d 577, 269 P.2d 81.



ness and that "Ordinance No. 727 was adopted for the purpose of discriminating against plaintiff and compelling the discontinuance of plaintiff's business; \* \* \* and does in fact discriminate against plaintiff by requiring the discontinuance of his business and operations while not requiring discontinuance of any other business based upon the extraction of natural resources;" and "purports to take from plaintiff a valuable property right inherent in the ownership of such property." As held by the trial court, ordinances 556 and 727 are invalid as applied to plaintiff.

A further contention of defendants is that it has been the continued policy of the city to classify plaintiff's property as residential-agricultural from 1938 to the present time, except for the 21 months during the time ordinance 477 classified the major part of it as industrial; and since plaintiff has never applied for rezoning of the property or appealed from the denial of his application for a special use permit by the planning commission and city council, his continued use of the property for mining decomposed granite has been illegal and a nuisance.

[4] There is substantial evidence in the record to support the trial court's findings to the effect that (1) plaintiff had established a lawful nonconforming use of his land prior to enactment of ordinances 556 and 727 and (2) the conduct of the operation does not constitute a nuisance. The record shows that the nonconforming use was established as early as 1944. The zoning ordinance of June 1945 (448) provided for the continuance of such nonconforming use. There was no abandonment or interruption in the mining operations from the time the second lessee commenced operations early in 1945 until the present. Thus, when most of the land was zoned from residential-agricultural to industrial for a period of 21 months in 1947 by ordinance 477 and then rezoned to residential-agricultural in 1950 under the comprehensive zoning ordinance which required a special use permit for production and development of natural resources on one's

land in any zone, plaintiff's nonconforming use was unaffected by denial of a permit to continue operating under that ordinance. Having established the nonconforming use, he was entitled to continue his operations as a matter of right. He was not required to obtain a special use permit.

[5] Defendants contend the trial court erred in failing to make a finding as to the scope and limitation of plaintiff's nonconforming use. They complain that the court ignored the provision of section 9221 of ordinance 556, "[T]hat no non-conforming use of land shall in any way be expanded or extended either on the same or adjoining property." Defendants assert that by such provision plaintiff was limited to excavating that portion of the property already excavated. We do not agree. The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose. "Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted." *Morton v. Superior Court*, 124 Cal.App.2d 577, 582, 269 P.2d 81, 85, 47 A.L.R.2d 478; *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 467, 202 P.2d 38, 7 A.L.R.2d 990; *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal.App.2d 776, 789, 194 P.2d 148; *Wheeler v. Gregg*, 90 Cal.App.2d 348, 364-365, 203 P.2d 37; *Borough of Cheswick v. Bechman*, 352 Pa. 79, 42 A.2d 60; *Lamb v. A. D. McKee, Inc.*, 10 N.J.Misc. 647, 160 A. 563; *Village of Terrace Park v. Errett*, 6 Cir., 12 F.2d 240, 243. An entire tract is generally regarded as within the exemption of an existing nonconforming

use, although the entire tract is not so used at the time of the passage or effective date of the zoning law. 58 Am.Jur. 1023, § 151. While it is true that the area already excavated up to the time of trial contained 150,000 to 200,000 tons yet to be mined, to hold that plaintiff's operations must be confined to extracting what remains in that area only would mean processing that portion of the land below the street level. This would result in the particular area taking on the aspect of an unsightly pit which could serve no useful future purpose other than perhaps a dump. The property is hilly. Plaintiff testified that his intention is to remove the material so as to bring the grade down in conformity with existing street levels, which is consonant with the highest and best use of the land for subdivision purposes. The evidence shows plaintiff has conducted his operations in such a way as to create a future beneficial use of the land for this purpose. Defendants' own witness, a licensed real estate broker, testified: "The grading which has already taken place has, I believe helped it, in that the grading, in my opinion, has not been a—and to Mr. McCaslin's credit—has not been haphazard operation; instead of a pit kind of operation he have [sic] had an operation which has covered some of that area and it in effect leveled it, and I think that helps for subdivision purposes." Of course, plaintiff's nonconforming use of the property in question cannot be expanded or extended to a separate parcel, called Parcel 2 in the record, or to the 200-foot buffer area along the westerly end of the property in question adjacent to the residential area. To this extent the ordinance prohibiting the expansion or extension of nonconforming use to "the same or adjoining property" is applicable to plaintiff.

[6] The ordinances in question cannot find support in the legislative power to prohibit a nuisance. It is established law in this state that the business of excavating rock and gravel is a lawful and useful operation. *Wheeler v. Gregg*, 90 Cal.App.2d 348, 369, 203 P.2d 37. The operation of a quarry is not a nuisance *per se*. *Morton v.*

*Superior Court*, 124 Cal.App.2d 577, 581, 269 P.2d 81, 47 A.L.R.2d 478. The trial judge, in addition to viewing the premises and plaintiff's operation thereon, heard extensive evidence as to whether plaintiff's quarrying operations constituted a nuisance in fact, an issue raised by defendants' pleadings. He found on substantial evidence that plaintiff's operations "do not create dust, dirt, smoke, noise or vibrations to a degree sufficient to impair the public health, safety, morals or general welfare or to a degree sufficient to constitute a public nuisance"; plaintiff's use of his property and the operations "have never impaired and do not now impair the public health, safety, morals or general welfare"; and the operations "have never constituted and do not now constitute a public nuisance." Defendants say these findings are "contrary to the preponderance of the evidence." While much of the testimony was conflicting, the evidence most favorable to respondent must be accepted. The evidence is sufficient to support the finding that the operation of the quarry was not a nuisance, and the trial court was justified in adhering to the rule that in a proper case it will not enjoin the conduct of an entire business operation where it is not a nuisance *per se*. We are bound by the oft-repeated rule that findings supported by substantial evidence will not be disturbed on appeal.

[7] The court excluded testimony of two members of the city council proffered by defendants with respect to their purposes and motives in voting for passage of ordinances 556 and 727. Defendants assert error. There was no error. The purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87, 99, 33 P.2d 672.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

**Wayland T. LEONARD dba Wayland T.  
Leonard Co., Plaintiff and  
Respondent,**  
v.

**Roy E. FALLAS, Defendant and Appellant.\***  
Civ. 22925.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 11, 1958.

Rehearing Denied Oct. 10, 1958.

Hearing Granted Nov. 5, 1958.

Action by real estate broker on contract, whereby owner agreed to pay broker percentage of selling price if property were sold within 90 days after termination of contract to anyone whose name was registered with owner as of termination date. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., rendered judgment for broker, and owner appealed. The District Court of Appeal, Nourse, J. pro tempore, held that failure to find upon issue tendered upon allegations of complaint and answer as to whether any act of broker was a procuring or efficient cause of sale required new trial.

Reversed.

### 1. Brokers $\S$ 82(4), 88(14)

In action by real estate broker on contract, whereby owner agreed to pay percentage of selling price if property were sold within 90 days after termination of contract to anyone whose name was registered with owner as of termination date, conclusion that owner had breached his contract with broker and had thereby prevented broker from performing his contract was not supported by findings, was beyond issues tendered by complaint, and was purely surplusage.

### 2. Appeal and Error $\S$ 117(8)

In action by real estate broker on contract, whereby owner agreed to pay percentage of selling price if property were sold within 90 days after termination of contract to anyone whose name was registered with owner as of termination date, failure to find upon issues tendered upon

allegations of complaint and answer as to whether any act of broker was a procuring or efficient cause of sale required new trial.

### 3. Brokers $\S$ 56(3), 84(1)

Provision in contract between real estate broker and owner to effect that owner would be required to pay commission if property should be sold to any person whose name broker had registered with owner in writing prior to termination date of contract and if sale were made within 90 days after termination date, implied an obligation on part of broker to do something more than merely contact prospects and list their names with owner, and in order that broker might be entitled to commission, he would be required to show that his efforts were a procuring or efficient cause of sale made by owner within 90 day period to person whose name had been registered with owner.

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Bailie, Turner, Lake & Sprague, Los Angeles, for appellant.

Allan L. Leonard, Los Angeles, for respondent.

NOURSE, Justice pro tem.

By his complaint in this action, plaintiff, hereinafter called Leonard, sought judgment against the defendant for breach of a contract to pay a commission upon the sale of real estate. Defendant appeals from the judgment of the trial court awarding plaintiff \$8,000 as damages for breach of the alleged contract.

By his complaint the plaintiff alleges that on February 29, 1956, plaintiff and defendant entered into a contract in writing whereby the defendant granted to the plaintiff (a licensed real estate broker) the exclusive right to sell certain property owned by the defendant, for a period expiring on March 22, 1956, at a price of \$243,000. By the terms of the contract, defendant agreed to pay a certain agreed percentage of the selling price "if said property is



sold on the above terms or any other terms acceptable to me while this contract is in force, or *if sold within 90 days after its termination to anyone whose name is registered with me in writing as of the termination date.*" (Italics ours.) That on March 7, 1956, the plaintiff, in writing, registered with the defendant the name of Morgan Adams as a person to whom he had submitted the property. That on June 7, 1956, the defendant sold the subject property to said Adams for the sum of \$220,000 and that plaintiff's "earned commission" was in the sum of \$8,000. That plaintiff had done and performed every act and thing to be performed by him under the terms of the contract. That defendant had failed and refused to pay to the plaintiff the said sum of \$8,000 or any part thereof.

By his answer the defendant admitted the execution of the contract; admitted that the plaintiff had in writing designated Adams as a person to whom the property had been submitted; admitted the sale of the property to Adams; denied that the plaintiff's "earned commission" was in the sum of \$8,000 and denied that the plaintiff had performed the terms of the contract upon his part to be performed.

By one of the affirmative defenses pleaded, the defendant alleged that said Adams was not a prospective purchaser of the property in question at the time of the termination of plaintiff's exclusive right to sell and that the sale to Adams was negotiated by and through a real estate broker other than the plaintiff and that plaintiff "did no act, nor performed any services which in any way brought about, induced, influenced or caused" the offer of Adams to purchase said property or the sale of said property to Adams.

The court found the existence of the contract; found further that plaintiff had made contact with one Morgan Adams "in re-

spect of the possible purchase by the said Adams of the said real property; that plaintiff under date of March 7th, 1956, and on March 22nd, 1956 by reference to the said letter of March 7th, 1956, registered with defendant in writing the name of Morgan Adams (among others) as a prospective purchaser." The court further found that defendant had sold the property to Adams on June 7, 1956 (within the 90 day period after the expiration of plaintiff's exclusive right) through the agency of real estate brokers other than the plaintiff for the sum of \$220,000. The court expressly refused to find upon any other issues tendered by the pleadings.

[1] As a conclusion of law from the facts, the court concluded that the plaintiff had been damaged in the sum of \$8,000 and the plaintiff was entitled to judgment in that amount together with interest at seven per cent per annum from June 7, 1956.<sup>1</sup>

[2] We have reached the conclusion that the findings are insufficient to support the judgment and that the court erred in failing to find upon the issues tendered upon the allegations of the complaint which were denied by the answer that plaintiff had performed all of the terms and conditions of the contract on his part to be performed, and the issues tendered by the affirmative defense which we have noted above.

[3] Plaintiff bases his right to recover upon that portion of the contract which we have heretofore italicized and which required the payment of commission to him if the property should be sold to any person whose name he had registered with the defendant in writing prior to the termination date of the contract and if said sale be made within 90 days after the termination date. This language in the contract implies an obligation on the part of the broker to do something more than merely contact the

1. The court further concluded that the defendant had breached his contract with the plaintiff and had thereby prevented plaintiff from performing his contract.

This conclusion could not be supported by the findings and was beyond the issues tendered by the complaint and is purely surplusage.

prospect and list his name with the owner. In order that he may be entitled to a commission under the terms of the contract he must allege and show, and by his evidence prove that his efforts were a procuring or efficient cause of the subsequent sale. *Wright & Kimbrough v. Dewees*, 52 Cal. App. 42, 197 P. 957; *Hobson v. Hunt*, 59 Cal.App. 679, 211 P. 242; *Mills v. Hunter*, 103 Cal.App.2d 352, at pages 358, 360, 229 P.2d 456, at pages 459, 461.

The facts found by the court fall far short of providing a basis for the judgment. Although the issue was directly tendered by the answer as well as by the denied allegations of the complaint, there is no finding that any act of the plaintiff was a "procuring or efficient cause" of the sale eventually made by the defendant.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 400

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Natlia Balboa ZAMORA, Defendant and**  
**Appellant.**

**Cr. 6173.**

**District Court of Appeal, Second District,**  
**Division 3, California.**

**Sept. 10, 1958.**

Defendant was convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., for unlawful possession of heroin, and she appealed. The District Court of Appeal, Vallée, J., held that even though heroin had been procured by officer by ordering defendant to open her mouth none of her constitutional rights had been violated, since there had been no force or violence or brutal or shocking con-

duct used in causing defendant to emit heroin she had in her mouth and since she had not been choked but had merely been asked to open her mouth.

Affirmed.

# **Searches and Seizures** §7(20)

That heroin, of which defendant was convicted of unlawfully possessing, had been procured by officer by ordering defendant to open her mouth violated none of her constitutional rights, where there was no force or violence or brutal or shocking conduct used in causing defendant to emit heroin she had in her mouth and she was not choked but was merely asked to open her mouth. *West's Ann.Health & Safety Code*, § 11500.

Natlia Balboa Zamora, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted of the unlawful possession of heroin. *Health & Safety Code*, § 11500. Her only contention is that after she was placed under arrest, the officers violated her constitutional rights in ordering her to open her mouth and to expel contraband therefrom.

Defendant was placed under arrest at about 12:20 p. m. on July 9, 1957 by Robert Nichols, a Deputy Sheriff. Nichols summoned Katherine Carruth, a female Deputy Sheriff, to the place where the arrest was made. Deputy Carruth testified: "When I arrived at the location, Sergeant Howell requested my searching Mrs. Zamora for the possibility of finding narcotics. I accompanied her to the rear of the house—I believe it is a bedroom at the rear of the home—and while I searched her, I asked her to open her mouth, and she appeared to gag. I noticed a white substance appear in her mouth. I held my hand just below her chin. She bent her head forward and spit an object into my hand."

Officer Carruth called Nichols into the room and gave him the object. Nichols said to defendant, "What is this?" Defendant replied, "Heroin." The object contained heroin. Defendant did not testify or offer any evidence in her own behalf.

Defendant asserts the conduct of Officer Carruth comes within the principle of *Rochin v. People of California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396. There is no basis for the assertion. In *Rochin* the conduct of the officers condemned was brutal and shocking. In the present case there was no force or violence or brutal or shocking conduct used in causing defendant to emit the object she had in her mouth. She was not choked—she was asked to open her mouth, appeared to gag, and then spat the object into the officer's hand. No constitutional right of defendant was violated. *People v. Smith*, 50 Cal.2d 149, 323 P.2d 435.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



163 Cal.App.2d 549

**The HOLLYPARK REALTY COMPANY, a corporation, Plaintiff and Respondent,**  
v.

**Joseph B. MacLOANE and Diantha N. MacLoane, husband and wife, Defendants and Appellants.**

Civ. 22990.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 16, 1958.

Action on promissory note. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered judgment for

plaintiff, and defendants appealed. The District Court of Appeal held that the evidence clearly showed that the note had not been given in payment of defendant's obligation under purchase agreement but only as evidence of it, and held that when owners elected, subsequent to purchaser's repudiation of contract, to sell property to third persons, they had terminated contract and had thus ended purchaser's obligation to pay contract price or any part thereof and held that owners no longer had right to pursue either specific performance or breach of contract remedies.

Judgment reversed with directions.

#### 1. Pleading ⚡370

Issue raised by evidence was before court even though unpleaded.

#### 2. Specific Performance ⚡3

##### Vendor and Purchaser ⚡322

When purchasers repudiated contract, vendors had choice as to whether to sue for specific performance or for breach of contract. West's Ann.Civ.Code, § 3307.

#### 3. Specific Performance ⚡87

Vendors electing to sue for specific performance after purchaser's repudiation of contract were obligated to remain in position to convey property to purchasers.

#### 4. Specific Performance ⚡61

##### Vendor and Purchaser ⚡322

When owners elected, subsequent to purchaser's repudiation of contract, to sell property to third persons, they terminated contract and thus ended purchaser's obligation to pay contract price or any part thereof, and they no longer had right to pursue either specific performance or breach of contract remedies. West's Ann.Civ.Code, § 3307.

#### 5. Payment ⚡16(1)

Note evidencing antecedent or contemporaneous obligation is not payment thereof unless parties expressly agree that it shall be taken in payment, or facts are such as to compel that inference.



**6. Vendor and Purchaser** Ⓒ315(3)

In action on note, evidence established that note had not been given in payment of defendants' obligation under purchase contract but only as evidence of it.

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Spiegel, Turner & Wolfson, Albert A. Spiegel and Gerald G. Wolfson, Santa Monica, for appellants.

Robert M. Aran, Pacific Palisades, for respondent.

**PER CURIAM.**

Defendants appeal from a judgment against them in the sum of \$5,500 plus attorneys' fees.

By its complaint in this action the plaintiff alleged that on June 3, 1956, the defendants delivered to the plaintiff their promissory note in the sum of \$5,500 by the terms of which they promised to pay, 29 days after date, to the order of "Hollypark Realty, Trust Account," the sum of \$5,500 without interest and, in case of suit, to pay an additional reasonable sum as attorneys' fees. It further alleged that by the terms of the note defendants promised to pay plaintiff the sum of \$5,500 on or before July 2, 1956, without interest and that no part of said sum of \$5,500 had been paid.

By their answer, the defendants denied all the allegations of the complaint and in addition thereto alleged certain special defenses including want of consideration. The details of these special defenses pleaded are not material in view of the conclusion which we have reached.

The plaintiff seeks to enforce the note pleaded as the trustee of an express trust and not as the beneficial owner and holder of the note. At the trial the plaintiff did not content itself as it might have with proof of the execution of the note and that plaintiff was the holder thereof but, in addition thereto, introduced evidence which established the following facts: The plaintiff had been employed as a real estate

broker by one Westerman and his wife to sell an apartment house commonly known as 11620 South Crenshaw Boulevard, Inglewood. On June 3, 1956, the property was being shown as an "open house" by one Stein, a real estate salesman employed by the plaintiff, and on that day Stein showed the defendants through the property as well as other properties and thereafter took them to the office of the plaintiff where he prepared two instruments; the first in the form of a deposit receipt. This deposit receipt is very uncertain in its terms but the body thereof, in substance, provides as follows: That Stein, as a broker, acknowledged the receipt of "\$5,500 form note" to be applied on the purchase price of \$55,000 for the subject property; that the terms of sale were that the buyers were to assume existing first and second trust deeds in the approximate aggregate amount of \$37,500; give their note secured by a third deed of trust in the approximate sum of \$6,000 and make a cash down payment of \$11,500 (this includes the \$5,500 evidenced by the note).

The defendant signed an endorsement on this receipt by which they agreed to purchase the property upon the above terms. At the same time Stein drafted and the defendants signed the note sued upon. The note on its face showed it was given as a deposit upon the subject property. On the same day Stein took the original and a copy of the deposit receipt and the note to the owners and they signed endorsement on the deposit receipt agreeing to sell the property upon the terms set forth in the receipt. Stein left a copy of the deposit receipt with the sellers but retained the note. On the same day he notified defendants that the owners had accepted the offer. On the following day Stein caused to be prepared escrow instructions. He then telephoned the defendants who advised him they could not raise the money to purchase the property and that they did not intend to go through with the deal. Thereafter Stein notified the owners of defendants' repudiation of their contract

and at some later date caused the owners to sign the escrow instructions. The owners did not deposit in the escrow any deed or other instrument of conveyance.

Thereafter the owners sold the subject property to third persons at a purchase price of \$51,000. This sale took place after the present action was at issue.

[1] Although the defendants did not amend their answer so as to plead the fact that seller had sold the subject property and had thereby discharged defendants' obligation under the note, the evidence to this effect having been offered by the plaintiff, the issue of discharge of the obligation was clearly before the court and is determinative of the present action. *Smith v. Smith*, 115 Cal.App.2d 92, 99, 251 P.2d 720; *Moeller v. Packard*, 86 Cal.App. 459, 460, 261 P. 315; *Kalmus v. Cedars of Lebanon Hosp.*, 132 Cal.App.2d 243, 246, 281 P.2d 872; 39 Cal.Jur.2d 456, 457.

[2] When the defendants repudiated the contract the owners had a choice of remedies which they might pursue. They might have sued for specific performance (assuming that the contract was certain enough and that the other conditions to specific performance were present). *Laske v. Lampasona*, 89 Cal.App.2d 284, 287-289, 200 P.2d 871. They might have treated the contract as breached and have sued the defendants for damages they suffered by reason of the breach. *Backman v. Park*, 157 Cal. 607, 108 P. 686; 25 Cal.Jur. 772; Civ.Code, § 3307.

[3] If they chose the first remedy the owners were obligated to be in a position to convey the property to the defendants. *Kelly v. Mack*, 45 Cal. 303; *Smith v. Taylor*, 82 Cal. 533, 541, 23 P. 217; 23 Cal. Jur. 499; 25 Cal.Jur. 772, 773.

[4] When the owners elected to sell the property to a third person they terminated the contract of purchase and no longer had the right to pursue either of the two reme-

dies above-mentioned. By terminating the contract they terminated the defendants' obligation to pay the contract price or any part thereof. *Glassell v. Coleman*, 94 Cal. 260, 266-268, 29 P. 508; *Yakoobian v. Johnson*, 102 Cal.App. 10, 14, 282 P. 522; *California Raisin Pool v. Dalian*, 139 Cal. App. 343, 348, 34 P.2d 227.

[5] The note sued upon was not given in payment of the contract price but merely evidenced defendants' obligation as to a part of that contract price. A note given which evidences an antecedent or contemporaneous obligation is not payment of that obligation unless the parties expressly agree that it shall be taken in payment or the facts are such as to compel that inference. *Dellapiazza v. Foley*, 112 Cal. 380, 386, 44 P. 727; *Woodhead Lumber Co. v. E. G. Niemann Investments*, 132 Cal.App. 115, 117, 22 P.2d 252; *Weger v. Rocha*, 138 Cal.App. 109, 117, 32 P.2d 417; 38 Cal.Jur.2d 256-257; 40 Am.Jur. 775-777.

[6] Here the evidence clearly shows that the note was not given in payment of the obligation but only as evidence of it.

The plaintiff sued for that portion of the contract price evidenced by the note. When, however, the owners sold the subject property they terminated the obligation which the note evidenced and the note thereupon ceased to be an obligation binding upon the defendants. After the sale of the property the defendants were no longer obligated to pay the purchase price and the owners could not enforce its payment. The plaintiff has no right beyond theirs.

The evidence offered by the plaintiff having conclusively shown that, at the time of trial, the obligation sued upon had been discharged, the findings and judgment are contrary to the evidence.

The judgment is reversed with directions to enter judgment for defendants.

163 Cal.App.2d 526

Cite as 329 P.2d 535

**Harry MARGOLIS and Ann Margolis, substituted for Etta Margolis, Boris E. Ersunoff and Walter Ersunoff, Plaintiffs, Appellants, and Respondents,**

**v.**

**Jeannie TEPLIN et al., Defendants,**

**Morrie Teplin and Daniel Teplin, Defendants, Respondents, and Appellants.**

**Civ. 17971.**

**District Court of Appeal, First District,  
Division 2, California.**

**Sept. 15, 1958.**

**Rehearing Denied Oct. 15, 1958.**

**Hearing Denied Nov. 12, 1958.**

Action to recover value of distilled spirits removed from plaintiffs' liquor store and allegedly appropriated by defendants. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., entered judgment against defendants and they appealed. The District Court of Appeal, Dooling, J., held that defendants had failed to show prejudice in production of their evidence by court's irregularity in not ruling upon admissibility of deposition of alleged co-conspirator before close of trial, and admission of some hearsay testimony in an action tried by court without jury, was not prejudicial error where there was otherwise enough competent evidence to support findings.

**Affirmed.**

### **1. Appeal and Error ⇨1043(6)**

In action to recover value of goods allegedly appropriated from plaintiffs' store, admission into evidence of alleged coconspirator's deposition which was never read, corrected or signed was not prejudicial since witness' refusal to answer resulted in a deposition containing no substantial evidence against defendants.

### **2. Appeal and Error ⇨1043(6)**

In action to recover value of goods allegedly appropriated from plaintiffs' store, failure of court in not ruling on admissibility of deposition of alleged coconspirator before close of trial resulted in irregular procedure, but there is no legal showing that defendants, under circumstances, were

prejudiced in production of their evidence by such irregularity.

### **3. Appeal and Error ⇨1032(2)**

Where defendants claimed irregularity because of court's failure to rule on admissibility of deposition of alleged coconspirator before trial, burden was on defendants to show prejudice from action of court in this regard.

### **4. Stipulations ⇨14(7)**

Where action was brought against defendants to recover value of goods allegedly appropriated from plaintiffs' store, and defendants' counsel had orally agreed to taking of deposition of alleged coconspirator and counsel entered into formal stipulation that the deposition might be used by either party, such action constituted a waiver of more formal notice. West's Ann.Code Civ. Proc. § 1991.

### **5. Depositions ⇨88**

Where deposition of alleged coconspirator of defendants was taken and witness afterwards signed deposition without any correction or comment, privilege of objecting to propriety of certain questions was that of the witness and not the defendants, and deposition as returned under oath of witness was properly admissible against defendants.

### **6. Appeal and Error ⇨1054(1)**

Error in admission of some hearsay evidence in an action tried before court without a jury is not prejudicial where there is otherwise enough competent evidence in record to support findings.

### **7. Damages ⇨6**

Where action was brought against defendants for alleged appropriation of goods from plaintiffs' store as result of conspiracy with store employee, defendants could not complain that loss occasioned by their own doing could not be established with complete mathematical precision.

### **8. Evidence ⇨177**

Where action was brought to recover value of goods appropriated from store by defendant, testimony of plaintiffs' witness as to inventory and amount of goods sold



was not subject to objection because based on summaries of detailed records which were available for cross-examination. West's Ann.Code Civ.Proc. § 1855, subd. 5.

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Morris M. Grupp, San Francisco, for appellant, Teplin.

Garry, Dreyfus, McTernan & Keller, Francis J. McTernan, Jr., San Francisco, for respondents.

DOOLING, Justice.

Defendants Daniel Teplin and Morrie Teplin appeal from a judgment against them in the sum of \$17,786.11, based upon findings that appellants conspired with defendant Henry Albers to remove distilled spirits from plaintiffs' liquor store and to appropriate the same to their own use and that pursuant to said conspiracy appellants did remove and appropriate from plaintiffs' store property of the value of \$17,786.11.

Henry Albers was for many years a trusted employee in the liquor stores operated by respondents and their assignors. There were two of such stores in San Francisco. In November 1954 respondents suspected that an inventory loss had occurred in their stores. An investigation led them to believe that their employee, Albers, was responsible for this loss. Albers admitted that he had taken substantial quantities of liquor from the stores in 1953 and 1954 and further stated that he had disposed of these liquors to appellants herein receiving from appellants about  $\frac{1}{3}$  of their sale value and appropriating the money so received to his own use. He gave respondents a statement in writing to this effect. Thereafter Albers gave a written statement to the police of the same character. (Both statements were hearsay as to the complicity of appellants in Albers' wrong-doing and the recital of his implication of appellants in these statements is here given solely for the purpose of clarifying the background of what followed.)

This action was thereupon commenced joining Albers, appellants, and certain others not here material, as defendants.

Albers was arrested under a charge of grand theft based upon his appropriation of such liquors and while he was under arrest on this charge his deposition was taken by respondents at the city prison on May 17, 1955. Counsel for appellants was present and representing appellants at that time. Albers refused to answer any and all questions relating to his taking of liquor from respondents' stores, or relating to the connection of appellants, if any, therewith, and refused to answer any and all questions as to the truth of the written statements above referred to. The notary, at the request of counsel for respondents, instructed Albers to answer many of these questions and he persisted in his refusal. The notary certified the proceedings before him and on June 8, 1955, at 10 a. m. proceedings were taken in open court by respondents to obtain the order of the superior court to compel the witness to answer the questions which he had refused to answer after being instructed by the notary to do so.

The witness Albers was present at that time without counsel. No one representing the appellants was in court but counsel for the respondents stated to the court at the beginning of the proceedings: "Mr. Jackson represents all of the defendants except the one in question, Henry Albers, and I spoke to Mr. Jackson this morning, and he permitted me to inform your Honor that he had been given notice but had no desire to appear."

After somewhat informal proceedings before the superior court it was suggested that the taking of Albers' deposition should be continued in the court room that same afternoon at 2 p. m. before a notary public in the absence of the judge. After some discussion Albers said: "At 2:00 o'clock, then?" The judge asked: "Will that be all right?" and Albers answered: "That will be fine."

At 2 p. m. on June 8, 1955, before a different notary Albers was again sworn and the taking of his deposition proceeded. The deposition as certified by the notary shows that "Joseph A. Jackson \* \* \*

appeared as counsel for the defendants Morrie Teplin and Daniel Teplin." It further appears therein: "It was stipulated by and between counsel for the respective parties that the said deposition shall be reported by Holmes Christian \* \* \* and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

"It was further stipulated that if this deposition has not been signed by the time of trial, provided the witness has had a reasonable opportunity to read, correct and sign the same, it may be used by either party at the trial with the same force and effect as if signed by the witness."

Mr. Jackson thereupon requested a continuance of the taking of the deposition on behalf of Albers to permit Albers to procure counsel. He prefaced this request by the words: "In the case wherein Mr. Margolis appeared this morning before Judge Deasy, and Henry Albers appeared as a witness for the purposes of being certified to the Superior Court in this matter to answer certain questions propounded by him in a deposition, taken while he was temporarily a resident of the City Prison \* \* \*"

After requesting the continuance on behalf of Albers Mr. Jackson continued: "I might add that this matter of certification came to my attention through Mr. Margolis a day or so ago. It is the first time I knew about it, as to the date, and I have never been served with copies of the questions propounded for certification, although I appeared at the time the deposition of Mr. Albers was taken \* \* \* and though at said time I requested of the Court Reporter that I be given copies of that.

"Let the record show that Mr. Albers also has no copy of the questions to be propounded to him; for whatever effect that may have on this proceeding—I do not know at this time.

"It is now incumbent upon me to appear in Judge Arata's Court \* \* \*"

Whereupon the record shows that Mr. Jackson left the court room.

The taking of the deposition then proceeded. The deposition after being transcribed was later signed by Albers and duly certified by the notary.

At the trial the deposition of May 17, which had been certified by the notary but never signed by the witness, and the deposition of June 8 were both offered in evidence by respondents. Counsel for appellants objected to their introduction and after some discussion, at the court's suggestion, it was stipulated that the depositions shall be deemed read without waiving any objections made to the admissibility of the depositions and subject as to "[a]ll the questions—all objections that would be available." The court reserved the ruling and did not act on the offer at any time during the trial. However the findings recite: "Evidence both oral and documentary was offered, including the deposition and affidavits of defendant Henry Albers, which the Court admitted into evidence \* \* \*"

[1] So far as the deposition of May 17 is concerned we may concede the validity of appellants' objection that it was never read, corrected or signed by the witness. However we can find no prejudice in its admission since, because of the witness' refusal to answer, it contains no substantial evidence against these appellants.

The deposition of June 8 stands on a different basis since therein is found the only substantial evidence, apart from the admission of Morrie Teplin as to one isolated transaction, to support the findings upon which the judgment against appellants is bottomed.

[2, 3] Appellants correctly complain of the irregular procedure of the court in not ruling on the admissibility of this deposition before the close of the trial. *Clopton v. Clopton*, 162 Cal. 27, 32-33, 121 P. 720; *DeTray v. Higgins*, 31 Cal.App.2d 482,

487, 88 P.2d 241. However appellants not only produced their own testimony and that of other witnesses in contradiction of their implication in the appropriation of liquor from respondents' stores, but the court admitted by way of impeachment an affidavit of Albers repudiating his implication of appellants and expressly denying that they improperly received any of respondents' liquor from him. This affidavit could only have been introduced for the purpose of impeaching the testimony of Albers contained in the June 8 deposition. The only showing of additional testimony that might have been produced by appellants to contradict or impeach the testimony of Albers is a so-called affidavit of Albers' mother offered in support of appellants' motion for new trial reciting certain alleged conversations with Albers, Margolis and Ersunoff. This so-called affidavit is not in fact an affidavit. The certificate of the notary attached thereto is not a jurat but a certificate of acknowledgment. It does not recite that the witness was sworn by the notary but only that Maud Albers "duly acknowledged to me that she executed" the instrument. There is no legal showing that appellants were prejudiced in the production of their evidence by the irregularity in not ruling on the admissibility of the deposition before the close of the trial. The burden is on appellants to show prejudice from the action of the court in this regard. *DeTray v. Higgins*, supra, 31 Cal.App.2d 482, 489, 88 P.2d 241; *Ebner v. West Hollywood Transfer Co.*, 45 Cal. App. 186, 191, 187 P. 114.

[4] Appellants also argue that they did not receive the statutory notice of the proceedings held on the morning of June 8 before the superior court nor of the taking of the deposition on that afternoon. There was testimony by Margolis offered to establish that appellants' counsel had orally agreed to the hearing on the morning of June 8 and no testimony was offered to contradict this showing. The quotations from the deposition above set out indicate the familiarity of counsel for appellants with this proceeding and while he stated that he

had had only one or two days oral notice of the exact date of the hearing he not only made no objection to the taking of the deposition on this ground but he entered into a formal stipulation to the taking of the deposition and that it might be used by either party. This constituted a waiver of more formal notice. The only motion that he made was for a continuance, not on behalf of his clients, but of Albers. Albers had clearly consented before the court to the taking of his deposition at 2 p. m. on that day and Albers afterwards signed the deposition without correction or amendment. The only possible objection that counsel for appellants voiced on behalf of his clients was that he had not received a copy of the questions certified by the notary to the court. Counsel has furnished us with no authority that this need be done and we find no such provision in section 1991 of the Code of Civil Procedure. In any event counsel's consent to the hearing without such service was established.

The witness proved a very reluctant one and counsel for respondents called his attention to the statements theretofore made by him, stating that they were made under oath and threatening him with prosecution for perjury if he repudiated them. Concerning the statement made to the police the witness finally testified: "Well, if that is a sworn statement, then I did not know it was a sworn statement. For the record, I will have to say that it is true."

"Q. On the same basis, the entire statement is true, isn't it? A. Yes." The statement to the police was copied into the deposition.

[5] Counsel for appellants argue that in thus questioning the witness about the police statement respondents acted contrary to the instructions of the court and the taking of the deposition was for that reason manifestly unfair. The fact is, however, that the witness afterwards signed the deposition as taken without any correction or comment. He is not complaining and the privilege if any was his, not appellants'. The deposition as returned was



under the oath of the witness and properly admissible against the appellants.

[6] While the witness was very reluctant to implicate these appellants enough appears in the direct questions and answers (without reference to the previous written statements) to support the findings of the court that appellants conspired with Albers to receive liquor belonging to respondents and did receive such liquor. While the written statements may be hearsay as to appellants, the error in the admission of some hearsay evidence (in an action tried by the court without a jury) is not prejudicial error, where there is otherwise enough competent evidence in the record to support the findings. *Bixby v. Bixby*, 120 Cal. App.2d 495, 499, 261 P.2d 286 and cases cited.

The amount of damages found is based upon testimony that alcoholic beverages were handled under fair trade agreements under which the liquor was purchased at fixed wholesale prices and sold at fixed retail prices. By taking the inventory on hand at the beginning of 1953 and 1954 respectively and adding thereto the purchases of liquor during each year and subtracting the inventory on hand at the end of each year respondents established the amount of such liquor withdrawn from their stock in each year. By comparing the actual receipts from sales of liquor in each year with the figure that should have been received from the retail sale of the amount of liquor withdrawn from stock in each year at the established mark-up price they established a loss aggregating the amount of the judgment.

[7] Appellants complain that the figures for both stores were combined in these calculations, but the testimony shows that liquor was transferred from one store to the other freely and no other source of loss in either store was established. They also complain that an average mark-up was used in these calculations. Appellants cannot complain, however, that the loss occasioned by their wrong-doing cannot be established with complete mathematical precision.

*Stott v. Johnston*, 36 Cal.2d 864, 876, 229 P.2d 348, 28 A.L.R.2d 580; *Zinn v. Ex-Cell-O Corp.*, 24 Cal.2d 290, 297-298, 149 P.2d 177.

[8] Appellants' complaint that the witness Margolis' testimony was based on a summarization of the records is met by the fact that the records were in court for use on cross-examination or otherwise as appellants might desire and Margolis testified to his familiarity with the records from which the summaries were made and their correctness. Code Civ.Proc. § 1855(5); *Johnstone v. Morris*, 210 Cal. 580, 587-588, 292 P. 970; *Mayer v. Hazzard*, 10 Cal.App. 2d 1, 4, 51 P.2d 189.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



163 Cal.App.2d 416

Arline CARR, Plaintiff and Appellant,

v.

Lloyd W. DICKEY, D.D., Defendant and Respondent.

Civ. 17766.

District Court of Appeal, First District,  
Division 1, California.

Sept. 11, 1958.

Action by a patient against a dentist for alleged malpractice and for assault and battery in alleged removal of a sound tooth. Judgment for the defendant in the Superior Court, City & County of San Francisco, Milton D. Sapiro, J., and the patient appealed. The District Court of Appeal, Peters, P. J., held that the evidence was insufficient to carry the case to the jury and that the consent of the patient to the removal of the sound tooth was a complete defense to the assault and battery charge.

Judgment affirmed.

**1. Physicians and Surgeons** ⇨18(6)

Doctrine of *res ipsa loquitur* is applicable only where the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

**2. Negligence** ⇨121(2)

Generally "*res ipsa loquitur*" is applicable where the accident is of such a nature that it can be said in the light of past experience that it probably was the result of negligence by someone and that defendant is probably the person who is responsible.

See publication *Words and Phrases*, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

**3. Negligence** ⇨121(2)

For doctrine of "*res ipsa loquitur*" to be applicable, there must be a basis of experience from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent, it must be caused by an agency within the exclusive control of defendant, and it must not have been due to any voluntary action by plaintiff.

**4. Physicians and Surgeons** ⇨18(9)

In action against a dentist for malpractice in the extraction of a tooth of plaintiff, evidence was insufficient to carry the case to the jury under the doctrine of *res ipsa loquitur* or to show that the defendant was negligent in any way.

**5. Assault and Battery** ⇨11

In action against a dentist for assault and battery on the ground that defendant extracted a tooth that was sound and perfect and allowed a tooth that was diseased to remain in the plaintiff's jaw, consent of the patient to the removal of the diseased tooth was a complete defense.

PETERS, Presiding Justice.

Plaintiff, Arline Carr, brought this action against defendant, Lloyd Dickey, a dentist, for malpractice and for an assault and battery. At the close of plaintiff's case the trial court granted defendant's motion for a nonsuit as to both causes of action. Judgment was entered accordingly, and plaintiff appeals.

The case involves the extraction of a tooth of plaintiff by defendant. For purposes of clarity, something should be said about how the teeth involved are indicated in the record. According to the system used by defendant, the lower left wisdom tooth is designated number 17. That tooth had been extracted by defendant prior to the events here involved. The molar next to the wisdom tooth, the second lower left molar, and the back tooth after the wisdom tooth was removed, is designated as number 18. The next tooth in front of that or the first lower left molar, is designated as number 19.

The complaint alleges, in the malpractice count, that defendant negligently extracted the first lower left molar (No. 19) of plaintiff, a tooth that was sound and perfect, and allowed the second lower left molar (No. 18), a diseased and decayed tooth, to remain in plaintiff's jaw. The assault and battery count charges that defendant was employed by plaintiff to extract a designated tooth but extracted a different one without cause, and without plaintiff's consent.

As already pointed out, the trial court granted a nonsuit as to both counts. In the course of its ruling the court, after reviewing the evidence, stated, in reference to the first count, "I am satisfied that there is no evidence in this case to establish negligence as required by law. \* \* \* There was no negligence shown in the manner of pulling the tooth. \* \* \* The Court cannot find any evidence of negligence whatsoever in the evidence that has been presented \* \* \*" The court also ruled that the assault and battery count could not be sustained "because the action,

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Jack H. Werchick, San Francisco, for appellant.

Lamb & Hoge, San Francisco, for respondent.

as testified to by the plaintiff, was taken with her consent. \* \* \* she consented to the fact that the tooth be removed."

Tested by the standards applicable to nonsuits, the record shows that these rulings of the trial court were correct.

The defendant is a dentist and oral surgeon. Called as an adverse witness, he testified that he first treated plaintiff in September of 1953. At that time he took full mouth X rays, and took the patient's dental history, and made a clinical examination of her mouth. He filled three of her teeth. At that time he discovered no reason to treat the lower left molars. On June 10, 1954, plaintiff called at his office and complained of pain in the lower left molar area. Upon examination he found no emergency situation requiring immediate extraction. He took an X ray of the two lower left molars and discovered a cavity in the back molar (No. 18) which he thought could be filled. He also discovered a radiolucent area in the first molar (No. 19). The plaintiff complained that both teeth hurt and requested that they be extracted. The doctor told plaintiff to go home to see if the pain became localized. He knew that plaintiff was a constant and chronic complainer of pain, and also knew that it was frequently difficult for a patient to localize the pain. He did not want to extract either of the teeth until he was sure that the pain was of such a type and character that such remedy was required.

A few days later plaintiff returned, complaining that both molars still bothered her. He had carefully examined the X rays and came to the conclusion that tooth numbered 18 could be saved by filling the cavity, but that number 19 should be removed. Neither molar was abscessed, but both were diseased. The radiolucent area shown in the X ray on tooth number 19 gave all the indications of decay. It was either decay, or a wasting away of the tooth. The condition had just about reached the nerve of the tooth. There was a discoloration in or close to the nerve. A radiolucent area in an X ray indicates that

there is a lesion in the tooth, a wasting away of the tooth, indicating a loss of tooth structure. It can indicate decay or a change in density of the tooth. After re-examining the X ray he came to the conclusion that plaintiff's pain was coming from tooth No. 19. He based this conclusion upon the fact that the radiolucent area was on the back surface of the tooth, below the gum line in the root of the tooth. When decay reaches the nerve of a tooth, extraction is one remedy. Plaintiff had stated that taking hot or cold substances into her mouth caused pain.

Under these circumstances defendant told the plaintiff that he could fill tooth number 18 and save that tooth, but advised the removal of No. 19. He showed the patient the X rays and called her attention to the radiolucent area in tooth No. 19, and pointed out to her how close it was to the pulp. Plaintiff agreed to the suggested procedure. He filled tooth No. 18, and extracted tooth No. 19. He extracted the tooth because of what he had observed from the X rays and because the symptoms of plaintiff as described by her indicated to him that the nerve of the tooth was involved, and extraction was indicated. He could not remember if his office radio was tuned to the Charles-Marciano fight during the extraction.

The testimony given by plaintiff does not substantially differ from that given by defendant. She testified that when she visited defendant in June of 1954 she told him that her back teeth were hurting, and that she thought it was the back lower tooth on the left side, which would be tooth No. 18. The doctor examined her mouth, and took some X rays. Then he told the witness that it was not tooth No. 18 that was hurting, but the tooth next to it, No. 19. Then "I told him it felt like it was the tooth in the back, I told him, but he is the dentist and he should know." She told the doctor that if she ate anything sweet, chewed gum, drank water, or opened her mouth so that the air got in, her tooth would ache. It was not an excruciating or continuous pain, nor did it keep her awake at night



The doctor told her to come back in a few days. This she did, coming in about 6:30 or 7:00 p. m. The doctor first took care of the teeth of her child and then brought her into his office. All of the time she was there the radio was on tuned to the Charles-Marciano fight. The doctor first filled several cavities in her front teeth. Then plaintiff asked the defendant about her back tooth, which was the one she thought was hurting, although she was not sure. The defendant took another X ray and then told her it was not the last molar, but the one next to it, that was giving the trouble. After showing her the X ray, he recommended that tooth No. 19 should be pulled, and No. 18 should be filled. When asked if she consented to this procedure, she replied: "Well, I told him he should know." Then defendant extracted tooth No. 19. Plaintiff then asked defendant for the extracted tooth. He gave it to her and she took it home. It was introduced into evidence in this case.

After the tooth was extracted the sensitivity and pain continued. About a week after the extraction plaintiff again visited defendant and told him that the condition still persisted. She accused defendant of pulling the wrong tooth and refused to permit him to work on tooth No. 18. Some time later she went to Dr. Brady, another dentist, showed him the extracted tooth and asked him to extract tooth No. 18. This he did.

The only other witness called by plaintiff was Dr. Brady. He testified that he extracted tooth No. 18 (he used a different numbering system) on June 23, 1954. He first took an X ray and then determined from it, and the complaints of the patient, that the tooth should be extracted. He found erosion around the gum line leading down towards the nerve. When shown the tooth that defendant had extracted (No. 19) he stated that it showed "quite a bit of erosion out at the gum line \* \* \* quite a bit of it," and that it had a "gum line cavity." When shown the X rays of tooth No. 19 he found "quite a bit of decay or erosion" on both the front and back of the

tooth, and several radiolucencies. The condition disclosed could be a reason for extraction, depending upon the sensitivity of the patient. He also stated that from the X rays you cannot tell whether there is decay or erosion unless you examine the tooth and pick at it with an explorer to see if it is soft. By just looking at the tooth that had been pulled he could not tell whether it should have been extracted. From the X rays, it looked to him as if the tooth had an extensive sensitive area. When asked if, in his opinion, tooth No. 19 should have been extracted, he said: "I would take that tooth out." As far as the X rays taken by defendant of tooth No. 18 were concerned, they showed a condition that raised a question whether that tooth could be saved.

On this evidence the trial court granted a nonsuit as to both causes of action. Appellant argues that the evidence presented questions of fact which could have been decided by a lay jury without expert evidence and which entitled her to the benefit of the doctrine of *res ipsa loquitur*. In addition, she asserts, that, independently of that doctrine, the evidence established a prima facie case that the respondent had failed, negligently, to use the requisite standard of care in his treatment of her.

[1] The doctrine of *res ipsa loquitur* is not applicable to the facts of this case. In 36 Cal.Jur.2d p. 72, § 337, the proper rule, applicable to malpractice cases, and supported by many cases, is stated as follows: "Medical malpractice cases are an abundant field for application of the doctrine of *res ipsa loquitur*. Of course, the mere fact that a medical treatment may have been unsuccessful is insufficient to bring the doctrine into operation. It is applicable only where the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised, and where under the evidence the hypothesis that the patient's prior condition was the proximate cause of the accident may be rejected by the trier of fact."

[2] In *Bauer v. Otis*, 133 Cal.App.2d 439, 443, 284 P.2d 133, 136, the applicable rules are summarized as follows:

"As a general rule, *res ipsa loquitur* is applicable where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it *probably* was the result of negligence by someone and that the defendant is *probably* the person who is responsible. \* \* \*

[3] "The conditions required for the application of the doctrine are: (a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citations.]" For a full review of most of the applicable cases see *Salgo v. Leland Stanford Jr. University Bd. of Trustees*, 154 Cal.App.2d 560, 317 P.2d 170.

Tested by these standards the doctrine is not here applicable. There is no evidence at all that plaintiff has suffered any legal injury. There is no evidence that tooth No. 19 was not diseased and should not have been extracted. No subsequent injury followed as a result of the extraction. Plaintiff's evidence is to the effect that tooth No. 19 was extracted after the condition existing was fully explained to her and after she had consented to its removal. The evidence as to tooth No. 18, the tooth respondent filled and that Dr. Brady subsequently removed, is to the effect that it was a matter of reasonable judgment as to whether that tooth should have been extracted or an attempt made to save it by filling it. Respondent, with praiseworthy caution, determined to save that tooth if he could. The fact that Dr. Brady, after the pain continued, decided to remove that tooth is no reason to apply the doctrine of *res ipsa loquitur*. The appellant admitted that, when she returned to re-

spondent's office after the extraction and complained of continuing pain, she refused to allow him to treat tooth No. 18. Thus, *res ipsa loquitur* is not applicable to the facts.

[4] Nor does the evidence show that respondent was negligent in any way. Quite to the contrary, the evidence shows that respondent exercised the highest degree of care and skill. There was not one word of testimony that the extracted tooth was a sound tooth. The testimony was to the contrary. Respondent and Dr. Brady both testified that the X rays of tooth No. 19 showed decay in or a wasting away of the tooth structure below the gum line and leading towards the nerve. The fact that pain continued after the extraction of tooth No. 19 is not evidence that that tooth was negligently removed. Nor does the fact that Dr. Brady subsequently removed tooth No. 18 raise an inference that respondent was negligent in not extracting that tooth. The evidence is uncontradicted that respondent, in the exercise of a sound judgment, felt that the tooth might be saved by filling it. There is not one word of testimony that tooth No. 18 was so diseased that a dentist, acting reasonably, should have known that it had to be extracted.

The theory of appellant was that respondent was so interested in the fight broadcast that he negligently removed tooth No. 19, a sound tooth, when he intended to remove tooth No. 18. The theory sounds good, but the difficulty is that the evidence of appellant and of her witnesses not only does not support it, but is quite to the contrary. There was no mistake in removing tooth No. 19. When appellant first visited respondent to complain of pain in the molar area, respondent, after taking and examining the X rays, and after visually examining the teeth, told appellant that it was his belief that it was tooth No. 19 causing the trouble, and that that tooth should be removed and tooth No. 18 should be saved. Before the tooth was extracted respondent, according to appellant, carefully explained the X rays and told her

that tooth No. 19 should be extracted. Appellant consented. No mistake was made. What was done was intentionally done, and done with appellant's consent. There is no evidence nor any inference from the evidence to support appellant's theory.

[5] The consent of appellant to the removal of tooth No. 19 was, of course, also a complete legal defense to the assault and battery charge.

Thus, the nonsuit was properly granted as to both charges involved.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.



163 Cal.App.2d 587

Harry SCHRAIER, Plaintiff, Cross-Defendant and Appellant,  
v.

Beatrice Pauline SCHRAIER, also known as Beatrice Pauline Schrarler, Pioneer Savings & Loan Association, Bank of America National Trust & Savings Association, Security First National Bank of Los Angeles, Farmers & Merchants National Bank of Los Angeles, Doe Savings & Loan Association and Doe I to X Inclusive, John Doe Company and Roe Corporation I to X Inclusive, Defendants.

Beatrice Pauline Schrarler, Defendant, Cross-Complainant and Respondent.  
Civ. 23097.

District Court of Appeal, Second District,  
Division 2, California.  
Sept. 17, 1958.

Action for divorce. From a portion of an order of the Superior Court of Los Angeles County, Elmer D. Doyle, J., modifying the alimony provisions of an interlocutory judgment of divorce, the husband appealed. The District Court of Appeal, Herndon, J., held that evidence supported

order modifying alimony provisions of an interlocutory judgment of divorce by providing that the husband should pay nominal sum of \$1 per month until further order of the court.

Order affirmed.

#### 1. Divorce $\Rightarrow$ 245(1)

Where application for modification of an award of alimony by the wife was filed before the expiration of the period covered by the original award, the trial court had the power to order the continuation of alimony after the expiration of such period if there was sufficient showing of a change of circumstances.

#### 2. Divorce $\Rightarrow$ 245(3)

Testimony that since rendition of judgment making an award of alimony the wife had suffered a heart attack and that her health had seriously deteriorated constituted a sufficient showing of change in circumstances to justify a modification of the award so as to retain jurisdiction in the court so that it might have power in the future to make such further order as the eventualities might require.

#### 3. Divorce $\Rightarrow$ 235

The question of making a nominal award of alimony for the purpose of retaining jurisdiction to deal with future possibilities is within the sound judicial discretion of the trial judge.

#### 4. Divorce $\Rightarrow$ 245(3), 286

The determination of whether there has been sufficient change of circumstances to justify modification of an alimony award rests largely in the discretion of the trial judge and such determination will not be disturbed unless an abuse of that discretion is clearly shown.

#### 5. Divorce $\Rightarrow$ 245(3)

Evidence supported order modifying alimony provisions of an interlocutory judgment of divorce by providing that the husband should pay nominal sum of \$1 per month until further order of the court, where though the trial court could reasonably conclude that the circumstances of the



parties were not such that a substantial alimony award should be made, the disabling potentialities of the wife's ailments were of such a character as to justify a retention of jurisdiction.

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Tobias G. Klinger, Los Angeles, for appellant.

Caras & Evangelatos, Los Angeles, for respondent.

HERNDON, Justice.

The order here presented for review modifies the alimony provision of an interlocutory judgment of divorce. The judgment required the husband to pay the wife alimony in the sum of \$40 per week beginning on October 19, 1956, and continuing for a period of 52 weeks. Before the expiration of the period covered by the original award the wife applied for a modification which would increase the payments to \$50 per week and require their continuation "until further order of the court." Upon the hearing the trial court concluded that the wife had "failed to establish sufficient change of circumstances since the granting of the interlocutory decree, upon which to grant an order requiring [the husband] to pay continued support" but that the husband should be required to pay the nominal sum of \$1 per month commencing on November 1, 1957, and continuing until further order of court. The husband appeals.

The essence of appellant's argument is that the evidence shows no substantial change in the circumstances of the parties, and that the lack of this requisite basis for the modification order is conclusively established by the "finding" that there was no sufficient change of circumstances to justify the extension of alimony payments except in a nominal amount. A brief review of the record will demonstrate that appellant's position is untenable.

At the time of their separation, the parties had been married more than 31 years and had two adult children. The divorce was granted to respondent wife on the

ground of extreme cruelty. She was awarded 51% of the community property which consisted of approximately \$38,000 in cash and a few other items of personal property. At the time the divorce case was tried, appellant was earning take-home pay averaging about \$80 per week. Respondent testified that she had not worked for some 14 years and that she was at that time physically unable to work by reason of extreme nervousness, arthritis and migraine headaches.

Turning now to the hearing of the modification proceeding, the testimony may be briefly summarized. Respondent testified that she still retained at least \$18,000 of the approximately \$19,000 which she had been awarded from the community property; that since the trial of the divorce action she had suffered a heart attack; that her health had become further impaired with a severe worsening of her previous ailments; that due to her recurring illnesses she had been bedridden at frequent intervals with the result that her expectation of being able to find gainful employment had been defeated. Respondent's testimony with respect to the deterioration of her health was substantially corroborated by a neighbor who testified to her observations that respondent's feet were so swollen that she walked with difficulty; that at frequent intervals she was confined to her bed by her illnesses for varying periods of time, and that respondent had "aged at least 10 or 12 years in the last 6 to 8 months."

The evidence revealed that appellant also had conserved his share of the community property. His average earnings had increased from \$80 to approximately \$86 per week, the increase being partially attributable to the fact that he had been able to work continuously since the divorce trial whereas previously he had suffered a temporary disability. It appeared that appellant had recently acquired a new home and was contemplating remarriage.

[1,2] Since the application for a modification was filed before the expiration of the 52-week period covered by the original

award, it is not disputed that the trial court had the power to order the continuation of alimony after the expiration of said period, assuming a sufficient showing of a change in circumstances. *Simpson v. Simpson*, 134 Cal.App.2d 219, 221-222, 285 P.2d 313; *Bechtel v. Bechtel*, 124 Cal.App. 617, 618, 12 P.2d 970; *Smith v. Superior Court*, 89 Cal.App. 177, 187-189, 264 P. 573. The trial court was entitled to give full credit to the undisputed testimony that since the rendition of the judgment respondent had suffered a heart attack and that her health had seriously deteriorated. Quite clearly this testimony alone showed a sufficient change in circumstances to justify the modification, the obvious purpose of which was to retain jurisdiction so that the court would have power in the future to make such further order as eventualities might require.

[3,4] As we pointed out in *Bird v. Bird*, 152 Cal.App.2d 99, 100-101, 312 P.2d 773, 774, "This question of making a nominal award for the purpose of retaining jurisdiction to deal with future possibilities is one which, like others pertaining to allowance of alimony, is committed to the sound judicial discretion of the trial judge." See *Farnsworth v. Farnsworth*, 81 Cal.App.2d 380, 383, 184 P.2d 7. The determination of the question whether or not there has been a sufficient change of circumstances to justify the modification of an alimony award rests largely in the discretion of the trial court, and such determination will not be disturbed by a reviewing court unless an abuse of that discretion is clearly shown. *Wilson v. Wilson*, 104 Cal.App.2d 167, 170, 231 P.2d 128; *Simpson v. Simpson*, supra, 134 Cal.App.2d 219, 224, 285 P.2d 313.

[5] From the evidence before it, the trial court could reasonably conclude that although the immediate circumstances of the parties were such that a substantial alimony award was not necessary, the disabling potentialities of respondent's ailments, with attending possibilities of her having to incur greatly increased expenses for medical care, were of such character as

to justify a retention of jurisdiction. In view of a 31-year marriage it does not seem unreasonable for the trial court in these circumstances to reserve the power further to enforce duties arising from the marital relation as the foreseeable and unforeseeable eventualities of the future may justly dictate.

The order is affirmed.

FOX, P. J., and ASHBURN, J., concur.



163 Cal.App.2d 424

George W. AYER, Plaintiff and Respondent,  
v.

E. W. ROBINSON et al., Defendants,

E. W. Robinson, Appellant.

Civ. 22890.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 11, 1958.

Civil action brought for damages for assault against defendants, father and son. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment for plaintiff and against both defendants for \$8,500 compensatory damages and \$1,000 exemplary damages, and father appealed. The District Court of Appeal, Shinn, P. J., held that although there was no evidence that father struck plaintiff, in view of testimony that father urged and encouraged his son to attack plaintiff, evidence was sufficient to support finding that father committed an assault on plaintiff and that father was actuated by malice.

Affirmed.

#### I. Assault and Battery §18

A party injured by an unjustified assault may recover damages not only from the actual assailant, but from any other person who aids, abets, counsels or encourages the assault.

**2 Assault and Battery**  $\S$ 35

In action against father and son for assault, evidence including disclosure that father urged and encouraged his son to attack plaintiff sufficiently supported finding that father committed assault on plaintiff, even though there was no evidence that father struck plaintiff.

**3. Trial**  $\S$ 391, 395(5)

Where a cause is tried to the court, the court must make findings on all material issues of fact raised by the pleadings and the evidence, but where the court has made findings upon the material facts in issue, it need not make further findings upon the probative facts, as a finding of ultimate fact includes a finding of all probative facts necessary to sustain it.

**4. Trial**  $\S$ 397(2), 404(3)

In action against father and son for assault, finding that defendants assaulted plaintiff was one of ultimate fact and it was not necessary that the trial court further find that father participated in the assault by aiding and abetting his son.

**5. Assault and Battery**  $\S$ 39, 42

An award of punitive damages is proper where the assault has been wantonly and maliciously committed, and the question of malice is one for the trier of fact.

**6. Assault and Battery**  $\S$ 35

In action against father and son for assault, where there was testimony respecting father's grievance against plaintiff and his employer, and father's participation in assault committed by his son, evidence furnished ample basis for finding that father was actuated by malice and for award of punitive damages.

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Bernard B. Cohen and Henry S. Cohen, Beverly Hills, for appellant.

Frank J. Kashare and Henry E. Kappler, Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action is against E. W. Robinson and his son, Ray Robinson, for damages for assault. Defendants filed a joint

answer, in which Ray Robinson admitted striking plaintiff, but alleged as an affirmative defense to the action that he did so in self-defense. It was also alleged as a defense that any violence committed by defendants was provoked by plaintiff's vile and abusive language, and by his unlawful "interference" with E. W. Robinson. After an extended trial, the court made findings and entered judgment in favor of plaintiff and against both defendants for \$8,500 compensatory damages and \$1,000 exemplary damages. E. W. Robinson appeals from the judgment; Ray Robinson has not appealed.

Plaintiff was employed as a truck driver by John Ferroni, who transported race horses to and from various tracks in California during racing seasons; appellant was one of Ferroni's competitors. On the morning of October 11, 1954, plaintiff drove a van belonging to Ferroni to a railway station near the Hollywood Park race track in order to pick up some harness horses that were scheduled to arrive by train from the east. At the station was a dock which was used primarily for the loading and unloading of freight. Ayer parked the van beside the dock and went onto the dock to wait for the train. A driver named Armstrong arrived shortly thereafter in another van. Ayer testified that appellant approached him and asked him what he was doing on the dock. Ayer said that he was there to pick up horses that had been consigned to Ferroni and appellant replied that plaintiff had no business picking up horses at the station.

Ayer returned to the station the following day as the horses he was expecting did not arrive on the 11th. Ferroni came to the dock a few minutes later. Ayer and Ferroni testified that appellant approached them and demanded to know what they were doing on the dock; appellant told Ferroni that they had no right to be there because he had "the contract" to haul horses to and from the track. Ferroni replied that he had letters and telegrams authorizing him to pick up some horses and transport them to the track. Ayer and Ferroni remained at the dock, but their horses did not arrive.



On the morning of the next day, October 13th, Ayer and Armstrong went to the station in separate vans; Ferroni arrived shortly thereafter. There were a number of people on the dock waiting for the train. Ayer waited near Armstrong's van. Plaintiff stated that a man whom he did not know, and who proved to be Ray Robinson, appellant's son, came up to him and asked him if he was the driver of Ferroni's van. When plaintiff said "yes", Robinson said "You'll have to move it." Ayer replied that he would not move the van until he picked up his horses, whereupon Robinson said: "If you don't move it, I will." As Robinson started to walk down the dock toward the van, plaintiff told Ferroni what Robinson had said, and Ferroni began to walk rapidly after Robinson. Ferroni called out "Hey Heavy", whereupon Robinson wheeled about and struck him on the head, knocking him to the ground. Robinson then jumped on top of Ferroni and began pounding him about the face and body. Plaintiff testified that while Robinson was hitting Ferroni, appellant was "egging him on" and shouted "Hit him; kill the s. b." and "Here is the other s. b.; get him too." Plaintiff ran up to the scene. Meanwhile, a man named Witt seized Robinson's arms and tried to pin them to his body. Robinson swung at Witt. Witt testified that appellant then shouted "No, it is not him. It is that one over there" and pointed to plaintiff. Robinson then hit plaintiff in the face, knocked him down, beat him about the face and body, picked him up and shoved him against the railing of the dock, and raised his fist to strike Ayer again, whereupon a Mr. French, an employee of the railroad, told him to stop or he would hit him with a crowbar. Armstrong testified that when French intervened, appellant called out: "Let 'em go it." Plaintiff suffered severe personal injuries, including three broken ribs, as a result of the beating.

Appellant's version of the circumstances occurring on October 11th, 12th and 13th differed materially from the versions related by plaintiff and his witnesses. Appellant testified that on October 11th plaintiff

parked Ferroni's van beside one of his own vans, making it impossible for him to load horses through the side gate. The van had room for eight horses, but only two could be loaded through the rear gate of the vehicle. Appellant asked plaintiff to move his van, but Ayer refused and became belligerent. The following day, plaintiff again parked his van in such a way as to prevent appellant from loading horses through the side gate. When appellant asked Ayer and Ferroni to move their vehicle they swore at him and threatened to "get" him either at the station or at the race-track. However, within 15 or 20 minutes they did move their truck about 20 feet and Robinson loaded his horses. That night, appellant visited his son, who was a fireman employed by the City of Los Angeles. Appellant told him that two men had been blocking his van, and that they were going to "get" him; he did not identify Ayer and Ferroni by name. Appellant denied calling out to his son during the altercation; several other witnesses to the fight testified that they did not hear appellant say anything to his son.

It appears from appellant's testimony that he had asserted to Ferroni and Ayer that he had the exclusive right to load horses from the dock, which they denied. He stood by looking on while his son was mutilating both Ferroni and Ayer, uttered no remonstrance and made no attempt to interfere. He testified that while the fight was under way he said something to the effect that "these are the two fellows that were trying to get me for three days." He had a grievance against Ferroni and Ayer because of the manner in which they parked their truck and because he claimed they were interfering with his business; they had none against him. The court would have been warranted in believing that he was not only pleased with the manner in which his son was handling the situation but actively encouraged him to assault Ayer.

Ray Robinson testified that he went to the dock on October 13th because he was concerned about his father. He did not know Ayer or Ferroni and had never seen them

before. His father pointed them out to him at the dock. He hit Ferroni after the latter seized him by the shoulder from behind and spun him around; he only struck Ferroni once. Plaintiff "jumped" him and hit him in the stomach, so he struck back. He hit Ayer only two or three times. Several other witnesses called by the Robinsons testified that plaintiff was the aggressor.

The court found that "the defendants wrongfully and violently assaulted plaintiff, struck and beat the plaintiff \* \* \*" and that "defendants were, and each of them was, \* \* \* guilty of a wilful, wanton, cruel and malicious attack" on his person. The court also found the affirmative defenses alleged in the answer to be untrue.

[1,2] The first assignment of error to be considered is that the evidence does not support the finding that appellant committed an assault upon Ayer for the reason that there was no evidence that he was guilty of striking plaintiff. The argument is without merit. A party injured by an unjustified assault may recover damages not only from the actual assailant, but from any other person who aids, abets, counsels or encourages the assault. *Turner v. Whittel*, 2 Cal.App.2d 585, 589, 38 P.2d 835; *Boyajian v. Balian*, 7 Cal.App.2d 174, 176, 46 P.2d 199. Whether appellant aided and abetted his son in administering a severe beating to plaintiff was a question of fact to be resolved by the court. Although the evidence was in conflict, the court could conclude from the testimony of plaintiff and his witnesses that appellant urged and encouraged his son to attack plaintiff. This testimony, if believed, sufficiently supports the challenged finding.

[3,4] It is next contended that the court erred in failing to make findings upon a material issue of fact. In this connection, appellant argues that the court should have made a finding as to the theory upon which he was to be held liable in damages, and that in failing to do so the court committed

reversible error. We cannot agree. Appellant directs our attention to the established rule that where a cause is tried to the court, the court must make findings on all material issues of fact raised by the pleadings and the evidence. However, it is also well settled that where the court has made findings upon the material facts in issue, it need not make further findings upon the probative facts, as a finding of ultimate fact includes a finding of all probative facts necessary to sustain it. *Fischer v. Ostby*, 127 Cal.App.2d 528, 531-532, 274 P.2d 221, and cases cited; 24 Cal.Jur. 968-969, 974-975. It is contended that the court may have held appellant liable on the theory of respondeat superior or the theory that he advised and encouraged the assaults by his son. It is a specious argument. It is negated by the pleadings, the remarks of the court and the fact that plaintiff developed by the testimony of appellant that his son did not work for him. The finding that the defendants assaulted plaintiff was one of ultimate fact, and a further finding that appellant participated in the assault by aiding and abetting his son would have been superfluous.

[5,6] The final contention to be considered is that the award of \$1,000 punitive damages against appellant was unwarranted for the reason that there was no evidence of malice. The argument cannot be maintained. An award of punitive damages is proper where the assault has been wantonly and maliciously committed, and the question of malice is one for the trier of fact. *Herman v. Glasscock*, 68 Cal.App.2d 98, 104, 155 P.2d 912. We have already related the testimony respecting appellant's grievance against Ferroni and Ayer and his participation in the assault; it is unnecessary to repeat it. There was ample evidentiary basis for the finding that appellant was actuated by malice.

The judgment is affirmed.

PARKER WOOD and VALLEE, JJ.,  
concur.

163 Cal.App.2d 553

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Winston Glenn CREWS, Defendant and**  
Appellant.  
Cr. 2771.

District Court of Appeal, Third District,  
California.

Sept. 16, 1958.

Defendant was convicted in the Superior Court, Butte County, Dudley G. McGregor, J., for forgery and for issuing a check without sufficient funds, and he appealed. The Third District Court of Appeal, Peek, J., held that since notice of appeal had not been filed until 11 days after entry of judgment, appeal would have to be dismissed, notwithstanding fact that notice had been prepared for defendant and filed by prison records officer.

Appeal dismissed.

**Criminal Law** ⇨ 1081

Where notice of appeal was not filed until 11 days after entry of judgment, appeal would have to be dismissed, notwithstanding fact that notice had been prepared for defendant and filed by prison records officer. West's Ann.Pen.Code, §§ 470, 476a.

Peter M. Koutchis, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction following a jury verdict finding him guilty of forgery (Penal Code, sec. 470) and issuing a check without sufficient funds. Penal Code, sec. 476a.

The record shows that defendant's notice of appeal was filed on the eleventh day fol-

lowing the entry of judgment. The mere fact that the notice was prepared for defendant and filed by the prison records officer is insufficient to warrant application of the rule enunciated in *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868. See also *People v. Head*, 46 Cal.2d 886, 299 P.2d 872. It necessarily follows that the appeal must be dismissed. *People v. Riser*, 47 Cal.2d 594, 305 P.2d 18.

The appeal is dismissed.

VAN DYKE, P. J., and SCHOTTKY,  
J., concur.



163 Cal.App.2d 513

**Mattle JORGENSEN, Petitioner,**

v.

**The SUPERIOR COURT of the State of**  
**California, IN AND FOR THE COUNTY**  
**OF SONOMA, Respondent.**

Civ. 9492.

District Court of Appeal, Third District,  
California.

Sept. 12, 1958.

Hearing Denied Nov. 5, 1958.

Mandamus to compel Superior Court to set aside its order denying application for pre-trial inspection of medical report in the possession of attorneys for defendants. The District Court of Appeal, Schottky, J., held that where plaintiff voluntarily submitted to physical examination by physician on request of attorneys for defendant, and report was thereafter transmitted to attorneys for defendant, submission of plaintiff to examination was adversary rather than confidential, medical report was not privileged as a communication between client and attorney or as a report of an expert witness on subject matter of litigation, and plaintiff was entitled to a copy of report.

Writ issued.



**1. Witnesses**  $\Rightarrow$ 211(2)

When plaintiff is examined by physician for purpose of informing plaintiff's attorney as to plaintiff's physical condition, the medical report is privileged, but when plaintiff is examined by physician for purpose of informing defendant's attorney as to plaintiff's physical condition the medical report is not privileged. West's Ann.Code Civ.Proc. §§ 2031, 2032.

**2. Discovery**  $\Rightarrow$ 90

Where plaintiff voluntarily submitted to physical examination by physician on request of attorneys for defendant and medical report was thereafter transmitted to attorneys for defendant, submission of plaintiff to examination was adversary rather than confidential, medical report was not privileged as a communication between client and attorney or as a report of an expert witness on subject matter of litigation, and plaintiff was entitled to a copy of report. West's Ann.Code Civ.Proc. §§ 2031, 2032.

**3. Witnesses**  $\Rightarrow$ 219(4)

Even if medical report which was submitted to defendant's attorneys after plaintiff was examined at request of defendant's attorneys were privileged, such privilege was waived. West's Ann.Code Civ.Proc. §§ 2031, 2032.

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Barbagelata, Zief & Carmazzi, San Francisco, for petitioner.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Peart, Baraty & Hassard, San Francisco, James B. Shovlin, Jr., San Francisco, and Edward Dermott, Santa Rosa, for respondents.

SCHOTTKY, Justice.

This is a petition for a writ of mandate to compel the respondent to set aside its order denying an application for the pre-trial inspection of a certain medical report in the possession of the attorneys for Daniel McCaskill, the defendant in a civil action initiated by the petitioner.

On May 13, 1957, petitioner filed a complaint for damages due to personal injuries resulting from the alleged medical malpractice of defendant Daniel McCaskill.

The attorneys for defendant Daniel McCaskill requested that the petitioner be examined by Dr. John Adams. On January 14, 1958, the petitioner voluntarily submitted to a physical examination by Dr. Adams, whose report was thereafter transmitted to the attorneys for defendant.

The petitioner did not receive a copy of this medical report and her request for such copy was refused by the attorneys for defendant. Petitioner then, on March 14, 1958, moved the respondent court for an order to inspect and copy this medical report. This motion was denied on March 18, 1958. A subsequent motion to vacate the respondent court's order of March 18, 1958, was likewise denied on March 28, 1958.

The motions of petitioner before the respondent court were apparently made under the authority of sections 2031 and 2032 of the Code of Civil Procedure. Section 2031 in effect permits any party, upon good cause shown, to inspect and copy any documents or other papers in the possession of any other party. Section 2032 in effect provides that where the mental or physical condition of a party is in issue the court may, upon good cause shown, order a party to submit to a physical examination. The party examined pursuant to such order is then entitled to a copy of the medical report.

It appears that the motions of the petitioner were denied solely on the ground that the medical report was privileged, the court stating: "It is, therefore, the Court's opinion that the communications, whether they be oral or in writing, between Dr. Adams and counsel for defendant, are privileged and, therefore, not subject to inspection under Sections 2031 and 2032 of the Code of Civil Procedure."

The respondent contends that this report is within the attorney-client privilege. It relies principally on City and County of

*San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26, 25 A.L.R.2d 1418. In that case the plaintiff brought an action against the city. To aid in preparing the suit the plaintiff's attorney caused the plaintiff to be examined by a doctor to ascertain the extent of his injuries. The defendant city sought to compel the doctor to answer certain questions. The court held that while no physician-patient privilege was present the attorney-client privilege was applicable and the doctor could not be compelled to answer. The theory of the case was that the attorney-client privilege exists in order to permit a client to communicate freely with his legal adviser without fear that such communication would later be divulged to his prejudice. In order to communicate with his attorney it may be necessary for the client to employ an agent, such as a messenger or interpreter and any communication through such an agency is likewise within the privilege. When it is necessary for the client to communicate information as to his physical condition to his attorney he may require the services of a physician. The physician is then the agent through which the communication is made and his report would be privileged. As the court there stated (37 Cal.2d at page 237, 231 P.2d at page 31): "Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed."

[1,2] Thus we see that the attorney-client privilege is to protect communications between attorney and client. When the plaintiff is examined by a physician for the purpose of informing the plaintiff's attorney as to the plaintiff's physical condition the medical report is privileged. *City and County of San Francisco v. The Superior Court*, *supra*; *In re Ochse*, 38 Cal. 2d 230, 238 P.2d 561; *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417.

However, when the plaintiff is examined by a physician for the purpose of informing the defendant's attorney as to the plaintiff's physical condition the circumstances are entirely different and the same rule is not applicable. It is communication between the client and his own attorney which is privileged. In the instant case the communication was by plaintiff to a physician engaged by counsel for defendants. In such a case the necessary element of attorney-client relationship is lacking and the essential feature of confidential intent in revealing information is also lacking.

Our Supreme Court has held in *Sharff v. Superior Court*, 44 Cal.2d 508, 282 P.2d 896, that when a doctor selected by defendants conducts a physical examination of plaintiff, the plaintiff should be permitted to have plaintiff's attorney present during the examination. This indicates strongly that the submission of plaintiff to examination by a doctor employed by defense counsel is adversary rather than confidential.

Respondent also argues that the physician in this case is in the nature of an expert witness who has examined the subject matter of litigation and that his report is then privileged. However, this report was made possible only through the cooperation of the plaintiff. Without such cooperation the defendant would have been compelled to seek a court order requiring such an examination and under such a situation the plaintiff would have been entitled to a copy of the report. Code of Civil Procedure, sec. 2032. Therefore, when the plaintiff voluntarily submits to such an examination there is no reason to deny him a copy of the report.

[3] We conclude that the medical report requested by petitioner was not a privileged communication and that the court erred in denying petitioner's motion for an inspection of it. But even if the report was privileged we believe that the privilege was waived.

A similar question was recently before the First District Court of Appeal in

Grover v. Superior Court, 161 Cal.App.2d 644, 327 P.2d 212. In that case counsel for plaintiff had stipulated that a Dr. O'Connor, acting for defendant, could conduct a physical examination of plaintiff. Thereafter, plaintiff's request for a copy of the report was refused. The Superior Court denied plaintiff's motion to inspect and take a copy of the report, and plaintiff sought a writ in the District Court of Appeal. In granting the writ the court said, 161 Cal.App.2d at page 647, 327 P.2d at page 214:

"\* \* \* Since the communication by plaintiff was not to his attorney, and the communication to defendant's attorney probably was not by his client, it would be difficult to hold that the medical report is within the attorney-client privilege defined by our statute. But we do not find it necessary to pass upon this question, as we have concluded that, even if the privilege exists, it was waived.

"Defendant relies heavily upon the provision of the amendatory statute that:

" 'This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.' Code Civ. Proc. § 2016, [subd.] (b).

"Section 2032, subdivision (b) (1), provides expressly that upon request of the person examined the opposing party shall deliver to him a copy of the examining physician's report. Assuming that the report is privileged, it is contended that the two sections are in conflict. Of course, to treat section 2032, subdivision (b) (1) as eliminating a privilege heretofore existing would be to create direct conflict between this section and the above quoted language of Section 2016, subdivision (b), thus necessitating holding one or

the other of these simultaneously adopted provisions to be inoperative. But a statute should be so construed as to give effect to each and every part thereof. (23 Cal.Jur. 758.) To construe Section 2032, [subdivision] (b) (1) as providing that any privilege against disclosure of the medical report is waived by procuring the physical examination upon which that report is based is in accord with this basic principle. Thus construed, Section 2032, [subdivision] (b) (1), does not 'change the law of this State with respect to the *existence* of any privilege,' but provides only that, if there be a privilege whose continuing existence is recognized, nonetheless the privilege is waived. We adopt this construction."

Let the writ issue as prayed for.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.



163 Cal.App.2d 373

Charles H. TARBOX, Plaintiff and Appellant,

v.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES and H. L. Byram, Defendants and Respondents.

Civ. 22881.

District Court of Appeal, Second District, Division 3, California.

Sept. 8, 1958.

Proceeding by motion picture theater operator for writ of mandate to board of supervisors and county tax collector which had denied renewal of license to operate motion picture theater. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment denying petition and theater operator appealed. The District Court of Appeal, Nourse, J. pro



tempore, held that evidence that some 19 arrests had been made in theater for violation of lewd conduct statute but visiting the theater by persons of homosexual propensities could not be stopped despite owner's engagement of private detective, was insufficient to deny renewal of license for operation of theater.

Reversed with directions.

#### 1. Mandamus ☞168(3)

Where proceeding was brought for writ of mandate to the board of supervisors and county tax collectors denying renewal of motion picture theater operator's license, superior court was not entitled to receive any other evidence than that which was before the board.

#### 2. Theaters and Shows ☞4

Business of operating a motion picture theater is a lawful one of beneficial character and not inherently dangerous to public, and while it may be subject to reasonable regulation, it may not be prohibited.

#### 3. Theaters and Shows ☞4

Motion picture theater operator could not have refused admission to persons of homosexual proclivities who had not committed or attempted to commit any lewd act upon the premises, since such persons have a legal right to be admitted to any place of public amusement.

#### 4. Theaters and Shows ☞3

In proceeding on motion picture theater operator's proceeding for writ of mandate to review decision of county board of supervisors and tax collector in denying renewal of motion picture theater license, evidence disclosing that some 19 arrests for lewdness had been made in theater and that despite operator's hiring of a private detective, darkened theater made it impossible to observe lewd acts, was insufficient to justify denying renewal of license. West's Ann.Pen.Code, § 647, subd. 5.

#### 5. Theaters and Shows ☞3

County board of supervisors in acting upon theater operator's application for

renewal of license acted in a quasi-judicial capacity and was required to exercise its discretion in accordance with law, and it was necessary that its decision be based upon sufficient evidence.

S. V. O. Prichard, Hollywood, for appellant.

Harold W. Kennedy, County Counsel and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

NOURSE, Justice pro tem.

[1] Appellant here, petitioner below, appeals from the judgment denying his petition for a writ of mandate addressed to the respondent board of supervisors and the county tax collector and dismissing said petition. While the judgment appealed from purports to be based upon an order sustaining a demurrer to the petition without leave to amend, inasmuch as the petition set forth the entire record before the board of supervisors and as the return to the alternative writ issued by the superior court incorporated that record and as the superior court was not entitled to receive any other evidence than that which was before the board (*Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 246 P.2d 656), we treat the judgment as one upon the merits.

The petitioner is the owner of and since October, 1955 has operated a motion picture theater known as the Carmel Museum Theater in the county of Los Angeles. Each year he was issued a license by the county of Los Angeles to conduct the operation of that theater. In March of 1957 petitioner applied for a renewal of his license and, objection thereto having been made by the sheriff of the county a hearing was held before a referee appointed by respondent board of supervisors; and after that hearing, the referee made a written report to the board of supervisors recommending that petitioner's application be denied. The board, without hearing further evidence, adopted the report of the referee and denied the petitioner's application.

The question for decision here is: Did the evidence before the referee, giving that evidence every intendment in favor of the action of the board, justify the board's action denying petitioner a renewal of his license?

The facts as shown by the evidence, viewing that evidence in the light most favorable to the respondent board, are:

The petitioner purchased the theater in question in October, 1955 and from that time until the theater was closed by the police in March of 1957 operated it as a motion picture theater; the theater was operated in the same manner as similar theaters in the county were operated. In the theater he showed only films of high quality and there is no contention that any of them were of a lewd or immoral character or which might induce lewdness on the part of any patrons. From October 25, 1956, until March 17, 1957, 19 men were placed under arrest in the theater during the showing of pictures on charges of violation of section 647, subdivision 5, of the Penal Code (vagrancy, lewd). These arrests were all based upon attempts by the persons arrested to place their hands upon the private parts of members of the sheriff's vice squad (plain clothesmen) who had seated themselves as decoys in the theater. All arrests of the alleged offenders occurred when the theater was dark for the purpose of exhibiting the picture. During the period in which the arrests were made from two to five members of the vice squad attended each performance in the theater. In this period a minimum of 20,000 patrons attended the theater.

When petitioner first learned of the arrests in the theater, on about the 19th of January 1957, he immediately contacted the office of the sheriff and learned the cause of the arrests and he then learned of other arrests that had been made and of the fact that persons of homosexual propensities were among his patrons and that they had attempted lewd acts within the premises. He then attempted to retain deputy sheriffs in uniform to work in the theater during their off hours but after this was first

arranged he was advised that it was against the policy of the sheriff's department to permit the sheriff's deputies to take outside employment and that he should get a private detective to do that work. This he did and from that time on a private detective was at all times on duty in the theater. On several occasions this detective requested persons who were believed to be of undesirable character to leave the theater although no lewd acts were observed. Finally, the defendant engaged the services of a uniformed private patrolman to assist the plain clothes private detective whom he had employed but on the following day the theater was closed by the sheriff on the grounds that it was a public nuisance.

The officer in charge of the sheriff's vice squad testified that 10 of the 19 arrests were made after the employment of the private detective by the petitioner; a darkened theater was "a pretty poor place to make observations of criminal acts"; and that the theater therefore constituted a serious police problem and that the sheriff's office could not properly police it so as to prevent the commission of lewd acts, such as we have heretofore described, by the patrons.

No evidence was offered against the character of petitioner or that the petitioner had knowingly allowed into the theater any person known by him to have committed or attempted to commit any lewd act therein or that he had failed to eject from the premises any such person.

The referee found and reported to the board that 19 arrests for violation of Penal Code, section 647, subdivision 5, had been made during the period of October 25, 1956, to March 17, 1957; that the number of arrests at the theater indicated that a number of individuals with homosexual tendencies frequented "the area"; the semidarkened theater provided an ideal place for the promotion of such activities and that "the surreptitious actions of such persons could well go unobserved by patrons" unless they were personally contacted. He concluded that the activities

of the homosexually inclined patrons of the theater clearly established that the continued operation of the theater constituted a public nuisance and was extremely detrimental to the public welfare.

Section 83 of the County Licensing Ordinance upon which the respondents found their right to deny a license to petitioner reads in part as follows:

"The Board \* \* \* shall not \* \* \* grant, and the Tax Collector shall not issue a license to carry on any business, occupation or activity, *if such business* \* \* \* has been \* \* \* any one or more of the following:

"\* \* \* (b) A public nuisance.

"(c) In any way detrimental to the public interest.

"(d) Prohibited by [this is followed by the number and title of the county zoning ordinance]." *(Italics ours.)*

Section 84 provides that the license may be denied if the applicant is unfit to be trusted with the privileges granted by the license.

It is respondents' contention that the evidence before the referee establishes that petitioner's business was a public nuisance, that it was detrimental to the public welfare and that applicant was shown to be an unfit person to conduct the business. They also assert that due to the presence in the area of persons of homosexual proclivities the board could find that the theater was not a proper place to conduct a motion picture theater despite the fact that the property was zoned for use for that purpose. None of these contentions can be sustained.

[2] The business of operating a motion picture theater is a lawful one of beneficial character and not inherently dangerous to the public and while it may be subject to reasonable regulation it may not be prohibited. *Central States Theatre Corporation v. Sar*, 245 Iowa 1254, 66 N.W.2d 450, 455-457; 86 C.J.S. Theaters & Shows § 3, p. 668; 16A C.J.S. Constitutional Law § 668, pp. 1061-1063; and see collaterally 11 Cal.Jur.2d 561-562. It is not asserted nor would the evidence sustain such an as-

sertion that petitioner conducted his business in any other manner than motion picture theaters are ordinarily conducted. It is not asserted that he countenanced, consented to or in any wise permitted any lewd or immoral acts upon the premises. It cannot be said, therefore, that the business conducted by him constituted a public nuisance although it may be that the acts of those who gained lawful entrance to the theater might be detrimental to those of the public who observed them or who were molested by these unfortunate deviates. It is their acts which were seemingly beyond the control of either the police or petitioner which were detrimental to the public interests, not the operation of a motion picture theater. The fact that a motion picture theater, being a darkened place, provides opportunity for these persons to assert their unnatural proclivities is true of every theater, motion picture or legitimate, or of any other place to which the public is admitted and which through the nature of the business transacted therein is darkened; and if, because the condition permits of the performance of some lewd act, this makes the place a public nuisance then all such places are public nuisances. To so hold would be absurd.

[3] The assertion that the board could deny a license because, although the property was zoned and the building designed for use as a theater, the board could find that it was a wrong location in which to conduct a theatrical business seems to us unsound. The fact, if it be a fact, that an area is frequented by homosexuals could in nowise justify the depriving another citizen of the right to conduct a lawful and harmless business in the area. As we have said, there is no evidence that petitioner permitted anyone to enter his premises who had conducted himself in a lewd manner thereon nor is there any evidence that he admitted anyone of known homosexual proclivities; nor could he have refused admission to persons of that character who had not committed or attempted any lewd act upon the premises, for such persons have a legal right to be admitted to any place of public



amusement. *Stoumen v. Reilly*, 37 Cal.2d 713, 716, 234 P.2d 969; *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 227 P.2d 449; *Nickola v. Munro*, Cal.App., 328 P.2d 271.

[4] Respondents argued that the fact that petitioner was unable to prevent the commission of lewd acts within his premises establishes that he is a person unfit to hold a license to operate such a theater. There is no merit in such a contention. He could not legally refuse admission to any person even though he knew him to be a homosexual unless that person had theretofore committed a lewd act upon the premises; and, it is admitted and shown by the evidence to be an impossibility to police in a darkened theater the surreptitious acts of each patron. The law does not require the impossible. It could be as well contended that the fact that the lewd acts were committed in the theater showed the incompetency of the sheriff's vice squad for if they, by constant surveillance, were unable to prevent these acts, how is it to be contended that the petitioner might do so.

The facts in this case are not comparable to those involved in *Kershaw v. Dept. of Alcohol Bev. Control*, 155 Cal.App.2d 544, 318 P.2d 494, or *Nickola v. Munro*, supra. In each of those cases the evidence showed that the person holding a license from the Department of Alcohol Beverage Control had so conducted his or her business as to countenance and in fact promote lewd and lascivious acts among the patrons of the licensed premises. The opposite is true here for it is unquestioned that petitioner did not countenance but used every endeavor to prevent such acts upon his licensed premises.

[5] The board's power to withhold a license to petitioner was not absolute. In acting upon petitioner's application it acted in a quasi-judicial capacity and it was required to exercise its discretion in accordance with the law and it was necessary that its decision be based upon sufficient evidence. *Weiss v. State Board of Equalization*, 40 Cal.2d 772, 775, 256 P.2d 1;

Cal. Rep. 329-330 P.2d-23

*Stoumen v. Reilly*, supra; *Riley v. Chambers*, 181 Cal. 589, 595, 185 P. 855, 8 A.L.R. 418. Here the evidence was insufficient to support the implied findings of the board or its act in denying a license to petitioner and the board's act was an unreasonable and arbitrary denial of petitioner's right to pursue a lawful occupation.

The judgment is reversed with directions to the trial court to issue a peremptory writ of mandate as prayed for in the petition.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 470

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Vernon HARRIS et al., Defendants,

Paul E. Le Blanc, Defendant and Appellant.  
Cr. 1375.

District Court of Appeal, Fourth District,  
California.

Sept. 11, 1958.

Hearing Denied Nov. 5, 1958.

Prosecution for receiving stolen property. The Superior Court, San Diego County, William P. Mahedy, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, P. J., held that evidence was sufficient to establish the corpus delicti, to establish venue, and to sustain conviction.

Judgment affirmed.

# I. Criminal Law  564(1)

## Receiving Stolen Goods  8(3)

Evidence was sufficient to establish the corpus delicti, to establish venue, and to sustain conviction for receiving stolen property. West's Ann.Pen.Code,   777.

**2. Criminal Law** §112(9)

The proper venue for the crime of receiving stolen property is the county in which the goods were received. West's Ann.Pen.Code, § 777.

**3. Receiving Stolen Goods** §7(1)

Information charging that property was stolen from a specified corporation and that in San Diego County, defendant feloniously received it and knew, at the time, that it had been stolen, sufficiently alleged the gist of the offense of receiving stolen property. West's Ann.Pen.Code, §§ 496, 951, 952, 1118.

**4. Receiving Stolen Goods** §9(2)

In prosecution for receiving stolen property, instruction that if jury should find from the evidence that a burglary was committed on premises involved and that thereafter defendant was found in possession of or claimed to be owner of certain property stolen from the burglarized premises, such a fact would be a circumstance tending in some degree to show guilt, although not sufficient standing alone and unsupported by other evidence to warrant jury in finding defendant guilty, was proper. West's Ann.Pen.Code, § 777.

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Edgar G. Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., John M. Huntington, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant Paul E. Le Blanc was charged with defendant Vernon Harris with the crime of receiving stolen property, set forth in two separate counts. Harris was charged with three prior convictions and appellant with two such convictions, which he admitted. In a consolidated case each defendant was charged with the burglary of a dress shop, of which charge they were acquitted. The jury returned a verdict of guilty as to appellant on count one and guilty as to Harris on the other count of receiving stolen property.

Le Blanc, in propria persona, appealed, and through his court-appointed attorney now claims, as we construe it (1) that the evidence was insufficient to convict appellant of the crime of receiving stolen property; (2) no proper venue or jurisdiction was alleged or proved; (3) no corpus delicti was established; (4) error of the court in denying appellant's motion for an advised verdict at the conclusion of the people's case; and (5) an erroneous instruction was given.

The evidence shows that one Dunaway, bookkeeper for B. F. Goodrich Company branch in El Centro, California, came to work early in the morning of September 22, 1957. The store had been broken into. Considerable merchandise, including a safe, was gone. An inventory was taken. A transistor radio with a specified serial number was among the property missing. All the sales tickets and contracts containing serial numbers were checked and no such radio had been sold from the store. This transistor radio ordinarily sold for \$33.95. In late September, 1957, appellant came to the home of one Elizabeth Cottingham, who stated that she lived at 2050 J Street (within the city limits of San Diego); that appellant was carrying a lady's blue suit and asked her if she wanted to buy it. He claimed he and his wife had separated and he wanted some money. The price mark of \$58 or \$60 was attached to the garment. She paid defendant \$10 and he left the suit with her. Later, he came to her home with a transistor radio and sold it to her for \$10. She positively identified Le Blanc as the one who sold her these articles which she subsequently turned over to the police. The radio was later, in court, identified by her as the one sold by defendant, and Dunaway identified it by serial number as being the one missing from his store. Later, about October 2nd, when appellant was apprehended, he denied selling a suit or radio to her. About October 30th, he was again interviewed by the officers and was asked why he denied selling the radio to Mrs. Cottingham and he remarked he did not want to implicate himself or anyone

else; that he received the dress from someone along Imperial Avenue who had stopped him and asked him to sell it on commission and that he found the transistor radio in his car one night; that someone had borrowed his car (Lee Knox's friends) and he did not notice the radio in it until later and did not know from whence it came. Appellant lived at 3030 Franklin Avenue in San Diego. On the witness stand he claimed he knew nothing about the burglary in El Centro and had never been there; that he did not know Mrs. Cottingham and did not sell her anything, and said that the first time he saw the radio was at his preliminary hearing.

One Lee Knox testified he and one Davis burglarized a dress shop in Del Mar and used appellant's car, and they also committed a burglary in El Centro at the Firestone Store and stole some appliances, transistor radios, etc.; that he kept one of the television sets and turned the rest over to Harris to sell and to divide the proceeds.

Harris testified he knew appellant about that time and roomed with Davis but knew nothing about the El Centro burglary and he never received any property from Davis or Knox. He admitted he had previously been convicted of felonies, to wit, burglary, grand theft and "suspicion of attempted burglary".

[1] A mere résumé of the evidence, notwithstanding appellant's claimed innocence, overwhelmingly supports the verdict of receiving stolen property as charged. *People v. Boyden*, 116 Cal.App.2d 278, 287, 253 P.2d 773; *People v. Malouf*, 135 Cal. App.2d 697, 706, 287 P.2d 834; *People v. O'Shaughnessy*, 135 Cal.App. 104, 110, 26 P.2d 847.

[2] There is no merit to the argument that the evidence did not show appellant received said property in San Diego County and that the prosecution did not establish venue there. The property was stolen in Imperial County. Appellant claims he was never in that county but did live in San Diego County, and it appears that all the transactions involving this radio and its

sale took place therein. The proper venue for the crime of receiving stolen property is in the county in which the goods are received. Penal Code, Sec. 777; *People v. Baca*, 34 Cal.App.2d 284, 287, 93 P.2d 174.

[3] The information does charge that the property stolen was the property of B. F. Goodrich Company, a corporation, without alleging where its place of business was located. Appellant claims it may have been in Russia, China, or Europe, and he was entitled to be informed of this fact, citing such authority as *People v. Pond*, 44 Cal. 2d 665, 676, 284 P.2d 793; and *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588. Apparently appellant attempts to raise this question for the first time on appeal. The material allegation is that said property was stolen from the specified corporation and that in San Diego County appellant feloniously received it and knew, at the time, that it had been stolen. The gist of the offense was sufficiently alleged to comply with sections 496, 951 and 952 of the Penal Code.

The corpus delicti was sufficiently shown and the court did not err in refusing to grant appellant's motion for an advised verdict in his favor at the close of the people's case under section 1118 of the Penal Code. *People v. Ives*, 17 Cal.2d 459, 463, 110 P.2d 408; *People v. Smith*, 26 Cal.2d 854, 858, 161 P.2d 941; *People v. Grahle*, 67 Cal.App. 183, 188, 227 P. 227; *People v. O'Shaughnessy*, *supra*; *People v. Lyons*, 50 Cal.2d 245, 324 P.2d 556; *People v. Cox*, 117 Cal.App. 254, 256, 3 P.2d 581; *People v. Haflinger*, 91 Cal.App. 50, 52, 266 P. 561.

[4] No error appears in the giving of an instruction by the court reading in part:

"If you should find from the evidence that a burglary was committed on the premises involved in either of these cases and that thereafter the defendants were found in possession, or claimed to be the owners, of certain property stolen from the burglarized premises, such a fact would be a circumstance tending in some degree to show guilt, although not sufficient,



standing alone and unsupported by other evidence, to warrant your finding them guilty."

The instruction as given, when read as a whole, was proper.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.



163 Cal.App.2d 281

**Maxine V. JUE, etc., et al., Plaintiffs  
and Respondents,**

**v.**

**SAN TONG JUE, etc., et al., Defendants  
and Appellants.**

**Rush M. BLODGET, etc., Plaintiff and  
Respondent,**

**v.**

**SAN TONG JUE, Defendant and Appellant.**

**Dorothy Jue MOE, Plaintiff and  
Respondent,**

**v.**

**SAN TONG JUE, Defendant and Appellant.  
Civ. 22868.**

District Court of Appeal, Second District,  
Division 1, California.

Aug. 28, 1958.

Rehearing Denied Sept. 22, 1958.

Hearing Denied Oct. 22, 1958.

Action to enforce trust in favor of alien's family upon proceeds from sale of part of parcel of land sold by alien's son and upon remainder of parcel, which alien's daughter had conveyed to son's child, on ground that land had been purchased under arrangement whereby alien, who had been prohibited by Alien Land Law from owning land, paid purchase price, land was conveyed to trustee and named beneficiary of trust assigned beneficial interest to daugh-

ter for benefit of alien's family. The Superior Court of Los Angeles County, William J. Palmer, J., rendered judgment, and appeal was taken. The District Court of Appeal, White, P. J., held that evidence sustained finding that alien himself was not included in family as used by him in naming beneficiaries of trust and that trust was valid as against community interest of alien's widow.

Affirmed.

#### **1. Husband and Wife ⚭273(12)**

In action to enforce trust which was created for benefit of family of alien, who had been prohibited by Alien Land Law from owning land, and who had paid purchase price for land which was conveyed to trustee under arrangement whereby named beneficiary of trust assigned beneficial interest to daughter for benefit of family, evidence sustained finding that alien's wife knew of creation of trust and acquiesced therein. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

#### **2. Husband and Wife ⚭273(1)**

Where alien, who was prohibited from owning land under Alien Land Law, paid purchase price for land, which was conveyed to trustee, and named beneficiary of trust assigned beneficial interest to alien's daughter for benefit of alien's family, trust, which was valid as against alien, was also valid as to community interest of alien's widow. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

#### **3. Trusts ⚭119**

Fact that alien father, who was prohibited by Alien Land Law from owning land, paid purchase price for land, which was conveyed to trustee under arrangement whereby named beneficiary of trust assigned beneficial interest to alien's daughter for benefit of alien's family, and fact that father occupied the land, raised no presumption that father included himself among beneficiaries of trust. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

**4. Trusts** 119

In action to enforce trust in favor of alien's family upon proceeds from sale of part of parcel of land sold by alien's son and upon remainder of parcel, which alien's daughter had conveyed to son's child, on ground that land had been purchased under arrangement whereby alien, who had been prohibited by Alien Land Law from owning land, paid purchase price, land was conveyed to trustee and named beneficiary assigned beneficial interest to daughter for benefit of alien's family, evidence sustained finding that alien himself was not included in "family" as used by him in naming beneficiaries of trust. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

See publication Words and Phrases, for other judicial constructions and definitions of "Family".

**5. Trusts** 373

In action to enforce trust in favor of alien's family upon proceeds from sale of part of parcel of land sold by alien's son and upon remainder of parcel, which alien's daughter had conveyed to son's child, on ground that land had been purchased under arrangement whereby alien, who had been prohibited by Alien Land Law from owning land, paid purchase price, land was conveyed to trustee and named beneficiary assigned beneficial interest to daughter for benefit of alien's family, question whether alien intended children of deceased son to benefit from trust was question of fact to be determined from evidence. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

**6. Trusts** 21(2), 60

Where alien, who was prohibited by Alien Land Law from owning land, paid purchase price for land, which was conveyed to trustee, named beneficiary of trust assigned beneficial interest to alien's daughter for benefit of alien's family, land was used as family home and for family business for 22 years before alien's death and nine years thereafter, when his son sold portion of it, practical construction

given trust was that property was to be used as family home and for family business so long as that should be best for family and trust was not uncertain as to its purpose or duration. West's Ann.Civ. Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

**7. Gifts** 49(4)

Where father, who was prohibited by Alien Land Law from owning land made absolute gifts to two daughters of one lot, put adjacent lot in trust for benefit of his family, gave youngest daughter an automobile upon her graduation from high school, took care of son's two oldest children, made a home for them from death of their mother until his own death, and helped son to go to China for his second wife, youngest daughter's statements that father intended to make a gift of farm to her were not improbable or unbelievable on ground that there was no reason for gift. West's Ann.Civ.Code, § 671 note; Act May 4, 1882, 22 Stat. 58.

**8. Ejectment** 95(1)

In action against alien's son by alien's daughter to recover property, which had been conveyed to her at direction of son, who had executed purchase agreement for property, and who claimed that property had been purchased with his money, and which had been subsequently conveyed to son by daughter, who alleged that property had been a gift to her from alien and that she had executed deed to son under threats by son, evidence sustained finding that Chinese writing on check stub to effect that amount of check, which was given as down payment on property, was loaned to son by alien, was not that of alien, was not placed on stub at time check was drawn and sent to vendor, that son had not paid amount of check to alien, and that other payments of purchase price were made by alien's company and were not made with son's money.

**9. Husband and Wife** 267(9)

In action by daughter against son to recover property, which she had conveyed

to son, on ground that property had been a gift to her from her father and that her deed to son had been executed under threats by son, evidence sustained finding that mother acquiesced in gift of property to daughter and that business, from which payments for property were made, was owned by father and not by son.

#### 10. Husband and Wife ⇨267(9)

Where mother acquiesced in father's gift of property to daughter and waived any interest she had in father's business from which payments for property were made, waiver would be presumed to include any right she might otherwise have had in property because of payments made by such business after death of father.

#### 11. Trusts ⇨336

Where alien father, who was prohibited from owning land by Alien Land Law, intended to make gift of land to daughter and property was purchased in name of son, son by his nomination of daughter to receive legal title to property and his statements to daughter that father had told him that property was hers and that title was to be put in her name, voluntarily performed his duty as his father's trustee and it was not necessary to enforce trust.

#### 12. Ejectment ⇨95(1)

In action by alien's daughter against alien's son to recover land, which she had deeded to son under threats, on ground that alien, who had been prohibited from owning land by Alien Land Law, had entered into arrangement whereby land was to be conveyed to daughter by vendor when she became 21 years old, evidence sustained finding that daughter was intended by alien to be owner of the land.

#### 13. Gifts ⇨48

Where father gave daughter impression that she had always owned property, which had been purchased in name of son, and father had carefully arranged with son that she was to take legal title when she became 21 years old, and contract of purchase required conveyance to nominee of son, who was allegedly instructed by father

to name daughter as grantee, fact that father did not tell daughter when or how she was to become owner of property was immaterial to question of whether gift had been made.

#### 14. Deeds ⇨203

Where down payment on parcel of land was made with father's money but purchase agreement was made in name of son under arrangement whereby son was to nominate daughter as grantee when purchase price was paid, father's widow waived claim she had against son for his appropriation of father's properties after death of father, and there was no reason for exempting from such waiver any claim she might have arising out of son's instruction to vendor to convey land to daughter, vendor's compliance, or daughter's acceptance of deed, and no one other than widow lost anything by son's act, question whether son exceeded his authority in acting as agent for father after father's death by ordering conveyance was immaterial to question whether daughter, who had later conveyed land to son because of son's threats, was entitled to recover land.

#### 15. Deeds ⇨71

Where sister had been in undisputed ownership of land for more than five years, and her deed to brother was procured by brother's threats and sister's fear induced thereby, deed was properly canceled by court and it was not necessary that it be determined who was real owner of property, in absence of son's showing some other and better right in himself than the legal title acquired by his wrongful act. West's Ann.Civ.Code, § 2224.

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Guy Richards Crump, John N. Hurtt, Los Angeles, for appellants.

Andrew J. Copp, Jr., Robert A. Waring, Los Angeles, for respondents.

WHITE, Presiding Justice.

Three actions were filed, consolidated for trial, and disposed of by one set of findings



and conclusions and one judgment. Defendants, other than Corinne Jue Kwok who was not served with process and did not appear in the action, have appealed from the judgment.

The judgment incorporates 22 pages of findings of fact and conclusions of law as to the rights, interests, duties and obligations of the parties. In turn the findings and conclusions incorporate by reference the 12-page notice of decision filed December 28, 1956, and the 6-page supplemental notice of decision filed February 15, 1957.

Many issues in addition to those discussed in the briefs on appeal were litigated in the trial which continued from October 22 to December 18, 1956, was reopened after the service of the notice of decision dated December 28th, and resubmitted on February 8, 1957. Some of the issues not raised on appeal were decided in favor of defendants because of implied waivers, estoppel and the statute of limitations. For the sake of brevity, we hereinafter epitomize only the portions of the judgment under attack and the facts pertinent to the consideration of the issues raised on appeal.

The litigants are the widow, children and grandchildren of Jue Joe, and Attorney Rush M. Blodget, as Executor of Jue Joe's will.

Jue Joe was born in China in 1870, came to Southern California about 1886, and remained here until 1902, when he returned to China and married Leong Shee, who was born in China in 1885. In China two sons were born to them: San You Jue, herein and generally called "Sam", born in 1903; and San Tong Jue, herein and generally called "San Tong", born in 1905.

In 1905 Jue Joe returned to Southern California. He spoke little English and wrote only a little Chinese. His American neighbors became his friends and those friendships continued until his death. He worked from daylight until dark, seven days a week, raised asparagus and other vegetables on large farms in several coun-

ties, marketed his produce in Los Angeles, and saved his money.

In 1918 Jue Joe sent for Leong Shee, Sam and San Tong, who then came from China and joined him in Southern California. Here two daughters were born: Corinne in 1919 and Dorothy in 1921.

Sam died in Los Angeles in 1933, leaving a widow, Maxine May Kam Jue, called "May", and three daughters, June C. born in 1925, Maxine V. born in 1927, and Leatrice born in 1928.

February 26, 1941, Jue Joe died in San Fernando Valley. He left a widow, Leong Shee, a son and two daughters, San Tong, Corinne and Dorothy, seven grandchildren, June, Maxine and Leatrice, daughters of his deceased son Sam, Jack and Joan, children of San Tong and his first wife Rose who died in 1935, Soo Jan and Guy, children of San Tong and his second wife Ping.

Between the time of Jue Joe's death in 1941 and the trial in 1956, Corinne, Dorothy, Jack and Joan were married, and eight more grandchildren and several great-grandchildren were born.

Each member of the family, as above outlined, was also known by several other names, some Chinese and some American, some given in accordance with ancient Chinese customs, and some probably accidental as "Sam" for San You Jue, but throughout this decision we will refer to each as listed above.

Notwithstanding the California Alien Land Law, Civil Code, § 671 note, and the federal Chinese Exclusion Act, 22 Stat. 58, Jue Joe with the assistance of his friends invested some of his savings in a number of parcels of California real property, paid for them in annual instalments, and had contracts made in the names of, and titles conveyed to, other persons. Only two parcels so purchased are subjects of the instant appeal. They are "Lot 690", about 50 acres in San Fernando Valley (now in the Van Nuys District of the City of Los Angeles), and the "Tulare property", about 90 acres near Porterville

in Tulare County. Jue Joe farmed both properties from their purchase until his death. The facts and issues regarding title to these two parcels of real property differ materially and will be hereafter separately stated.

#### Lot 690

Appellants assign as error the decision that Lot 690 was owned by Leong Shee, San Tong, Corinne, Dorothy and Maxine as Administratrix of the Estate of her deceased father Sam, as tenants in common, each owning an undivided one-fifth. Corinne, Dorothy and Maxine have not appealed.

Although apparently all defendants (except Corinne) are appellants, in their opening brief they state that their contention at the trial based upon oral evidence of declarations of Jue Joe that Corinne held title to Lot 690 in trust for the benefit of Jack, the firstborn grandson, and not for the family was decided against them upon conflicting evidence; and they "admit that there is substantial evidence supporting the holding against Jack and in favor of a trust" for "the family" of Jue Joe.

Appellants urge that, even if Jue Joe succeeded in creating a valid trust as to Lot 690, it could involve only his half of the community property and have no effect upon the half belonging to Leong Shee. Leong Shee is the only defendant-appellant who could have been prejudiced by the failure of the court to award her one-half of Lot 690 as her community interest. By the judgment, the court undertook to enforce the trust "for the family" as to the whole of Lot 690, not against Corinne, the trustee who conscientiously tried to perform her duties and received no benefit from San Tong's usurpation, but against San Tong and Jack who have shown no right whatever for San Tong's taking of the proceeds of the sale of 35 acres and having title to the remaining 15 acres transferred to Jack.

[1,2] Although Leong Shee was herself a party and a witness at the trial, she did not claim for herself any com-

munity or other interest in Lot 690. There is evidence in the record that she was present in 1942 when San Tong demanded that Corinne deed the property to Jack to prevent Corinne's husband from getting it away from "the family", when Corinne handed the deed to Dorothy requesting that she make sure Lot 690 was held for "the family", and when Dorothy promised that she would. We cannot say that, as a matter of law, the trial court erred in determining that Leong Shee knew of the creation of the trust by Jue Joe and acquiesced therein. Therefore, if the trust was valid as against Jue Joe, it is likewise valid as to the community interest of Leong Shee. Appellants urge further that the trust is invalid because of the uncertainty of its terms. As to community property, Leong Shee was the only heir at law of Jue Joe, and she was the only beneficiary named in his will. Jue Joe had no debts. If the trust was too uncertain to be validly enforced as to the property of Jue Joe, likewise it was unenforceable as to the interest of Leong Shee, and the whole of Lot 690 belonged to Leong Shee upon Jue Joe's death.

It is therefore necessary to review the evidence tending to support the judgment that the trust "for the family" was valid. There are over 3,000 pages of reporter's transcript, 102 exhibits introduced by plaintiffs, and 199 exhibits introduced by defendants. The evidence is conflicting in many respects.

With the help of his friend, O. F. Brant of the Title Insurance & Trust Company, Jue Joe bought Lot 690 from one Anderson in 1919, the year of Corinne's birth. Deed dated October 29, 1919, conveyed title in trust to Title Insurance & Trust Company subject to Anderson's trust deed to Title Guarantee & Trust Company securing Anderson's indebtedness of \$18,000. The Declaration of Trust dated November 1, 1919, recites that no part of the consideration was paid by Title Insurance & Trust Company and certifies that said property is held by it in trust for O. F. Brant, beneficiary. The specified purpose of the

trust is to convey "upon written demand" to said "O. F. Brant or order". Assignment of Beneficial Interest to Corinne (referred to therein by her Chinese name "Ah How Jew"), signed by O. F. Brant and Sue E. Brant, is dated November 7, 1919. In the same file of the Title Company was a letter signed by Corinne as Ah How Jew, dated March 18, 1940, directing the Title Insurance & Trust Company to convey Lot 690 to her and, as a part of the same document, under date of March 19, 1940, appears Corinne's receipt for an unrecorded quitclaim deed of the property and her acknowledgment of the termination of the trust.

From the purchase of Lot 690 in 1919 until his death in 1941, Jue Joe and his family lived upon Lot 690 and considered it their family home. Jue Joe, his wife, children and grandchildren (with the exception of Sam's children after Sam's death) lived there. Jue Joe and his sons grew asparagus on the unoccupied portion of it and marketed the asparagus as a part of Jue Joe's business, sometimes referred to as "Jue Joe Company" and sometimes as "the family business". During a part of this time, the adjoining 50 acres of Lot 691, which had been bought by Jue Joe and conveyed to Corinne and Dorothy as absolute owners, was likewise used for farming and marketing as a part of the family business. Although a guardian of the estates of the two minor daughters had been appointed, no accounts were rendered. Apparently, during his entire life, Jue Joe took care of his family and no thought was given to rents, profits or wages which might be due from any member of the family to any other.

Up to the time of his death in 1941, Jue Joe also carried on large farming projects near Newhall and Saugus in Los Angeles County, and in Tulara County, and at various times he farmed other lands in Los Angeles and Riverside counties. He taught his sons to grow and market asparagus and other vegetables, gave San Tong a high school education, cared for San Tong's two

oldest children, Jack and Joan, after their mother's death, helped San Tong to return to China to marry his second wife, Ping, sent Corinne to the University of California at Los Angeles, and Dorothy to the University of Southern California.

Corinne had been told many times, from her earliest childhood up to her father's death in 1941, that she was "to hold title to Lot 690 \* \* \* for the benefit of the family", and she had always told her father that she would. She didn't hear "any technicalities" about it, but her father had told her that she owned the property and was to hold it for the family, to give it to them. After Corinne's twenty-first birthday in 1940, she received the deed from the title company. Before that she had thought that the title was in her name. Then, in 1940, her father again told her to keep Lot 690 for the family, and she promised him that she would.

After Jue Joe's death in February, 1941, the family's use and occupancy of Lot 690 continued as before, except that San Tong acted as head of the family, managed the farms, marketed the produce, handled the money, and "advanced" to Dorothy and the others the money they needed. Dorothy continued her studies at the university. Each member of the family "did something to help" in the business.

July 4, 1942, Corinne married Lansing Kwok. She telephoned from San Francisco to tell San Tong of her marriage, and he told her to come down to Los Angeles at once and attend to Lot 690. She came down by plane, and on July 11th signed a deed in favor of Jack. The deed is dated June 11, 1942, but Corinne testified that it was signed on July 11, 1942. After she signed it she wanted to keep it, but San Tong said that Lot 690 was "for the family" and the deed should be in more neutral hands so her husband wouldn't get it if anything should happen to her in a plane crash or an accident. She noticed and mentioned to San Tong that the deed described her as a single woman. He said perhaps it was better that way, otherwise



her husband might have to know about it. She handed the deed to Dorothy and said "Be sure it is for our family". Dorothy said "Yes". San Tong and Leong Shee were both present and she did not remember that they said anything at that time.

In January, 1950, while Corinne was in Hong Kong she received a letter from Charles E. Cook, Jr., as attorney for San Tong, requesting that a new deed in favor of Jack be signed by her. Attorney Cook said in that letter "I am sure that you are familiar with the fact of the sale of the land here, belonging to the family, including yourself and Dorothy \* \* \*" The only enclosure was the deed of Lot 690 from Corinne to Jack, and, pursuant to the request in the letter, Corinne signed it. She mailed it to Dorothy, relying upon her to see that Lot 690 and the proceeds of the sale were kept for the family. When she returned to California in September or October, 1950, she asked San Tong where the money from the sale of Lot 690 was. He said he was going to take care of the family with it and she believed and trusted him.

Dorothy testified that she saw Corinne sign the deed to Jack in July of 1942 and it was kept in the safe deposit box of Corinne and Dorothy until January, 1945, when San Tong asked Dorothy to let him hold it while she was back east attending Johns Hopkins University. He followed her to the bank, she got the deed out of the safe deposit box and handed it to him. That was the last she saw of it until the escrow in 1950. When, in 1950, Dorothy handed San Tong the new deed from Corinne to Jack, San Tong promised Dorothy that he would give May and her three girls some of the proceeds of the sale of Lot 690.

Other documents in evidence are a general power of attorney from Jack to San Tong, a grant deed from Jack (by San Tong under said power of attorney) to Southwest Properties, Inc., a letter dated March 10, 1950, from the escrow officer to Jack, handed to San Tong, his attorney

in fact, mentioning a check for \$107,633.71 enclosed, and cancelled checks from the escrow holder to Jack for \$107,633.71, \$8,475.11, and \$5,000, or a total of \$121,108.82, in addition to the \$10,000 received by San Tong for Jack outside of escrow.

No rents or profits of Lot 690 were paid to Corinne, either before or after her marriage, and none were ever paid to Jack. Up to the time of the sale in 1950 the improvements on Lot 690 were simple and cheap. Corinne, Dorothy, Jack and Joan, at the times of their marriages, ceased to live there. Using some of the proceeds of the sale, San Tong constructed on the unsold portion of Lot 690, a large home with swimming pool, patio, barbecue, fish pond and flower garden. He, his wife Ping, their four children, and Leong Shee were still living there at the time of the trial.

Appellants contend that a trust "for the family" is invalid because the term "family" is not a sufficient designation of the beneficiaries. While they have quoted many varying and different definitions of the word "family", as said by the trial judge in his Notice of Ruling on the Motion for New Trial: "\* \* \* the question which confronts us is not how dictionaries, judges and lexicographers have defined the word in writings with which Jue Joe was wholly unfamiliar \* \* \*" but rather what was meant by Jue Joe when he taught Corinne from babyhood that Lot 690 was "for the family" and on several occasions procured her solemn promise to him that she would hold it for the family and give it to them.

The trial court found that "the family" was understood by both the trustor and trustee to consist of Jue Joe's widow, his three children living at the time of his death in 1941, and the children of his deceased son; and that the property should be divided in five equal parts, one for Jue Joe's widow, one for each of his three children, and one to be divided between the children of his deceased son.

It is contended by appellants in their opening brief that, as a matter of law,

Jue Joe was included in "the family" and his interest would have passed to Leong Shee at his death.

[3] There is in the record no direct evidence that Jue Joe included himself among the beneficiaries of the trust, and it has been held by the California Supreme Court that no such presumption arises from the fact that an alien parent ineligible for citizenship paid the purchase price of land conveyed to his American born child. In *re Estate of Yano*, 188 Cal. 645, 650, 206 P. 995. Nor did any such presumption arise from the fact that the alien father occupied the land. *People v. Fujita*, 215 Cal. 166, 170, 171, 8 P.2d 1011.

Appellants quote and rely upon the statement of the Supreme Court in *Hills v. Superior Court of Los Angeles County*, 207 Cal. 666, at page 668, 279 P. 805, at page 806, 65 A.L.R. 266, that, "The husband, if living, is, of course, a member of the family". That statement, however, is dicta. The court there decided that the granting of a "family" allowance to a husband was not authorized by Section 1466 of the Code of Civil Procedure. The provision of Section 156 of the Civil Code that "The husband is the head of the family" is next quoted by appellants. That sentence is followed by the statement that "He may choose any reasonable place or mode of living, and the wife must conform thereto".

Other cases cited by the parties are to the effect that the "family" includes the husband (*Estate of Lamb*, 95 Cal. 397, 407, 30 P. 568); relatives of a predeceased husband (*In re Estate of Watts*, 179 Cal. 20, 23, 175 P. 415); an acknowledged illegitimate son taken into the family (*In re Estate of Lund*, 26 Cal.2d 472, 494, 159 P.2d 643, 162 A.L.R. 606); the acknowledged son of a bachelor and his house servant (*In re Estate of Gird*, 157 Cal. 534, 545, 108 P. 499); nieces and nephews and children of deceased nieces and nephews (*In re Estate of McCrum*, 97 Cal.App. 576, 275 P. 971); and that the "family" does not include one's brothers and sisters when one is married and has children of her own (*In re Estate*

of *Bennett*, 134 Cal. 320, 323, 66 P. 370); or a debtor's mother living apart from him (*Lawson v. Lawson*, 158 Cal. 446, 449-451, 111 P. 354).

Obviously, whether Jue Joe intended to include himself among the beneficiaries designated by him as "the family" is not concluded by any of the above mentioned statutes or decisions. His intention as expressed to Corinne was a question of fact to be determined by the trial court.

The phrases "the family", "my family" and "our family" do not necessarily include the head of the family or the speaker. The words must be construed with reference to the circumstances under which they are used. Considering all the evidence before the court in the instant action, including Jue Joe's pride in the American citizenship of his daughters and grandchildren, the court's knowledge that any interest of a Chinese alien in California land was then subject to escheat proceedings, the inference is not only warranted but practically inescapable that Jue Joe, smart business man that he was, intended to exclude from "the family" who were the beneficiaries of the trust not only himself but also his wife and sons who were born in China.

[4] We are convinced that the evidence is sufficient to support the finding and conclusion of the trial court that Jue Joe himself was not included in "the family" as used by him in naming the beneficiaries of the trust.

Since no claim is made on the instant appeal that either Sam Tong or Leong Shee was entitled to less than the interest given by the judgment, it is not necessary to determine whether the evidence was sufficient to support the finding that they were intended by Jue Joe to be included in "the family" as beneficiaries.

Appellants cite as error the trial court's decision that Sam's children were intended to participate as beneficiaries. They urge that, if those grandchildren of Jue Joe are entitled to participate in the division of the trust property, they should

share equally with the other members of the family, and not take "in the right of Sam" who died in 1933.

[5] Whether Jue Joe intended Sam's children to benefit from the trust is a question of fact to be determined from the evidence. There is testimony that Corinne and Dorothy believed he did, and that San Tong promised in 1950 that he would see that they received a share of the proceeds of the sale of Lot 690. The inference was properly drawn that Sam's children were part of the family and entitled to share in the benefits of the trust.

Since no member of Sam's family has appealed, and the appellants were not prejudiced by Sam's family getting only one-fifth of the beneficial interest in the trust property instead of the three-sevenths to which they would have been entitled had they shared equally with Leong Shee, San Tong, Corinne and Dorothy, we will not further discuss that portion of appellants' argument.

From a study of the cases cited and others, as well as the evidence before the court, we find no reason to reverse the judgment because of any uncertainty as to who were the members of "the family" entitled to benefit from the trust.

[6] While appellants mention in their briefs that they consider the trust as to Lot 690 uncertain as to its purpose and duration also, it is difficult to follow their reasoning in that regard. There is evidence before the court that Lot 690 was used as the family home and for the purpose of growing asparagus for the family business from 1919 until 1950, that San Tong then sold 35 of its 50 acres, appropriated the proceeds of the sale, had title to the remaining 15 acres conveyed to Jack, and took exclusive possession of the unsold portion himself. The practical construction given the trust by Jue Joe, Corinne, San Tong, Jack and Dorothy, seems to have been sufficiently certain. Lot 690 was to be used as the family home and for the growing of asparagus so long as

that should be best for the family. From Jue Joe's death in 1941, San Tong, himself, used Lot 690 as the family home and for the raising of asparagus. In 1950 when the land was no longer suitable for the growing of asparagus and was in demand for subdivision, San Tong arranged the sale. Apparently then all agreed that the time had come for the sale of the land and the closing of the trust. At the request of San Tong's attorney, Corinne then in China executed a deed to Jack, sent it to Dorothy, who in turn handed it to San Tong. San Tong then stated to Dorothy that the proceeds of the sale would be for the family including Sam's children. San Tong was trusted by the entire family to manage the sale and at the same time trusted with Jack's general power of attorney. All trusted San Tong to see that the beneficiaries received their respective portions of the proceeds of the sale. The trial court found no uncertainty in these respects, and none appears upon the instant appeal.

As authority for reversal, appellants cite and rely upon the following decisions: *Wittfield v. Forster*, 124 Cal. 418, 57 P. 219; *Sheehan v. Sullivan*, 126 Cal. 189, 192, 58 P. 543; *Lefrooth v. Prentice*, 202 Cal. 215, 227-228, 259 P. 947; *In re Estate of Ralston*, 1 Cal.2d 724, 726, 37 P.2d 76, 96 A.L.R. 953; *In re Estate of Zilke*, 115 Cal.App. 63, 1 P.2d 475; and *McElroy v. McElroy*, 32 Cal.2d 828, 831, 198 P.2d 683.

As to facts and relief sought, the instant action differs from the decisions last above cited. The *Wittfield v. Forster* case, *supra*, sought to cancel a deed absolute and quiet title in an alleged beneficiary of the land conveyed by a decedent. In *Sheehan v. Sullivan*, *supra*, there was no evidence of any declaration or understanding respecting any trust, even oral.

The evidence in *Lefrooth v. Prentice*, *supra*, was that the purported donor and trustee of securities made no declaration of trust, even oral, remained in possession and control and made no accounting after



their sale; that instead he claimed unsuccessfully that a ranch purchased in his own name was purchased with the proceeds of the securities and was held by him in trust for his children, and therefore was exempt from execution on outstanding judgments against him.

Mr. Chief Justice Waste, speaking for the Supreme Court, in *In re Estate of Ralston*, supra [1 Cal.2d 724, 37 P.2d 77], where the pertinent provision of decedent's will gave to the named executor "in trust" with "absolute authority to dispose of this my entire estate as he may see fit" and "as I could if I were still alive", upheld the decision of the trial court that "The 'trust' here involved is defective and invalid because of its complete failure to indicate either the object or the persons to benefit thereby".

*In re Estate of Zilke*, supra [115 Cal. App. 63, 1 P.2d 476], involved a bequest to "Offens home of San Francisco", and no evidence had been offered to remove the ambiguity as to testator's intended beneficiary. On appeal the decree distributing the estate to seven orphans homes in San Francisco was reversed with directions that evidence of testator's intention be received if offered.

*McElroy v. McElroy*, supra, affirmed a money judgment against the parents of defendant husband in a divorce action for the reason that the wife was also a beneficiary of the community funds left in trust with them by their son, her husband.

We consider none of the cited decisions applicable to the facts of the instant action. We are persuaded by the entire record on the instant appeal that it was not error for the court to enforce the trust in favor of the "family" of Jue Joe.

#### Tulare Property

In regard to the Tulare property, a 90-acre farm near Porterville, in Tulare County, California, the trial court found and determined:

(1) That about the year 1933, a lease, and thereafter an agreement for the pur-

chase of the Tulare property from one Scott Manlove were entered into in the name of San Tong;

(2) That San Tong for a long time has been in possession of said property;

(3) That Dorothy is the owner thereof;

(4) That between December 8, 1942, the date of the deed from Manlove to Dorothy, and August 24, 1948, the date of Dorothy's deed to San Tong, Dorothy was the owner of the property subject only to the purchase money trust deed executed by Dorothy in favor of Manlove upon which the last payment was made in 1944;

(5) That no adverse claim of ownership was made by San Tong or anyone else prior to August 24, 1948, when San Tong induced Dorothy to execute the deed to him by threats of physical violence which caused her to fear bodily injury and possible death at his hands;

(6) That Dorothy's consent and execution of the deed were not "real or free" but solely because of her fear of unlawful and violent injury; that San Tong intentionally induced such fear for the purpose of forcing Dorothy to execute said deed; and that any reasonable person situated as was Dorothy would have been in like fear of San Tong;

(7) That after she had consulted attorneys and been advised as to the remedy available, Dorothy immediately rescinded her deed to San Tong;

(8) That San Tong, ever since August 24, 1948, has used said land solely for his own profit and benefit and has not accounted to Dorothy for any part thereof;

(9) That since August 24, 1948, San Tong has been a trustee for Dorothy;

(10) That from the date of the filing of the instant action, September 16, 1952, to the date of the trial, March 1, 1957, the value of the use of the property to San Tong was \$23,011.06, actually collected by him in cash from persons to whom he rented the property, from which amount there should be deducted \$4,082.26, the amount paid by him for taxes and main-

tenance during that period, leaving a balance of \$18,928.80, which should be paid by him to Dorothy for the use of the land from September 16, 1952 to March 1, 1957.

It is urged by appellants that since the finding of a gift from Jue Joe to Dorothy is supported only by the testimony of Dorothy, and Dorothy's testimony is so improbable as to be wholly unbelievable, the court's finding and decision that Dorothy was the owner of the Tulare property is without the support of any substantial evidence and must be reversed on the instant appeal.

In their opening brief they state that "the great current of the evidence is against a gift and the only evidence which it can be contended brings the case within the rule which governs in cases where there is a *material* conflict of evidence is the uncorroborated testimony of Dorothy that her father gave her the property and that San Tong subsequently acquiesced."

In this regard, appellants quote from and rely upon *In re Estate of Tarrant*, 38 Cal.2d 42, 51, 237 P.2d 505, 509, wherein the Supreme Court said: "While it is true that 'the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them,' \* \* \* such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts".

Cited by appellants in the same connection are the following decisions:

*People v. Haydon*, 18 Cal.App. 543, 555-556, 123 P. 1102, 1108, 1114, from which we quote: "\* \* \* A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable *per se*, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do."

*People v. Erking*, 119 Cal.App.2d 551, 555, 259 P.2d 492, 494, from which we quote: "\* \* \* Where the testimony of a witness \* \* \* accords with facts established by other proof or with well known physical laws or laws governing human conduct, then it is not inherently improbable \* \* \*"

*Kircher v. Atchison T. & S. F. Ry. Co.*, 32 Cal.2d 176, 183, 184, 195 P.2d 427, 432, from which we quote: "\* \* \* Although an appellate court will not uphold a verdict or judgment based upon evidence inherently improbable \* \* \*, unless we can say that plaintiff's version of the accident was wholly unacceptable to reasonable minds, we cannot set aside the jury's implied acceptance of it. \* \* \*"

"It is true, that as related by plaintiff, the manner in which the accident happened appears to have been most extraordinary. But as stated in *Neilson v. Houle* [200 Cal. 726, 729, 254 P. 891], 'common experience and observation teach us that strange and astonishing things sometimes happen \* \* \*'"

The reasons assigned by appellants for the improbability and unbelievable character of Dorothy's testimony are:

(1) There was no reason for a gift to Dorothy;

(2) The Tulare property had not been paid for in full when Jue Joe is said to have told Dorothy he was giving it to her;

(3) A gift to Dorothy would defraud Leong Shee of her community interest;

(4) If the property had been given to Dorothy by Jue Joe, San Tong would not have done these things: (a) paid for the Tulare property with his own money; (b) worked for years in the cultivating and farming the property without compensation; and (c) made extensive improvements and repairs at his own expense and without consulting Dorothy; and

(5) If the property had been given to Dorothy by Jue Joe, Dorothy would not have done these things: (a) permitted San Tong to retain all rents and profits for

many years without insisting on an accounting; and (b) conveyed the property to San Tong's children at San Tong's insistence when she was going to Johns Hopkins to study.

As "applicable" to the first, second and third reasons given, appellants in their opening brief quote from *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 170-172, 168 P.2d 946, 957, an excerpt which includes the following: " \* \* \* Oscar Hansen was not the man to do this thing. With all his devotion to his mother, he was not the person to turn over to her as a cold gift practically everything he had in this world. With what the evidence shows of his temperament, disposition and traits,—particularly his tremendous ambition, and his determination to eliminate competition in his line, all these things, coupled with the fact that he had made it all 'the hard way,' and after a very tough struggle, it simply cannot be concluded, \* \* \* (that he decided) to immediately give away the whole thing, 'lock, stock and barrel', to his mother who was already apparently living comfortably and with a sufficiency considering her modest needs. If there ever was an improvident gift this would be it \* \* \*

"It is thus apparent that the evidence gives rise to the inference that the transfers made by Oscar to Josephine were transfers of legal title only, and that Oscar at all times intended to and did retain the full beneficial ownership."

[7] Appellants' first, second and third reasons are not persuasive. Jue Joe could not own land in California. He loved the land and he loved his daughters who could own it. He made an absolute gift to Corinne and Dorothy of Lot 691 adjacent to Lot 690, which he put in trust with Corinne for "the family", as hereinbefore set forth. He gave Dorothy an automobile upon her graduation from high school. He took care of San Tong's two oldest children and made a home for them from the death of their mother until his own death. He "helped" San Tong to go to China for his second wife, Ping. Such a man needed

no special reason to make an additional gift to his youngest child.

In *Back v. Farnsworth*, 25 Cal.App.2d 212, 218, 219, 77 P.2d 295, not cited by the parties, it is held that testimony that plaintiff had completely paid for real property bought on contract from decedent, that some months before her death she had given plaintiff all her papers referring to the property and told him she would sign a deed whenever he brought one to her, and that he had failed to ask for the deed before her death, is not inherently improbable, especially in view of their lack of acquaintance with legal proceedings or the formal requirements of transferring title to real property, remembering that plaintiff, decedent and her husband were good friends from the same country, that they were not well educated, and that they expressed themselves in English with great difficulty.

In considering the improbability and unbelievable quality of Dorothy's testimony concerning the Tulare property, the court had before it the entire record which included satisfactory proof that Jue Joe had bought property having title put in Woi King, a Chinese friend who was an American citizen, and later had sold that property receiving the consideration himself; that he had bought Lot 691 having title put in the names of his two baby daughters, for whom guardians had then been appointed; that as to Lot 691 the girls were taught from childhood that it belonged to them; that he had bought Lot 690, having title put in trust in the name of Title Insurance & Trust Company for the benefit of his friend, Brant, who in turn and at almost the same time made an informal and unrecorded assignment of beneficial interest to Corinne; that although Corinne was taught from babyhood that she owned Lot 690 and must give it to the family, she received legal title from the title company after she was 21 years of age; that several years before his death, Jue Joe told Dorothy the Tulare property was to be hers; that when Dorothy became 21 years of age in 1942, title



to the Tulare property was put in her name; and that, according to her testimony, San Tong then told Dorothy that Jue Joe had told him the property was hers and to have the title put in her name. While no assignment of beneficial interest, or document naming the person to take title to the Tulare property appears in the record, in many respects this deal parallels other deals made by Jue Joe. Most of the purchase price of Lot 690 remained unpaid in 1921 when the informal assignment to Corinne of the beneficial interest was made by Brant, who acted as nominal beneficiary to aid his friend Jue Joe. It must be remembered that Jue Joe spoke very little English and wrote and read none, and that he had depended upon his friends and relatives to handle many things for him. It is not improbable or inherently unbelievable that he so depended upon his son, San Tong, in the purchase of the Tulare property for Dorothy.

With regard to the Tulare property as with Lot 690, Jue Joe retained no power in himself to prevent title going to his daughter upon her 21st birthday. It seems to us probable, considering the Alien Land Law of that time, that Leong Shee fully acquiesced in the gift to Dorothy. Apparently, Jue Joe, Dorothy and San Tong so understood.

From Jue Joe's death in 1941 to 1948, San Tong's right to exercise all the powers and prerogatives of the "head" of a Chinese family was not questioned by anyone. He ran the family home on Lot 690, which Corinne held in trust for the family; he ran the business of growing asparagus and other vegetables for market upon Lot 690, upon Lot 691, which belonged outright to Corinne and Dorothy, and upon many other properties theretofore farmed by Jue Joe, including the Tulare property; he marketed the produce from all the properties through the Jue Joe Company business at Central Market in Los Angeles; he furnished his mother and sisters with money needed by them, had them sign income tax returns showing that they were

partners in Jue Joe Company, and told Dorothy there would be an accounting later.

In 1942, Corinne, to protect the family's beneficial interest in Lot 690, at San Tong's request made a deed to Jack and left it with Dorothy. Later Dorothy, also at San Tong's request, made a deed of the Tulare property to Guy and Soo Jan, and left her own and Corinne's deed with San Tong for safekeeping.

San Tong's good faith, honesty and efficiency were not questioned until he threatened Dorothy's safety and her life to procure her deed to himself of the Tulare property in 1948.

It is appellants' contention that San Tong, and not Jue Joe, bought and paid for the Tulare property, and in this connection they say "Respondents cannot dispute the physical evidence in Jue Joe's own handwriting, that the \$4,000.00 check of Jue Joe to Manlove was a loan to San Tong. That appears from Jue Joe's Chinese writing on the check stub 'Tong owes money'."

[8] Considering the record as a whole, including San Tong's ability to produce exhibits (even personal letters many years old) to strengthen his own claims, his failure to produce from records which had admittedly been in his possession the items requested by respondents, his own conflicting statements, his taking possession of all the contents of his father's safe deposit box after his death and before the bank learned of it, his assumption with the passive consent of his mother and sisters of complete control of the family property, money, records, and business, his representations that his mother and sisters were partners, his advancing to his mother and sisters the moneys needed by them, his statements to Dorothy that they would all have an accounting later, and the trial court's determination that much of his sworn testimony was untrue, there seems to be no reason why respondents, and the court, should not doubt that the Chinese

writing on the check stub was that of Jue Joe, or was placed on the stub at the time his check was drawn and sent to Manlove as the down payment on the Tulare property, or that San Tong ever paid the \$4,000 to Jue Joe, or that the other payments upon the purchase price made by the Jue Joe Company were made with San Tong's money.

[9,10] San Tong's contention is that the Tulare property belongs to him because he paid for it with moneys of the Jue Joe Company; "but this contention is based upon the premise that after 1928 he was the sole owner of the business". The court found that Jue Joe was the sole owner of the business up to the time of his death in 1941. Consequently, the payments on the Tulare property prior to his death were made by him. There is evidence that Jue Joe had told both San Tong and Dorothy that he was buying the land for Dorothy and that he was relying upon San Tong, named in the contract as buyer with the right to name the grantee, to have it conveyed to Dorothy when she became 21 years old; and that, in 1942, when Dorothy was 21 years old and the contract required that Manlove convey the property subject to a trust deed, San Tong, pursuant to his father's instructions had the property conveyed to Dorothy, and Dorothy executed the note and trust deed required by the contract. At the time of Jue Joe's death in 1941, Jue Joe's property, money and business became the property of Leong Shee. She had acquiesced in the gift of the Tulare property to Dorothy, and by her pleadings she waived any interest she had in the business. San Tong, according to Dorothy's testimony, and other evidence, took over the active management of all Jue Joe's property and business, represented the other members of the family as partners, told Dorothy that the money paid on the Tulare property after 1941 was from her share in the "family business", on which there would be a later accounting. Leong Shee's waiver of her rights in the Jue Joe Company, not put in

issue on the instant appeal, must be presumed to include any right she might otherwise have had in the Tulare property because of the payments thereon made by the Jue Joe Company after the death of Jue Joe. There is no evidence that she retained any greater rights as to the money of Jue Joe Company used to pay for the Tulare property given to Dorothy, than as to the property and money of Jue Joe Company appropriated by San Tong.

Appellant's claim that it cannot be believed that San Tong would have farmed the Tulare property without compensation if it had been given to Dorothy by Jue Joe, completely ignores the evidence and finding that, in the few years between the dates of the filing of the instant action and the trial thereof, San Tong rented the Tulare property to other farmers, paid for upkeep and taxes, and made a net profit from the land of some \$18,000.

It is urged by appellants that "equity will not give effect to an imperfect gift by enforcing it as a trust". In *re Estate of Alberts*, 38 Cal.App.2d 42, 46, 100 P.2d 538, 540.

[11] Equity in the instant action was not required to enforce the trust as, under the court's findings and decision, San Tong, by his nomination of Dorothy to receive the legal title and his conversation with her about it, voluntarily performed his duty as his father's trustee.

Appellants argue at length that any interest Jue Joe had in the Tulare property at the time of his death descended to Leong Shee. No interest has been shown to have been in Jue Joe at the time of his death. In all of his dealings in interests in real property, including leases, even before the birth of Corinne who was the first American born member of his family, he carefully refrained from taking any interest in himself. It is only reasonable to imply that the deal as to the Tulare property was arranged the same way. Jue Joe was meticulous in avoiding any violation of Alien Land Law. Whether San Tong previously intended to violate Jue

Joe's trust in him, and regardless of his reasons for so doing, he lived up to his father's trust in him when he had Manlove deed the Tulare property to Dorothy in 1942, just as Brant and the Title Company had done in conveying Lot 690 to Corinne when she became 21 years of age.

[12] Appellants in their closing brief state that "there is not a scintilla of evidence to the effect that Dorothy was intended owner of the Tulare property until 1939, at the earliest." This overlooks the evidence before the court of the previous dealings of Jue Joe and the trial court's right to presume therefrom that he would not have told Dorothy in 1939 that the Tulare property was to be hers had he not previously arranged to have it so and made the payments required up to that time. It also ignores the evidence of the character of the previous dealings of San Tong and the inferences the court evidently drew from his statement to Dorothy that the property was hers.

Appellants rely somewhat upon the testimony of Manlove that he knew no one save San Tong in the deal. When it is remembered that as to Lot 690, purchased by Jue Joe through his friend Brant and the Title Company, Corinne's name did not appear of record until after she was 21 years of age, and that the seller probably never heard of her, it is not improbable that Jue Joe believed the Tulare property was being purchased for Dorothy under similar arrangement. Appellants contend that Dorothy's interest in the Tulare property rests upon her own uncorroborated testimony alone. This ignores the fact that San Tong did have the title transferred from Manlove to Dorothy and, according to Dorothy, her husband and Corinne, he made no claim of ownership of the property until 1948 when by threats he procured a deed from Dorothy. Also, the conflicts in San Tong's testimony warranted the trial court's failure to take it at face value.

Appellant insists that Leong Shee knew nothing of a gift of the Tulare property to Dorothy. We find nothing in her testimony to that effect, and in view of the Alien Land Law of that time we think the trial court justified in inferring from the evidence before it that Leong Shee had acquiesced and joined with Jue Joe in making the gift to Dorothy.

[13] Much is made by appellants of the fact that Jue Joe did not tell Dorothy when or how she was to become the owner of the Tulare property. This, to us, seems immaterial, since he apparently told San Tong when and how she was to take the title. It will be remembered that as to Lot 690, Jue Joe had given Corinne the impression that she always owned it, but he had carefully arranged with the trustee that she was to take legal title when she became 21 years old. He had arranged with San Tong for Dorothy to take legal title of the Tulare property when she became 21 years of age and the contract of purchase required Manlove to convey it to San Tong's nominee.

Appellants urge that "the instruction of Jue Joe to San Tong to 'turn' the property over to Dorothy was given to San Tong as *agent* for Jue Joe" (since San Tong could not convey the property and could only instruct Manlove to do so) "and the agency terminated with Jue Joe's death".

[14] Since it has been finally determined that Leong Shee, the heir at law and successor to Jue Joe, has waived the claims she had against San Tong for his appropriation of the Jue Joe Company, Jue Joe's crops and other properties (except her interest in Lot 690), and no reason is given for exempting from such blanket waiver any claim she might have had against San Tong, Manlove or Dorothy arising out of San Tong's unauthorized instruction to Manlove, Manlove's compliance, or Dorothy's acceptance of the deed after Jue Joe's death, and no appellant other than Leong Shee having lost anything by San Tong's act, whether he exceeded



his authority in that regard is immaterial to the issues raised on the appeal now engaging our attention.

In answer to appellants' arguments to the effect that Jue Joe's intended gift to Dorothy cannot be completed by the courts, respondent, in her brief, states: "Happily Dorothy has no occasion to sue for specific performance of Jue Joe's oral declaration of his intention to make a gift of the Tulare property to Dorothy, or to sue San Tong Jue for specific performance of his obligation to her as constructive trustee. San Tong Jue's voluntary act in meeting and fulfilling that obligation removed the necessity of suit on that score.

"Dorothy's suit is to recover from San Tong Jue the same property, wrongfully wrested by him from her after she had been in undisputed ownership of it for five years and eight months. The means used by San Tong Jue were extortionate and consisted of menace, causing fear and terror."

The court found on the testimony of Dorothy, her husband, and San Tong that the deed from Dorothy to San Tong on August 24, 1948, was procured by menace and threats of San Tong and Dorothy's fear induced thereby.

Respondents cite Civil Code, Section 2224 as requiring the court to cancel the deed so obtained and award the Tulare property to Dorothy, as it did. They urge that San Tong's threats were such a wrongful act as to make San Tong an involuntary trustee of the Tulare property for the benefit of Dorothy. The only manner in which the transaction can be excepted from said Section 2224 is by proving that San Tong has "some other and better right" to the Tulare property.

[15] Appellants urge in their closing brief, that the "question as to who is the real owner of the Tulare property, regardless of whether record title stands in the name of Dorothy or San Tong" had to be decided in order to determine whether the cancellation of the deed from Dorothy to

San Tong was warranted. San Tong, however, failed to prove "some other and better right" in himself, than the legal title acquired by his "wrongful act". Therefore, the deed from Dorothy to him was properly cancelled.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



163 Cal.App.2d 410

Gladys Marle BROOKS, Plaintiff and Appellant,

v.

ALLIS CHALMERS MANUFACTURING COMPANY, et al., Defendants,

Insley Manufacturing Corporation,  
Defendant and Respondent.

Civ. 9356.

District Court of Appeal, Third District,  
California.

Sept. 10, 1958.

Hearing Denied Nov. 5, 1958.

Action for negligent design and manufacture of crane involved in death of plaintiff's husband. The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peek, Acting P. J., held that evidence had not required filing as a matter of law that decedent had been contributorily negligent with regard to "tending the load" of the crane, and that evidence had been sufficient to take to jury questions (1) as to whether brake handle and drum or safety device called a "boom dog" had been negligently designed or manufactured and (2) as to whether intervening negligence, if any, of crane operator had been foreseeable.

Reversed.

**1. Trial** Ⓒ142

It is only when reasonable minds cannot differ with respect to whether proved facts and reasonable inferences therefrom make out negligence or nonnegligence that such issues may properly be taken from jury.

**2. Negligence** Ⓒ136(18, 25, 26)

In action for negligent design and manufacture of crane involved in death of plaintiff's husband, evidence did not require finding as a matter of law that decedent had been contributorily negligent with regard to "tending the load" of the crane, and evidence was sufficient to take to jury questions (1) as to whether brake handle and drum or safety device called a "boom dog" had been negligently designed or manufactured and (2) as to whether intervening negligence, if any, of crane operator had been foreseeable. West's Ann.Code Civ. Proc. § 1963, subd. 4.

**3. Negligence** Ⓒ62(3)

If crane involved in death of plaintiff's husband had been negligently designed by defendant, defendant's liability would not be cut off by reason of intervening negligence, if any, of crane operator, if such negligence could be said to have been foreseeable.

**4. Negligence** Ⓒ66(1)

For decedent's contributory negligence to be bar to recovery for negligent design and manufacture of crane involved in his death, he would have to have appreciated the degree of danger involved as well as danger itself. West's Ann.Code Civ.Proc. § 1963, subd. 4.

**5. Negligence** Ⓒ105

For decedent's alleged assumption of risk to be bar to action for negligent design and manufacture of crane involved in his death, there would have to have been a voluntary exposure to danger and actual, rather than constructive, knowledge of risk involved.

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P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellant.

Hadsell, Murman & Bishop, San Francisco, for respondent Insley Mfg. Corp.

PEEK, Acting Presiding Justice.

This is an appeal by plaintiff from a judgment of nonsuit in an action by her against Insley Manufacturing Corporation for negligent design and manufacture of a crane involved in the death of her husband, Cecil O. Brooks. Plaintiff also appeals from an order granting judgment on the pleadings in favor of Insley relating to a cause of action alleging breach of warranty of fitness of the crane. All of the original defendants have been dismissed except the Insley Manufacturing Corporation.

The appeal from the order granting judgment on the pleadings on the breach of warranty cause of action does not appear to be supported by existing law, which appellant concedes; hence the judgment as to that cause must be affirmed, and we limit this opinion solely to the question of the propriety of the nonsuit.

Thus the only question presented is if by disregarding conflicting evidence, giving plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, can it be said that there was no substantial evidence to support a verdict in favor of plaintiff? *Leonard v. Watsonville Community Hospital*, 47 Cal.2d 509, 514-515, 305 P.2d 36.

The evidence, when viewed in light of the stated rule, shows that Brooks was employed as an iron worker by the Anson-Smith Company which was engaged in building a fish hatchery for the state. On the morning of December 10, 1952 (the first day of his employment), at about 10 a. m., Brooks was "tending the load" of an Insley crane. In this his duty was to keep the load, which was suspended from a cable and held in a sling about two to four feet off the ground, from spinning or swinging. He followed customary procedure by holding on to the load with his hands as he walked along with the moving crane. In fact his foreman testified that had he not held on to the load, he would have been

fired. The crane was engaged in moving a 1,500- to 2,000-pound load of steel a distance of 100 to 150 feet. The day was rainy and the ground was soft and depressed in spots. Apparently because of its construction, the crane when in motion would move from side to side; that is, it zigzagged back and forth rather than proceeding in a straight line, which motion caused the load to swing back and forth. There also was testimony that the uneven ground caused the boom to sway up and down, allowing slack in the cable and thereby causing it to whip-lash on the drum and to vary the tension on the spring which held the safety device. The boom of the crane was at about a 45-degree angle from the cab of the crane. Without warning the boom fell, fatally injuring Brooks.

When the crane operator saw the boom start to fall he jumped on the boom brake in an effort to stop it, but the brake failed. There was evidence that the boom on this crane had fallen on two prior occasions but that it had not been inspected at those times to determine if there had been a mechanical defect. Immediately following the accident here in question the boom was raised and it was discovered that the brake could not hold the weight of the boom even without the load.

Plaintiff's contentions are directed at the design and construction of the crane in two particulars—first, the brake handle and drum; and second, a safety device called a "boom dog."

In support of her first contention it is argued that the evidence showed the brake was so negligently designed that it was not adequately protected from the elements in that rain could get on the brake and drum, allowing it to slip; that on the morning of the accident the operator endeavored to protect it by covering it with some pieces of tin, but it still got wet so that when the boom started to fall and he jumped on the brake, it did not hold. Additionally it is argued that the evidence further shows that the brake handle and its mechanism was so negligently constructed that although designed to be normally "on" when in a down

position, the handle showed marks indicating that it would become stuck, and that when in such position the brake handle could not be depressed to increase the brake pressure.

Plaintiff's argument concerning her second contention relates to the construction of the boom dog, a device designed to secure the boom against movement. It consisted of a piece of metal hung vertically over ratchet gears attached to the driveshaft of the boom drum. When it was desired to raise the boom, the operator would disengage the dog by a lever allowing the drum to run free. When it was the desire to lock the boom at the point to which it had been raised, the operator would move the lever to the "in" position, thereby engaging the dog in the teeth of the ratchet and hence preventing movement of the drum. When moving a load, as was being done in this case, it was the practice to engage the dog to prevent the drum from moving and allowing the boom to fall. This is of importance in regard to this particular crane since it had a "dead boom"; that is, there was but one source of power. The crane could either raise or lower the boom, or travel by means of caterpillar treads, or swing the boom horizontally, but it could perform only one of these operations under power at any one time. The dog itself couldn't be seen by the operator by reason of its location behind a metal plate guarding the boom line drum. Hence the operator could not visually determine whether or not the dog was engaged.

Immediately following the accident a state inspector for the Division of Architecture, who was an eyewitness to the accident, examined the crane and at the trial testified that with the lever in the engaged position, he was able to move the dog in and out; that by reason of being vertically suspended it could, in effect, "pop out" while the crane was being operated. There was further testimony that although the operator turned the lever for controlling the dog to the engaged position, the dog could have stopped on the point of a ratchet tooth; that if it stopped at that point, as a safety



engineer for the Industrial Accident Commission testified, "You could expect trouble." There was further evidence of gouging on the teeth of the ratchet points and that the nature of the gouging was such that it could only have occurred while the boom was coming down. Thus there was evidence that if the brake was not working properly, and the dog was on the point of the tooth, the boom could come down by jarring or by the combination of depressions in the ground over which it was traveling. It was further shown that the zigzagging movement of the crane could also have so released the pressure on the boom dog as to have allowed the boom to fall. There was additional testimony by the safety engineer that when he examined the set screw which was used to prevent the dog from rotating, he found that the set screw was not keyed into the shaft; and that the spring which held the dog against the ratchet was inadequate in that it did not have sufficient tension. The operator of the crane testified that the last time he had raised or lowered the boom he had put the dog in the "in" position. This was corroborated by the inspector who, immediately after the accident, examined the crane and found the dog to be in the "in" position, as did the foreman who also checked the crane shortly after the accident.

[1-3] Since "\* \* \* it is only when reasonable minds cannot differ with respect to whether proved facts and reasonable inferences therefrom make out negligence or non-negligence, that such issues may properly be taken from the jury" *Biondini v. Amship Corporation*, 81 Cal. App.2d 751, 766, 185 P.2d 94, 103, then it would seem to follow from the evidence so summarized that reasonable minds could well differ in light of all of the circumstances of this case, and that therefore the question of defendants' alleged negligence should have been submitted to the jury.

Defendants' primary contention, which appears to have been the basis of the trial court's order, was that proximate causation is lacking, in that the accident was the proximate result of the negligence of the

crane operator. However if it may be said that the jury could reasonably have found negligence in the design of the crane, and we conclude that it could, then defendant's liability could not be cut off by reason of the intervening negligence of the operator, if such negligence can be said to have been foreseeable, and whether or not such intervening negligence was foreseeable was a question for the jury. *De Mirjian v. Ideal Heating Corp.*, 129 Cal. App.2d 758, 278 P.2d 114.

Defendant further argues in support of the judgment that it is not liable by reason of the contributory negligence of Brooks. In this regard reliance is placed upon testimony that Brooks had been repeatedly warned to stay out from under the boom, and that he had not heeded such warning. However there is a statutory presumption that he used due care. Sec. 1963, subd. 4, Code Civ. Proc. This presumption, coupled with the testimony that the crane was moving in a zigzagging manner, thereby causing the boom to swing as the crane changed direction, was evidence from which the jury could infer that at the time of the accident the boom had swung over Brooks, rather than that Brooks had stepped under the boom. Since plaintiff's evidence is reconcilable with the presumption, the question of contributory negligence was one for the jury. *Johnson v. Nicholson*, 159 Cal.App.2d 395, 324 P.2d 307.

[4, 5] It is finally argued by defendant that the accident was due to an obvious danger. It is not clear from its brief whether obvious danger is urged as indicating contributory negligence or assumption of risk. If the theory is contributory negligence, the rule is that Brooks must have appreciated the degree of danger involved as well as the danger itself. *Johnson v. Nicholson*, supra, 159 Cal.App.2d at page 409, 324 P.2d at page 315. Here it is to be noted that this was the first day that Brooks had worked with this crane, and he had not seen it fall on two prior occasions. Also, as previously noted, the jury could have found that on this particu-

lar occasion the boom had swung over him. And also as noted, whether he had appreciated the amount of danger involved was a jury question. Again, if defendant's theory is that Brooks assumed the risk, then it is the rule that there must be voluntary exposure to danger and actual, not constructive knowledge of the risk involved. *Johnson v. Nicholson*, supra, 159 Cal.App.2d at page 409, 324 P.2d at page 315. Furthermore, there was the testimony of the foreman that Brooks was under orders to tend the load, and that if he had not done so he would have been fired; hence there would be further question as to Brooks' actual knowledge of the risk involved.

The judgment on the pleadings as regards the warranty cause of action is affirmed. The judgment of nonsuit as to the negligence cause of action is reversed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.



**Ted CHAVEZ, Plaintiff and Appellant,**  
v.

**O. E. SARGENT et al., Defendants and Respondents.\***  
Civ. 18012.

District Court of Appeal, First District,  
Division 1, California.

Sept. 4, 1958.

Hearing Ordered on Court's Motion  
Oct. 22, 1958.

Action involving the validity of the so-called "right to work" ordinance. From a judgment of the Superior Court, County of San Benito, Stanley Lawson, J., holding that the ordinance was unconstitutional and entering judgment for defendants, the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the ordinance was invalid as attempting to legislate

\* Opinion vacated 339 P.2d 801.

in a field already occupied by state legislation.

Judgment affirmed.

#### 1. Labor Relations ⇨259

A "union shop" agreement means the contract under which an employer may hire nonunion employees but such employees must join a union within a specified time after they are employed and by "closed shop" agreement is meant a contract under which only union members may be hired.

See publication Words and Phrases, for other judicial constructions and definitions of "Closed Shop" and "Union Shop".

#### 2. Labor Relations ⇨243

The Taft-Hartley Act permits non-federal legislation and regulation in the labor relations field with respect to agreements requiring membership in a labor organization as a condition of employment by state or territorial law when a problem involves interstate commerce. National Labor Relations Act, §§ 8(a) (3), 14(b) as amended 29 U.S.C.A. §§ 158(a) (3), 164(b).

#### 3. Labor Relations ⇨45

Taft-Hartley Act applies only to matters relating to interstate commerce and has no application to commerce purely local in character and would not invalidate a county "right to work" ordinance where it was not claimed that interstate commerce was involved or affected. National Labor Relations Act, §§ 8(a) (3), 14(b) as amended 29 U.S.C.A. §§ 158(a) (3), 164(b).

#### 4. Counties ⇨21½

Under the constitution, police powers conferred on cities and counties are equal in extent to those of a state, and hence if the state has not occupied the field of labor relations with respect to "right to work" ordinance, the counties might legislate on the subject. West's Ann.Const. art. 11, § 11.

#### 5. Counties ⇨21½

##### Municipal Corporations ⇨592(1)

The problem of the union or closed shop in labor relations is one of state-wide

concern, but even as to such a concern, local regulation is permissible until state laws have been enacted to occupy the field, and hence power to act on such a question is concurrent between the state and counties and municipalities with state law prevailing in event that the local ordinance conflicts with general laws.

#### 6. Counties $\Rightarrow$ 21½

##### Municipal Corporations $\Rightarrow$ 592(1)

The phrase "general laws" with respect to conflict between state law and ordinances of counties and municipalities implies that for a conflict to exist it must be between the local ordinance and a state statute, and a conflict between an ordinance and the general common-law principles is not sufficient to constitute the conflict referred to in the constitutional provision that any county may make within its limits all police and other regulations not in conflict with "general laws". West's Ann.Const. art. 11, § 11.

See publication *Words and Phrases*, for other judicial constructions and definitions of "General Laws".

#### 7. Counties $\Rightarrow$ 21½

Under the constitutional provision authorizing any county to make all local police and other regulations not in conflict with general laws, such a conflict may exist not only where the ordinance directly forbids what a state statute permits or permits what the state law prohibits but also where the ordinance purports to operate in a field already occupied by state legislation. West's Ann.Const. art. 11, § 11.

#### 8. Counties $\Rightarrow$ 21½

Under the constitutional provision authorizing a county to make within its limits all local police and other regulations not in conflict with the general laws, a conflict may exist and the state will be deemed to have occupied the field not only where the ordinance and statute are in direct conflict but also where realistically the effect of the ordinance would defeat the basic ob-

jectives of state legislation. West's Ann. Const. art. 11, § 11.

#### 9. Labor Relations $\Rightarrow$ 44

A state constitutional or a state statutory enactment containing "right to work" provisions does not violate the United States constitution but constitutes a proper exercise of the police power even though it invalidates existing union security contracts and operates to weaken the bargaining power of unions.

#### 10. Counties $\Rightarrow$ 21½

A county "right to work" ordinance was invalid as attempting to legislate in a field already occupied by state legislation. West's Ann.Const. art. 11, § 11; West's Ann.Labor Code, §§ 920-923, 1115-1120.

Garvin W. Hale, San Jose, for appellant.

Severson, Davis & Larson, Nathan R. Berke, George Brunn, San Francisco, as amicus curiae for appellant.

Morgan & Beauzay, San Jose, for respondent.

Gladstein, Andersen, Leonard & Sibbett, Norman Leonard, San Francisco, as amicus curiae (I. L. W. U.).

Charles P. Scully, Victor Van Bourg, San Francisco, as amicus curiae (AFL-CIO).

PETERS, Presiding Justice.

This case involves the validity of the so-called "Right to Work"<sup>1</sup> ordinance of San Benito County. The trial court, on demurrer, held that such ordinance was unconstitutional, and entered its judgment for the defendants. From this judgment the plaintiff appeals.

The ordinance was enacted in July of 1957. It is entitled: "An ordinance relating to employment, prohibiting denial of employment because of non-membership in a labor organization, prohibiting agreements excluding any person from employment because of non-membership in a labor

1. See *In re Petition of Idaho State Federation of Labor (A.F.L.)*, 75 Idaho 367, 272 P.2d 707, 708, holding that such a

title was so deceptive that it could not be used properly as the title of a proposed initiative measure.



organization; \* \* \* Making illegal compelling or attempting to compel a person to join a labor organization or leave his employment against his will; prohibiting conspiracy to cause the discharge of any person because of non-membership in a labor organization; providing right of action for damages for violations; and providing for injunctive relief."

After setting forth several definitions, the ordinance provides that:

"Section 3. \* \* \* No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall \* \* \* [any person or corporation] enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.

"Section 4. \* \* \* Any act or provision in any agreement entered into on or after the effective date hereof or any renewal or extension of any existing agreement entered into on or after the effective date hereof which is in violation of this ordinance shall be illegal and void. Any strike or picketing to force or induce any employer to make an agreement in writing or orally in violation of this ordinance shall be for an illegal purpose.

"Section 5. \* \* \* It shall be unlawful for any employee, labor organization, or officer, agent or member thereof to compel or attempt to compel any person to join any labor organization or to strike against his will \* \* \*"

Section 6 prohibits and declares illegal any conspiracy to accomplish any of the prohibited acts. Section 7 provides that "Any person who violates any provision of this ordinance, or who enters into any agreement containing a provision declared illegal by this ordinance, or who shall bring about the discharge or the denial of employment of any person because of non-membership in a labor organization shall be liable to the person injured as the result of such act or provision for such damages

as such person injured may have sustained thereby and may be sued therefor."

Section 8 provides that "Any person injured or threatened with injury by any act declared illegal by this ordinance shall notwithstanding any other provision of this ordinance or any other ordinance to the contrary, be entitled to injunctive relief therefrom."

The next section contains a broad severability provision. There is no provision making a violation of the ordinance a criminal offense.

The complaint alleges that the plaintiff, Ted Chavez, is a painting contractor doing commercial and residential painting in Santa Clara and San Benito Counties; that a majority of his employees are members of a designated painters' local union affiliated with the A.F.L.-C.I.O.; that Sargent is the secretary of that union, and that such union is the only painters' union in San Benito County; that the defendants demand that plaintiff sign a union contract similar to the one that he has in Santa Clara County with the painters' union there, providing for union membership after 30 days of employment; that the union members in San Benito County are conspiring to compel the non-union painters to join the union, and refuse to work with non-union painters; that these acts are in violation of the ordinance; that plaintiff "wishes to sign a union security contract but is subject to a suit for damages" under the ordinance if he does so. Plaintiff therefore prayed for a temporary and permanent injunction compelling the defendant union "to desist from their demands for any type of union security in San Benito County and compelling them to work with non-union building trades employees."

The trial judge, the Honorable Stanley Lawson, held the ordinance to be unconstitutional. In doing so he wrote an opinion holding that the phase of the labor-management field here involved had been pre-empted by the Federal government

by certain provisions of the Taft-Hartley Act (29 U.S.C.A. § 158(a)), and that, even if this were not so, the State of California has legislated on the subject and occupied the field. This being so, the judge declared, a county cannot lawfully pass an ordinance that conflicts with the general laws of the state, "Nor may it forbid what the State law allows or legislate when the State law occupies the field. (Pipoly v. Benson, 20 Cal.2d 366 [125 P.2d 482, 147 A.L.R. 515])." The judge concluded "that since the Federal and State Governments have per-empted the field, the ordinance is void." It is these determinations that are challenged on this appeal. In addition to the briefs of the litigants several *amici curiae* have filed briefs on both sides of the controversy.

[1] The holding that the federal government has pre-empted the field of legislation here involved was erroneous for at least two reasons. In the first place, even if it be assumed that the Taft-Hartley Act is applicable to this controversy, by reason of section 8(a) (29 U.S.C.A. § 158(a) (3)) which outlaws the closed shop but authorizes union shop<sup>2</sup> agreements under certain conditions, section 14(b) of the Taft-Hartley Act (29 U.S.C.A. § 164(b)) provides:

2. A "union shop" agreement means a contract under which an employer may hire non-union employees, but such employees are required to join the union within a specified time after they are employed. A "closed shop" agreement is a contract under which only union members may be hired.

3. There is a disagreement between commentators on this subject. Berke and Brunn in an article "Local Right to Work Ordinances" in 9 Stanford L.Rev. 674, take the position that the above-quoted section clearly demonstrates that Congress did not occupy the field of regulation of compulsory unionism. On the other hand, Finman in "Local 'Right to Work' Ordinances: A Reply" in 10 Stanford L.Rev. 53, comes to a contrary conclusion. See also United Const. Workers, affiliated with United Mine Workers of America v. Laburnum Const. Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025; Garmou v. San Diego Building Trades

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

[2] This section, on its face, apparently permits non-federal legislation and regulation in this field by state or territorial law<sup>3</sup> when the problem involves interstate commerce.

[3] In the second place, even if it be assumed that, in a case involving interstate commerce, the federal government has pre-empted the field on the subject involved, and that the section quoted above does not mean what it apparently says, this would not assist defendants. The Taft-Hartley Act, of course, can apply only to matters relating to interstate commerce. It has no application to commerce purely local in character, that is, to commerce that is entirely intrastate. In the instant case, the record before us is completely devoid of any allegation or claim by any party that interstate commerce is involved or affected. There is nothing in the record to indicate that plaintiff was engaged in interstate commerce. Where the record is

Council, 49 Cal.2d 595, 320 P.2d 473, certiorari granted by U. S. Supreme Court generally discussing the problem as it relates to organizations involved in interstate commerce.

The parties and *amici curiae* also discuss the question of whether the permission granted by the quoted section to states and territories includes counties, which are, of course, legal and political subdivisions of the state for purposes of government. 13 Cal.Jur.2d p. 347, § 2. The trial court in the instant case, in support of its holding that the federal government had pre-empted the field, held that political subdivisions are not included within the grant of power to state and territories. Certainly the normal and customary construction of "State Law" encompasses county ordinances. There is nothing in the legislative history of the Taft-Hartley Act or in the Act itself to indicate that Congress left the field open for state legislation but pre-empted it as to county legislation.

barren as to interstate commerce the question of federal pre-emption does not arise. *Thorman v. International Alliance, etc. Employees*, 49 Cal.2d 629, 320 P.2d 494; *Seven Up Bottling Co. of Los Angeles v. Grocery Drivers Union*, 49 Cal.2d 625, 320 P.2d 492. We must, therefore, hold that, as to the problem here involved, inasmuch as interstate commerce is not involved, the trial court was in error in holding that the federal government has pre-empted the field.

The trial court also ruled that the State of California, by state law, has pre-empted the field, and that the ordinance is unconstitutional because contrary to state law and policy. This presents the pivotal issue presented on this appeal.

[4, 5] The Constitution of this state in Article XI, section 11, states: "Any county \* \* \* may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Under this section the police powers conferred on cities and counties are "equal in extent to those of the state." *McKay Jewelers v. Bowron*, 19 Cal.2d 595, 600, 122 P.2d 543, 546, 139 A.L.R. 1188; see also an article by Peppin, "Municipal Home Rule in California," 32 Cal.L.Rev. 341. Therefore, if the state has not occupied the field here involved, the counties may legislate on this subject. This is so no matter how logical and compelling the argument may be that laws permitting or prohibiting the union or closed shop should, for obvious reasons, be of statewide application. The problem is obviously one of statewide concern. But even as to such a concern, local regulation is permissible until state laws have been enacted to occupy the field. In *re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; In *re Iverson*, 199 Cal. 582, 250 P. 681; *Wilton v. Henkin*, 52 Cal.App.2d 368, 126 P.2d 425; *Sawyer v. Board of Supervisors*, 108 Cal.App. 446, 291 P. 892. Except in a very limited field not here involved, power to act on such a question is concurrent between the state and counties and municipalities, with state law prevailing

in the event that the local ordinance conflicts "with general laws."

[6] The phrase "general laws" implies that for a conflict to exist such conflict must be between the local ordinance and a state statute, and that a conflict between the ordinance and general common law principles is not sufficient to constitute the conflict referred to in the constitutional provision. The phrase used in that provision is "general laws", not "general law." The fact that the plural of the term was used implies that the framers were referring to statutes and not to the common law. Although we have been referred to no case directly passing on this subject, it is significant that most of the cases discussing the problem have stated that the local units may act until the "legislature" has entered the field, or have stated that the local ordinance is valid unless it is in conflict with the "statutes" of this state. In *re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; In *re Iverson*, 199 Cal. 582, 250 P. 681; *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. The determination of this point in the instant case is of importance because long prior to the passage of the ordinance here involved in 1957, and at least as early as 1908, the legality of the closed and union shop was recognized and approved under general common law principles. *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550. This case has been consistently followed. But for reasons already stated, the rule of these many decisions cannot be held to create a conflict between the local ordinance and the "general laws."

[7, 8] Thus, the key question presented is whether the ordinance in question is in conflict with the statutory law of the state. Such a conflict may exist not only where the ordinance directly forbids what a state statute permits, or permits what the state law prohibits, but also where the ordinance purports to operate in a field already fully occupied by state legislation. See *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482, 147



A.L.R. 515, for a full discussion of this principle. Inasmuch as the state has not, by legislation, directly authorized the union shop, the real question presented is whether the state has generally occupied the field so as to preclude local ordinances on the subject. Certainly it is the law that a conflict may exist and the state will be deemed to have occupied the field, not only where the ordinance and statute are in direct conflict but also where, realistically, the effect of the ordinance would defeat the basic objectives of the state legislation. In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; Agnew v. City of Culver City, 147 Cal.App.2d 144, 304 P.2d 788; Lynch v. City of Los Angeles, 114 Cal. App.2d 115, 249 P.2d 856. As was said in Wilson v. Beville, 47 Cal.2d 852, 859, 306 P.2d 789, 793, quoting from Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280: "Although the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute \* \* \* [Citing a case.] Determination of the question whether the Legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate. [Citations.] Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulations is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. [Citation.]" Thus, the question presented is whether or not the state by legislation has "occupied the field" of collective bargaining within the meaning of the principles above discussed. On this subject the litigants and the competing *amici curiae*, and the legal commentators are in disagreement. See Berke and Brunn, "Local Right to Work Ordinances," 9 Stanford L.Rev. 674, contending that the state has not occupied the field, and Fin-

man, "Local 'Right to Work' Ordinances: A Reply", 10 Stanford L.Rev. 53, urging that the state has occupied the field.

The State of California has not seen fit to adopt a detailed statutory scheme for the regulation of collective bargaining or for the regulation of the relations between unions and management, but the state has passed some legislation in this field. There are several statutes that have been enacted on these subjects, but, for the purposes of the problems presented, it is necessary to consider only sections 920 through 923 of the Labor Code. Section 920 defines the word "promise." Section 921 declares that promises "between any employee or prospective employee and his employer" are contrary to public policy if either party promises:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

"(b) Not to join or not to remain a member of a labor organization or of an employer organization,

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise \* \* \*".

Section 922 provides that: "Any person \* \* \* who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

Then comes section 923 which clearly and unequivocally sets forth the state's public policy as to labor organizations. It declares:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agree-

ment between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

This legislation was passed in 1933 (Stats. of 1933, p. 1478, Chap. 566) and placed in the Labor Code in 1937, and was passed at a time when there was a nationwide controversy over so-called "yellow dog"<sup>4</sup> contracts, over company unions, and over the use of injunctions in labor disputes. California did not see fit to adopt some of the legislation adopted in other

states and nationally aimed at correcting these evils, and failed to adopt the model anti-injunction bill adopted in many states. But it did adopt the declaration of policy contained in that proposed bill (§ 923 of the Labor Code) and the provisions which declare anti-union and company union contracts to be contrary to public policy. *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 385, 106 P.2d 403.

[9,10] The question to be decided is whether the county ordinance here involved is contrary to the provisions above quoted, or, stated another way, whether the ordinance attempts to legislate in a field already occupied by the state legislation.<sup>5</sup>

On this subject there is no reasonable basis for any real controversy. A reading of section 923 demonstrates that there is a direct conflict between the public policy of the state as there declared, and the public policy of the county of San Benito as set forth in the ordinance. Section 923 declares that it is the public policy of this state to leave the negotiation of labor contracts to voluntary agreement, and to give to the individual workman freedom in negotiating the terms and conditions of his employment. The ordinance declares, however, that it is the policy of San Benito

4. A "yellow dog" contract, definitely anti-union, is an agreement between an employer and his employee that the employer will maintain his business on a "non-union" basis, and that the employee will not join a labor union during term of his employment.

5. There can be no doubt that a state constitutional or a state statutory enactment containing right to work provisions does not violate the United States Constitution. They constitute a proper exercise of the police power, even though they invalidate existing union security contracts and operate to weaken the bargaining power of unions. *Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.* (Whitaker v. State of North Carolina), 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212, upholding a Nebraska constitutional amendment and a North Carolina statute, and *American Federation of Labor Arizona State Federation of Labor v. American Sash*

and Door Co., 335 U.S. 538, 69 S.Ct. 260, 93 L.Ed. 222, upholding an Arizona constitutional amendment.

In their briefs and on oral argument counsel place reliance on the state court decisions involving the Arizona constitutional provision (67 Ariz. 20, 189 P.2d 912), and the Nebraska constitutional provision (149 Neb. 507, 31 N.W.2d 477). Those cases do not involve in any way the problem with which we are here concerned. They involve, solely, the question as to whether the state constitutional provisions violated the provisions of the federal Constitution. It was held that they did not in that they were a proper exercise of the police power. In the present case we assume that the ordinance would be valid unless it operates in a field already occupied by the state. Obviously, this is an entirely different question than the one presented in the cited cases. They are not relevant on the issue here involved.

County to abolish voluntary agreement on the issue of the union shop, and to limit the workmen's freedom of contract by prohibiting negotiation with respect to that part of his contract of employment. Thus, the policy of section 923 is clearly contrary to the policy of the ordinance. This is not only clear from the general policy of section 923 but is also demonstrated by the precise language used. Section 923 states that "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees." This amounts to a prohibition of local regulation of the terms of collective bargaining agreements. Otherwise, the approval given by the statute to "voluntary agreement" would be meaningless. If cities and counties can regulate union shop provisions of collective bargaining agreements, then they can regulate and prohibit other provisions relating to the terms and conditions of employment, and thus destroy, completely destroy, the right of labor and management to determine these matters through voluntary agreement.

This meaning of section 923 is not only clear from the language of the section, but it is also the interpretation that the Supreme Court of this state has placed on the language used.

In *Levy v. Superior Court*, 15 Cal.2d 692, at page 704, 104 P.2d 770, at page 776, 129 A.L.R. 956, Mr. Justice Shenk speaking for a unanimous court, after first quoting section 923, stated: "This declaration evidences the existence of a policy to uphold the freedom of employees to organize and to enter into collective bargaining contracts for their own protection."

In *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 106 P.2d 403, the Supreme Court held that union shop contracts are valid in this state and not contrary to the provisions of section 921. The precise holding was that picketing by a union to force an employer to execute a closed shop agreement which obligated the employer to require that all employees, present and prospective, must designate the union as their

collective bargaining agent and to become and to remain members of the union as a condition of employment, was lawful and did not violate sections 920 through 923 of the Labor Code. After holding that the sections did not prohibit a promise on the part of employees to join an independent labor union, the court stated (16 Cal.2d at page 387, 106 P.2d at page 407.):

"These and other considerations render untenable the contention that union shop contracts in California are void under section 921. \* \* \* Considering all of these circumstances, a legislative intention to declare the closed shop contract unlawful will not be presumed.

"The argument is also made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right 'to coerce' the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain 'unorganized', and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. [Citing cases.]

"The argument that provisions similar to those now being considered guarantee employees freedom 'from all interference' in their selection of a collective bargaining agent has been accepted by several state courts. [Citing cases.] \* \* \* It is not in accordance with the law of this state, as judicially declared for many years, nor is it based upon a fair construction of sections 920 to 923 of the California Labor Code, considering their history and purpose. These sections lay no statutory restraints upon the workers' efforts to secure a closed shop contract from an employer,



hence the appellants' picketing was lawful and should not have been enjoined."

The least that can be said of the Shafer case is that it holds that sections 920-923 of the Labor Code do not place any restraint upon the efforts of workers to obtain a union shop contract from the employer, and that these sections recognize the validity and propriety of union shop agreements.

Whatever doubt may have existed as to the meaning of the sections after the decision in the Shafer case, was set at rest by the decision of *In re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675. This case held that section 923 was not simply a statutory declaration of policy to guide the courts in interpreting other provisions of the code, but contained pronouncements that have an independent meaning and effect of their own. There the court was presented with a city ordinance of Redding making it a crime to solicit members for a dues-paying organization without first paying a fee to procure a license. Porterfield was a paid union organizer, one of whose duties was to solicit memberships for his union. He solicited such memberships in Redding without securing a license, and was convicted. On *habeas corpus*, the Supreme Court held that the ordinance was unconstitutional because it was in conflict with the public policy of California as declared in section 923. In so holding Mr. Justice Schauer, speaking for the majority of the court, held in clear and cogent language that the tax provisions of the ordinance "are not consistent with the public policy of California as declared in section 923 of the California Labor Code." (28 Cal.2d at page 115, 168 P.2d at page 721.) After quoting the major portion of the section, and citing the Shafer case, *supra*, Mr. Justice Schauer continued (28 Cal.2d at page 116, 168 P.2d at page 772):

"Where a matter is of state-wide concern, local regulation upon the subject may be enforced only if it is not in conflict with the statutes of the state. [Citing authorities.] Respondent concedes that the ordinance in question is both a regulatory and

revenue measure. We think that because it is the latter as well as the former it is incompatible with the state legislation.

"The imposing of a license tax upon the exercise of the privilege of membership solicitation places an impediment in the way of realization of the state's declared policy of 'full freedom' for association and self-organization of workers. A part of the right of self-organization of employees is the right of reasonable solicitation of others to join their union. [Citing a case.] The solicitation of members is one of the most important activities of a union. Such solicitation is to a union akin to what breathing is to a human being. It is axiomatic to say that without members a union cannot function. In the development and apposition of a trade union the paid organizer usually has the duty to widely and systematically solicit workers for membership. A tax on solicitation of memberships thus tends to smother the workers' united existence. A revenue tax could be made so onerous as to proximately affect collective bargaining and the successful carrying on of concerted activities for other mutual aid or protection. The legitimate objective of the closed shop and consequent employer recognition can generally be obtained only by increase of membership and expansion of organization."

The ordinance was declared invalid because it operated in a field already occupied by state legislation. The state legislation did not refer to the power of licensing, the subject matter of the ordinance. But the court held that there was a conflict because freedom from licensing was reasonably necessary to secure the freedom of action guaranteed by the state legislation. The Porterfield case stands for the proposition that section 923 declares that it is the state's policy that no impediment may be set up by local ordinance that will stand in the way of the union's ability to bargain on a basis of equality with management, that is, that no local ordinance may interfere with voluntary collective bargaining agreements. The Shafer and Porterfield cases have never been questioned

or overruled. This court, as an intermediate court, is bound by them.

Certainly the point need not be labored that the prohibitions contained in the San Benito ordinance directly impede the ability of the unions to bargain with their employers on a basis of reasonable equality, and that such impediment is more direct and substantial than the impediment to the same objective found in the Redding ordinance.

Under section 923, as interpreted by these cases, it is basic state policy "to balance the industrial equation \* \* \* by placing employer and employee on an equal basis." *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 385, 106 P.2d 403. To accomplish this purpose the right to develop unions was granted because otherwise "the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." § 923, Labor Code. The section declares that it is an affirmative objective of state policy to equalize the bargaining power as between labor and management by means of encouraging the maintenance of effective unions. Any local ordinance that tends to obstruct this policy is directly in conflict with the state act. That is the necessary interpretation of the *Porterfield* case. The appellant argues that the collective bargaining powers of the unions are not affected by the ordinance, and are as fully effective now as they were before the ordinance was adopted. Such argument completely loses sight of the realities of life as they pertain to the labor-management field. Laws in this field do not operate in

a vacuum. The field of labor-management relations is a highly dynamic and realistic one. By prohibiting voluntary agreements relating to union security, the ordinance necessarily and inevitably adversely affects the power of the union to bargain effectively. This is obvious. Effective collective bargaining, so far as labor is concerned, depends upon labor's negotiating agents representing all or most of the workers. Under so-called "right to work" ordinances labor's representatives would no longer be able to speak for all the workers in the field of intrastate commerce. Inevitably, a large portion of the labor force would become non-union. This would result not only because many employers would prefer non-union help and would encourage new employees not to join a union, but because many new employees would not join a labor union for the obvious reason that under the ordinance they would be entitled to all the benefits in working conditions gained by the unions without the necessity of paying union dues. Thus, unions would not only lose the revenue from dues necessary to support their activities, but when it came time to discuss a new contract, management would have a single spokesman while the employees would be divided between union and non-union representatives and would necessarily have to speak through multiple spokesmen. Bargaining strength is necessarily dependent on the employee's ability to act collectively. The net result would be a significant lack of equality in bargaining power.<sup>6</sup> This would be in direct conflict with state policy as set forth in section 923.

The conclusion that this ordinance conflicts with the general state law as set

6. This is not a mere surmise or conjecture. The Supreme Court has recognized that union security arrangements are of basic importance to the maintenance of equality in bargaining power. Thus in *McKay v. Retail Automobile Salesmen's Local Union*, No. 1067, 16 Cal.2d 311, 326, 106 P.2d 373, 381, the Supreme Court states: "The closed union shop is an important means of maintaining the combined bargaining power of

the workers." In *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 388, 106 P.2d 403, 408, the same court stated that "the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain 'unorganized.'" Obviously, the court may properly take judicial notice of these economic facts.

forth in section 923 is not affected by the recent Supreme Court decision of *Garmon v. San Diego Building Trades Council*, 49 Cal.2d 595, 320 P.2d 473. This was a second appeal in this case. On the first appeal the Supreme Court of California had affirmed an injunction and a judgment of damages against the union there involved. *Garmon v. San Diego Building Trades Council*, 45 Cal.2d 657, 291 P.2d 1. The Supreme Court of the United States "vacated" this determination and ordered the cause remanded for further proceedings. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed. 2d 618.

In the *Garmon* case the plaintiff's employees did not belong to a union, and did not desire to join one. The plaintiff employer, for that reason, refused to sign a union shop agreement with defendants. The latter picketed plaintiff's place of business. The majority of the Supreme Court of California found that the picketing was unlawful. The majority reasoned that the picketing was an attempt to force upon plaintiff's employees terms and conditions of employment which they did not want and had specifically rejected. This activity violated the philosophy and policy of the Jurisdictional Strike Act (§§ 1115-1120, Labor Code), a statute not here involved and also violated the policy of section 923 of the Labor Code. There was a strong dissent in the *Garmon* case joined in by three of the justices, and the United States Supreme Court has granted *certiorari* in the case.

We do not find it necessary to engage in a lengthy discussion of the *Garmon* case. Assuming that the law stated in that case by the majority of the court is correct,

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it is not here even remotely applicable. That case involved a problem in interstate commerce. The instant case deals only with intrastate commerce. That case involved the Jurisdictional Strike Act, the instant one does not. But of even more importance, in the *Garmon* case all of the employees involved had refused to join the union that was picketing for a closed shop. In the instant case the employees want a union shop agreement and the employer wants a union shop agreement, but both are prevented from entering into such a voluntary agreement by the terms of the ordinance. The *Garmon* case in no way involved restraints upon labor organizations and employers who voluntarily desired to enter a union shop agreement. It dealt with a form of economic coercion being forced on both the employer and his employees against their wills. The vice of the San Benito ordinance is that it prohibits voluntary agreements in a field where the state has already pre-empted the field by declaring that the public policy of the state favors such voluntary agreements. Thus the *Garmon* case and the instant one involve not only different facts, but completely different legal principles.

The parties and *amici curiæ* argue many other points in their briefs. These need not be discussed because for reasons already stated we are convinced that the trial court correctly decided that the ordinance attempts regulation in a field already fully occupied by state law, and is, therefore, unconstitutional.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem.,  
concur.



163 Cal.App.2d 485

**CABANA NUTRIA, Inc., a California corporation, Plaintiff and Appellant,**

**v.**

**THE WAY, Inc., a corporation; Victor P. Wierwille; Harry Wierwille; Doe Green; Doe Black; Doe Red; Doe Brown; W. S. Curtis & Associates; William S. Curtis; Imperial Purebred Nutria Association; Purebred Nutria Associates, Inc., a corporation; Does I through X, Inclusive, Defendants.**

**W. S. Curtis & Associates, William S. Curtis, and The Way, Inc., a corporation, Respondents.**

**Civ. 23158.**

**District Court of Appeal, Second District, Division 2, California.**

**Sept. 12, 1958.**

**Hearing Denied Nov. 5, 1958.**

Action to enjoin performance of an agreement between certain of defendants allegedly violative of an agreement between plaintiff and one of defendants. From orders of the Superior Court, Los Angeles County, Jesse J. Frampton and Bayard Rhone, JJ., having effect of denying a preliminary injunction, dissolving a temporary restraining order and vacating upon court's own motion entry of default of certain defendant, the plaintiff appealed. The District Court of Appeal, Ashburn, J., held that contract between plaintiff and one of defendants conferring upon such defendant exclusive distributorship of plaintiff's product within certain specified counties of southern Florida did not prevent such defendant from doing business outside of Florida or require it in Ohio or other states to buy its supplies from plaintiff and plaintiff was not entitled to an injunction restraining such defendant from performing under a contract with another defendant appointing it as distributor of products in western portion of Ohio.

Orders affirmed.

#### **1. Contracts ☞207**

##### **Injunction ☞61(1)**

Contract between plaintiff and one of defendants conferring upon such defendant

exclusive distributorship of plaintiff's product within certain specified counties of southern Florida did not prevent such defendant from doing business outside of Florida or require it in Ohio or other states to buy its supplies from plaintiff and plaintiff was not entitled to an injunction restraining such defendant from performing under a contract with another defendant appointing it as distributor of products in western portion of Ohio. West's Ann.Civ. Code, § 1648.

#### **2. Contracts ☞220**

A condition cannot be read into a contract as to which the parties might well be deemed to have remained intentionally silent. West's Ann.Civ.Code, § 1648.

#### **3. Appeal and Error ☞153**

Where certain defendant did not appear at hearing of order to show cause why an injunction should not be granted and after motion had been denied and temporary restraining order dissolved plaintiff moved court for a rehearing directing notice of motion to other defendants but not to that certain defendant, plaintiff waived its appeal from that portion of order vacating entry of default against certain defendant upon court's own motion.

#### **4. Appeal and Error ☞770(1), 792**

Failure to serve appellant's opening brief upon an adversary effects a waiver or abandonment of appeal as to such adversary and court in exercise of its inherent power may dismiss the appeal on its own motion so far as concerns respondent who has not been served with the brief.

Julius A. Leetham, Los Angeles, for appellant.

Philip J. West, Fillmore, for respondents Curtis.

ASHBURN, Justice.

Plaintiff appeals from two orders which have the effect of denying a preliminary injunction, dissolving a temporary restraining order and vacating upon the court's

own motion the entry of default of defendant, The Way, Inc.

[1] Plaintiff seeks to enjoin performance of an agreement between defendants W. S. Curtis & Associates and The Way, Inc. which is asserted to be violative of its own rights under an existing contract between plaintiff and defendant, The Way, Inc. Plaintiff's contract confers upon The Way, Inc. exclusive distributorship of plaintiff's nutria animals within certain specified counties of southern Florida. The distributor is named in the document as "The Way, Inc. (Victor P. Wierwille, Pres.) dba Cabana Nutria of Southern Florida." Paragraph 7 says: "Distributor will buy and sell Nutria supplied to him by Corporation exclusively, and will not buy or sell Nutria from any other company, corporation or individual, except the Nutria supplied by Corporation." Giving this language universal import plaintiff claims that the contract between the Curtis company and The Way, Inc. (actually made before knowledge of plaintiff's contract) invaded its own rights and should be enjoined as unfair competition or on some similar ground. The Curtis agreement appoints The Way, Inc. as its distributor of nutria within an exclusive territory in the western portion of the state of Ohio. The distributor therein agrees to sell only nutria supplied by Curtis.

[2] Section 1648, Civil Code, governs this case: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." See, also, *Eastman Oil Well Survey Corp. v. Lane-Wells Co.*, 21 Cal.2d 872, 873, 136 P.2d 564; *Newby v. Anderson*, 36 Cal.2d 463, 470, 224 P.2d 673; *Southern California Gas Co. v. Ventura Pipe Line Construction Co.*, 150 Cal.App.2d 253, 257-258, 309 P.2d 849. The language of paragraph 7 of plaintiff's agreement cannot be fairly construed to prevent The Way, Inc. from doing business outside of Florida or to require it in Ohio or other states to buy its supplies from plaintiff. These things were not within the purview of the contract. A promise to do

no business outside the prescribed Florida territory, or to do no business with anyone but plaintiff in other states, cannot be implied unless it comes within one of the categories specified in *Stockton Dry Goods Co. v. Girsh*, 36 Cal.2d 677, 681, 227 P.2d 1, 3, 22 A.L.R.2d 1460: "A condition cannot be read into a contract as to which the parties might well be deemed to have remained intentionally silent. *Foley v. Euless*, 214 Cal. 506, 511, 6 P.2d 956. With citation of that and other cases, the court in *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App.2d 141, 149, 113 P.2d 878, 882, summarized the rules when covenants may be implied as follows: '(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.' See Civ. Code, Sec. 1648." Such is not the case here. "The purpose of a writing must be ascertained solely from a common sense meaning of it as a whole with a view to effectuate the mutual intention of the parties." *Broome v. Broome*, 104 Cal.App.2d 148, 157, 231 P.2d 171, 176. The lower court correctly ruled that plaintiff is not entitled to an injunction upon the facts shown by the record herein.

[3] Appellant's argument that there was error in vacating the default of The Way, Inc. cannot be considered for appellant has waived its appeal from that portion of the order.

The agreement between plaintiff and The Way, Inc. says: "It is further agreed that the within contract is to be performed at Arcadia, County of Los Angeles, California. Both parties, Distributor and Corporation, expressly consent to the jurisdiction

of the California Court having the venue of this matter in accordance with the foregoing, so long as either party, Distributor or Corporation, receive actual service of process." The record shows personal service within the state of Ohio of summons and complaint, order to show cause and supporting affidavits upon the president of The Way, Inc., a corporation. This probably constituted a valid basis for a personal judgment against that defendant. See, *Smith v. Moore Mill & Lumber Co.*, 101 Cal.App. 492, 494-495, 281 P. 1049; *Solot v. Linch*, 46 Cal.2d 99, 104, 292 P.2d 887; *Code Civ.Proc.*, § 406; 40 Cal.Jur.2d § 20, p. 49; 72 C.J.S. Process § 38 a, p. 1047. Said defendant did not appear at the hearing of the order to show cause why an injunction should not be granted. After that motion had been denied and the temporary restraining order dissolved, plaintiff moved the court for a rehearing, directing the notice of motion to defendants W. S. Curtis & Associates, William S. Curtis and their attorney, but not to The Way, Inc. No service of this notice was made or attempted to be made upon that corporation. It was in connection with the ruling on this motion that the court vacated the default of The Way, Inc. upon its own motion. The opening brief of appellant filed in this court shows that it was served only upon the attorney for said respondents Curtis. Only those respondents have filed a brief herein.

[4] Of course it is no longer necessary to serve a notice of appeal. Before the statute was thus amended, failure to serve the notice upon any of the successful opponents worked a waiver or abandonment of the appeal as to the party or parties not served. (2 Hayne on New Trial and Appeal (Rev.Ed.), § 210, p. 117 et seq.) Under existing rules failure to serve appellant's opening brief upon any adversary effects the same result and the court in the exercise of its inherent power may dismiss the appeal on its own motion so far as concerns the respondent who has not been served with the brief. *Palmer v. Holcomb*, 147 Cal.App.2d 94, 99-100, 305 P.2d 107;

*Brooks v. Duskin*, 159 Cal.App.2d 629, 324 P.2d 351. However, as a dismissal works an affirmance, it will suffice in this case to affirm the order in its entirety.

The orders now on appeal are affirmed.

FOX, P. J., and HERNDON, J., concur.



163 Cal.App.2d 448

**Mary Alice SCHALOW, Plaintiff and Respondent,**

**v.**

**Frank C. SCHALOW and Margaret I. Schalow, Defendants and Appellants.**

**Civ. 9431.**

**District Court of Appeal, Third District,  
California.**

**Sept. 11, 1958.**

**Hearing Denied Nov. 5, 1958.**

Suit to recover unpaid balance of purchase price under agreement to purchase improved farm property, rentals allegedly collected by defendant as plaintiff's agent, and agreed selling price of tractor and equipment. The Superior Court, Merced County, Gregory P. Mauhart, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that agreement by veteran and wife to pay vendor \$24,000 for farm and improvements purchased under provisions of West's Ann.Military and Veterans Code, §§ 985-988.3, relating to farm and home aid to veterans, which at time agreement was made limited to \$15,000 the total value of farm and improvements purchased thereunder, was contrary to public policy and void.

Judgment modified in accordance with opinion.



**1. Armed Services** ⇨101

Statutory limitation upon total value of farm and improvements purchased under provisions of Military and Veterans Code relating to farm and home aid to veterans was for the protection of veterans. West's Ann.Military & Vets. Code, §§ 985-988.3, 986.5.

**2. Contracts** ⇨123(1)

Agreement by veteran and wife to pay vendor \$24,000 for farm and improvements purchased under provisions of Military and Veterans Code relating to farm and home aid to veterans, which at time agreement was made limited to \$15,000 the total value of farm and improvements purchased thereunder, was contrary to public policy and void. West's Ann.Military & Vets. Code, §§ 985-988.3, 986.5.

**3. Armed Services** ⇨101

Agreement to purchase farm and improvements under provisions of Military and Veterans Code relating to farm and home aid to veterans was governed by statutory limitation on total value of farm and improvements purchased thereunder in effect at time agreement was made and not by subsequent amendment raising statutory limitation from \$15,000 to \$30,000, in absence of any language or provision in statute as amended indicating that legislature intended amendment to be retrospective. West's Ann. Military and Vets. Code, §§ 985-988.3, 986.5.

**4. Constitutional Law** ⇨23**Statutes** ⇨263

Constitutional and statutory provisions are not to be considered retrospective in their operation unless intent to make them so clearly appears from their terms.

**5. Contracts** ⇨138(1)

A contract which is against public policy may not be made the foundation of an action either in law or equity.

William W. Coshow and Law Office of C. Ray Robinson, Merced, for respondent.

WARNE, Justice pro tem.

Stating the evidence most favorable to the respondent, in March of 1950 the parties to this action entered into an oral agreement whereby respondent agreed to sell and appellants agreed to buy certain improved farm property in Merced County. The agreed price of the property was \$24,000. In order that the appellants might obtain a loan to carry out the deal respondent then sold and conveyed to the Department of Veterans Affairs, who, concurrently with said transfer, advanced the sum of \$13,000 to the respondent and then entered into an agreement for the sale of the property to the appellants on long term installment payments. In addition to the \$13,000 advanced by the Department appellants transferred a \$1,500 equity in other real property to respondent.

In April of 1956 respondent brought this suit against her son and his wife to collect the balance due her for the property, i. e., \$9,480, which she alleged the appellants promised to pay her in \$1,000 yearly installments commencing March, 1952.

In addition to the causes of action to recover on the real property contract the complaint contained a cause of action to recover rentals which Frank C. Schalow, as respondent's agent, had collected and failed to turn over to respondent, and a further cause of action to recover the sum of \$505, the agreed selling price of an Allis Chalmers Farm Tractor and ditcher and jumper attachment for same, which respondent sold to appellants. The trial court found that there was owing and due to respondent the sum of \$1,358 for rent collected, and that there was owing and due the sum of \$505 for the tractor and equipment. These items were included in the lump sum judgment rendered against the appellants. Appellants have not attacked the judgment in so far as it is based upon the last two items.

Winton & Edlefsen, by F. Leon Edlefsen, Merced, for appellants.

By their answer to the complaint respecting the real property transaction appellants denied that they were indebted to the respondent on account of the sale and conveyance of the real property in the sum of \$9,500 or in any sum at all; denied that they agreed to pay the sum of \$24,000 for the property, or any other sum in excess of the \$14,500 which respondent received. As separate and special defenses they alleged that the purported agreement was not in writing and therefore barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, and in so far as fraud was concerned it was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. They also by way of special defense alleged that the agreement to pay \$24,000 for the real property and improvements was at the time illegal, void and unenforceable under the provisions of section 986.5 of the Military and Veterans Code of California; and lastly they pleaded and alleged that the agreement was invalid under the statute of frauds since it was not in writing subscribed by the appellants.

The case was tried by the court sitting without a jury and resulted in a judgment in favor of the respondent for the sum of \$6,383, which was followed by this appeal.

So far as material herein the trial court found that in March of 1950 the defendants, hereinafter referred to as the appellants, purchased from respondent a certain portion of real property referred to in the proceeding as the "almond orchard," and the parties agreed that the total purchase price would be \$24,000, of which only \$14,500 has been paid; that the parties agreed that the balance of \$9,500 would be paid at the rate of \$1,000 a year commencing March 1, 1952, and that none of the annual payments have been made. The trial court further found that "there existed between the defendant, Frank C. Schalow, a confidential relationship of mother to son, and in this particular case

\* \* \* that the highest relationship of confidence and trust existed by the mother in her son, and said relationship continued until November, 1955," and concluded that because of such confidential relationship respondent's cause of action was not barred by the statute of limitations. The court also held that the statute of frauds was not a bar to recovery. The trial court, however, did not make any findings as to appellants' special defense that their oral agreement to pay \$24,000 was void as it violated the provisions of section 986.5 of the Military and Veterans Code.

The evidence is uncontradicted that appellants purchased the property under the provisions of the Military and Veterans Code relating to farm and home aid to veterans (sections 985 to 988.3, inclusive, Stats.1943, ch. 1046, p. 2981, as amended) and that respondent sold her ranch to the department for \$13,000 and that the department contracted to sell it to the appellants for the same amount. Section 986.5 for the Military and Veterans Code as of the date of the transaction provided, in part: "The cost of a farm to the department shall not exceed thirteen thousand five hundred dollars (\$13,500), and a veteran purchasing the farm may advance the difference between the total price of the farm \* \* \* and the cost of the farm to the department, *but in no case shall the total value of the farm and the dwellings and improvements thereon exceed fifteen thousand dollars (\$15,000).*" Stats.1949, ch. 419, sec. 3, p. 768. Emphasis added.

Appellants first contend that the statutory provision rendered illegal and void any agreement to pay more than \$15,000.

In *Young v. Hampton*, 36 Cal.2d 799, 802, 805, 228 P.2d 1, 3, 19 A.L.R.2d 1380, a veteran obtained a loan under the Servicemen's Readjustment Act (38 U.S.C.A. § 694a), which provides that the government will guarantee a loan to a veteran for home construction if "the price paid or to be paid by the veteran

\* \* \* for the cost of construction  
\* \* \* does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." It was held that the veteran's agreement to pay the contractor an amount in excess of the appraised value was void as it violated the basic policy of the act, to wit, "to assure terms of payment which bear a proper relation to the veteran's present and anticipated income and expenses. The requirement of the same section that the price to be paid by the veteran for the cost of construction shall not exceed the reasonable value as established by a designated appraiser was obviously enacted to protect the borrower from acquiring property at an exorbitant price." The court held that the contract was clearly contrary to public policy and denied recovery.

[1,2] Although the court in the Young case was considering a federal statute and the case involved a transaction between a veteran and a contractor rather than a contract for the sale and purchase of farm land and improvements, we see no reason why the rule with reference to public policy as applied in that case is not likewise applicable to this case. The federal statute under consideration in the Young case and section 986.5 of the Military and Veterans Code of California are quite comparable in their purpose. Here we are dealing with a price limitation of \$15,000 as fixed by the code section. Similarly in the Young case, the limitation under the federal statute was that the price to be paid by the veteran for such property or cost of construction should not exceed the appraised value. The requirement under the provisions of section 986.5 of the code that the price

shall not exceed \$15,000 was obviously for the protection of the veteran. Hence the contract in question violated the policy of the law and is void.

[3,4] However, respondent contends that because at the time of bringing the suit the maximum price under section 986.5 had been increased to \$30,000 this amount should govern the transaction, and not the \$15,000 limitation set forth in the statute at the time the agreement was entered into. Since we find no language or provision in the statute as amended indicating that the legislature intended the amendment to be retrospective we do not agree with respondent. The general rule, applicable alike to constitutions and statutes, is that they are not to be considered retrospective in their operation unless the intent to make them so clearly appears from their terms. *Willcox v. Edwards*, 162 Cal. 455, 460, 123 P. 276.

[5] Since a contract which is against public policy may not be made the foundation of an action, either in law or equity (12 Cal.Jur.2d, sec. 77, p. 280, and cases cited), we conclude that the trial court erred in failing to rule upon the issue and in allowing respondent \$5,000 on the cause of action based upon the agreement for the purchase and sale of the real property.

Since appellants in their briefs filed herein make no attack upon the balance of the judgment based upon the other transactions heretofore mentioned, it is ordered that the judgment be modified and reduced to the sum of \$1,863. Respondent to recover her costs.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



163 Cal.App.2d 401

Margaret TORBENSEN, Plaintiff and  
Appellant,

v.

FAMILY LIFE INSURANCE COMPANY, a  
corporation, and Walter R. Kitz  
Defendants,

Family Life Insurance Company, a  
corporation, Respondent.

Civ. 9325.

District Court of Appeal, Third District,  
California.

Sept. 10, 1958.

Action on a life policy. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment adverse to beneficiary and she appealed. The District Court of Appeal, Schottky, J., held that provision in a questionnaire signed by insured as part of his application for policy wherein he authorized and requested anyone concerned to disclose any and all information and records concerning insured's condition when under observation by such person, if requested to do so by insurer, constituted a waiver of patient-physician privilege, and therefore, physicians who had treated insured were competent to testify in such regard.

Judgment affirmed.

#### 1. Witnesses ⇨219(4)

The physician-patient privilege may be waived, but it must clearly appear that there is an intention to waive, and the court will not run to such a conclusion. West's Ann.Code Civ.Proc. § 1881, subd. 4.

#### 2. Witnesses ⇨219(6)

Provision in a questionnaire signed by insured as part of his application for a life policy, wherein he authorized anyone concerned to disclose any and all information and records concerning insured's condition when under observation by such person, if requested to do so by insurer, constituted a waiver of patient-physician privilege, and therefore physicians who

had treated insured were competent to testify in such regard in action by beneficiary for recovery of proceeds of policy which insurer refused to pay on ground that insured made incomplete and untrue statements in his application for the policy. West's Ann.Code Civ.Proc. § 1881, subd. 4.

#### 3. Insurance ⇨388(3)

Mere fact that examining physician for life insurer found no heart condition when he examined insured did not mean that insurer waived the right to rely on information given by insured in his application for insurance, as to his examination and treatment by other doctors.

#### 4. Insurance ⇨253

A life insurer is entitled to rely on the truthfulness of answers given in an insured's application.

#### 5. Insurance ⇨292

Even though an insured under a life policy died of cancer of the lung, in view of evidence offered by insurer in action by beneficiary for recovery on policy, that it would not have issued the policy if it had known insured was suspected of having a heart condition, misrepresentation by insured as to treatment for his heart condition was material to the risk.

#### 6. Insurance ⇨256(1)

It is not necessary that a misrepresentation relied on by a life insurer to defeat liability under a life policy have a causal connection with the death of the insured.

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Bradford, Cross, Dahl & Hefner, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

SCHOTTKY, Justice.

This action was brought to recover on a contract of insurance on the life of William P. Torbensen. The insurer, Family Life Insurance Company, refused to pay the amount of the policy upon the

ground that the deceased made incomplete and untrue statements in the application for the policy. The trial court denied recovery except for the premiums paid, and this appeal followed.

The facts, viewed in the light most favorable to the respondent insurer, discloses that on April 26, 1955, the insurer issued its policy of life insurance on the life of the decedent, William P. Torbensen. On August 20, 1955, the insured died of cancer. All premiums accrued to the date of death were paid. Margaret Torbensen, appellant herein, gave the insurer the required proof of death and demanded payment. The insurer refused payment on the ground that false statements were made to the examining physician in the application for insurance. At the time the deceased submitted to the physical examination required by the insurer he was asked, among other questions, whether he was in good health and free from bodily impairment, to which he answered yes; whether he had consulted a physician in the past five years, to which the answer was that he had consulted a Dr. Wiseman for low blood pressure; whether or not he had ever had heart disease, to which the answer was no; and whether or not he had ever had an electrocardiogram taken, to which the decedent answered no. At the bottom of the questionnaire above the deceased's signature appeared the following:

To Whom it May concern:

"I hereby authorize and request you to disclose any and all information and records concerning my condition when under observation by you, if requested to do so by Family Life Insurance Company \* \* \*"

At the time the application was prepared the deceased was under the care of Dr. John Craig for an ailment which Dr. Craig had diagnosed as a heart condition. Dr. Craig testified that he had informed the deceased of his condition and had the deceased submit to an electrocardiogram and had prescribed during his

course of treatment drugs which are used to relieve pain in heart disease.

Dr. Wiseman was contacted by the insurer and upon receipt of his reply the policy was issued as of the date of the application. The insurer did not know of any other doctors who had treated the insured but evidence disclosed that if the names of any other doctors had been known the insurer would have contacted them and made a more complete investigation; that the insurer would not have issued a policy if it had known of Dr. Craig's diagnosis, irrespective of its correctness.

The trial court found that the false and incomplete answers of the decedent were made with intent to deceive the insurer; that the insurer relied on the representations made; that if the true facts had been known they would have probably and reasonably influenced the insurer in its determination of whether or not it should issue the policy; and that if the true facts had been known the insurer would not have issued the policy. Judgment was entered in favor of the insurer.

[1,2] Appellant's first contention is that the testimony of Dr. Craig and another physician who treated the deceased should have been excluded. Section 1881, subd. 4 of the Code of Civil Procedure provides in part that a licensed physician cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe for the patient. It is clear that without a waiver the doctors were incompetent to testify in this case as to those matters covered by the statutory privilege. But that part of the application which pertained to the applicant's health and which was completed at the time of the medical examination by the insurer's physician and signed by the deceased included the alleged waiver clause hereinbefore set forth. The trial court held this to be a waiver of the privilege. The privilege may be waived but it must clearly appear there is an intention to waive,

and a court will not run to such a conclusion. *Kramer v. Policy Holders' Life Ins. Ass'n*, 5 Cal.App.2d 380, 391, 42 P.2d 665; *Newell v. Newell*, 146 Cal.App.2d 166, 178, 303 P.2d 839. It seems clear that the paragraph previously quoted was correctly construed by the trial court as a waiver of the privilege. In context, since it was part of the application pertaining to the applicant's state of health, the paragraph can only be interpreted to mean that the applicant was waiving his privilege of having his physician remain mute as to matters learned during the course of treatment of the applicant. Accordingly, Dr. Craig and the other physicians who had treated the applicant were competent to testify. See *George v. Guarantee Mutual Life Company*, 144 Neb. 285, 13 N.W.2d 176.

[3, 4] Appellant next contends that even if the provision can be construed as a waiver the insurer waived the right to the information by its failure to make inquiries as to such facts where they were distinctly implied in other facts of which information was communicated. In this regard it is claimed that because Dr. Prisinzano, the examining physician for the insurer, found no heart condition when he examined the deceased the insurer could not be allowed to disavow the findings of their own doctor. The fact that the deceased was examined by the insurer's doctor would not compel a finding of waiver. We have here an applicant for insurance who gives false answers to questions which are asked for the purpose of giving the insurer information from which it can determine whether or not it shall accept the risk. Appellant in effect argues that if an insurance company has an applicant examined, any false answers made by the applicant become immaterial. However, by failing to reveal the fact of his examination and treatment by doctors not named in the

application the applicant deprived the insurer of facts that might well have affected the extent of its investigation and its examination of the applicant. An insurance company is entitled to rely on the truthfulness of the answers given in the application. *Robinson v. Occidental Life Ins. Co.*, 131 Cal.App.2d 581, 281 P.2d 39; *Cohen v. Penn Mutual Life Ins. Co.*, 48 Cal.2d 720, 312 P.2d 241. Dr. Prisinzano testified that if the answers had been truthful a more complete examination would have been given, particularly with regard to the heart condition. The insurer introduced evidence that if it had known of the other doctors who had treated the applicant it would have contacted them.

[5, 6] Appellant's final contention is that in any event the false statements and concealments were immaterial. The deceased died of cancer of the lung. The attending physician at the time of death testified that he did not find anything that would indicate that the deceased had heart trouble. Appellant argues that since the deceased did not have heart disease the false answers did not go to the materiality of the risk. It is not necessary that the misrepresentation have any causal connection with the death of the insured. *Robinson v. Occidental Life Ins. Co.*, *supra*. The question is whether the misrepresentation is such that if the insurer had known the true facts it would have made further inquiries or would have been influenced materially in its decision in accepting the risk. There was testimony that if the insurer had known a heart condition was suspected it would not have issued the policy. Under such circumstances we cannot say that the false answers were immaterial.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



163 Cal.App.2d 384

**Robert J. MADDOX and Doreen Maddox,**  
**Plaintiffs and Appellants,**

v.

**Ruth RAINOLDI, also known as Ruth**  
**Higgins, Defendant and Respondent.**

Civ. 17934.

District Court of Appeal, First District,  
 Division 2, California.

Sept. 10, 1958.

Hearing Denied Nov. 5, 1958.

Action by daughter and her husband against mother for decree that mother held real property in trust for them in accordance with terms of oral promise under which plaintiffs had made valuable improvements on property in reliance upon trust and which mother had breached by informing plaintiffs that she intended to sell property. The Superior Court, Contra Costa County, Harold Jacoby, J., entered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that question whether mother, who had received property from her husband, had agreed to hold title to property during her lifetime and on her death to cause legal title to pass to daughter was for trier of fact and that action was not barred by statute of frauds.

Reversed.

# 1. Trial ⇨139(1)

If evidence viewed most favorably for plaintiff would support a judgment for any of relief prayed for, judgment of nonsuit to that extent would be erroneous.

# 2. Trusts ⇨371(2)

Complaint, filed by daughter and her husband against mother, stated cause of action predicated on theory that mother held real property she had received on death of father in trust for plaintiffs who had made valuable improvements on property in reliance upon trust, even though complaint did not plead that mother held property in trust and nowhere in pleading, except in prayer, was the word trust used.

# 3. Trusts ⇨373

In action by daughter and her husband against mother for decree that mother held real property in trust for them in accordance with terms of an oral agreement under which plaintiffs allegedly made valuable improvements on property in reliance upon trust, question whether mother agreed to hold property in trust for common use of plaintiffs and herself during her lifetime with title to vest in daughter upon mother's death was for trier of fact.

# 4. Trusts ⇨17(8)

If daughter and her husband made improvements on mother's property in accordance with terms of oral agreement of mother to hold property in trust for plaintiffs during her lifetime with title to vest in daughter upon mother's death, and improvements amounted to several times the original value of property, oral declaration of trust would be taken out of statute of frauds. West's Ann.Civ.Code, § 1624, subds. 4, 6; West's Ann.Code Civ.Proc. § 1973, subds. 4, 6.

# 5. Trusts ⇨25(1)

Where owner of property declares that he holds it for benefit of another, this may be sufficient manifestation of intention to create a trust by declaring himself trustee of property, although he does not use the word trust.

# 6. Trusts ⇨17(8)

Mere payment of money is insufficient to take oral contract for creation of trust with respect to real property out of statute of frauds and performance of services which can be adequately compensated in money is insufficient, but making of substantial improvements upon real property involved in reliance upon the oral promise is sufficient for that purpose. West's Ann. Civ.Code, § 1624, subds. 4, 6; West's Ann. Code Civ.Proc. § 1973, subds. 4, 6.

# 7. Frauds, Statute of ⇨144

The estoppel, upon which is based the rule that part performance may take an oral promise to create a trust with respect to real property out of statute of frauds, may

operate in case of an oral contract not to be performed in lifetime of promisor, and such estoppel does not require either substantial reliance upon the misrepresentation that the statute has been satisfied or reliance on another's promise that he will reduce the oral contract to writing. West's Ann. Civ.Code, § 1624, subds. 4, 6; West's Ann.Code Civ.Proc. § 1973, subds. 4, 6.

### 8. Limitation of Actions ☞103(1)

Cause of action for breach of and repudiation of mother's oral promise to hold real property in trust for daughter and her husband during her lifetime with title to vest in daughter upon mother's death arose when mother informed daughter and husband that she intended to sell property and action brought within two years of repudiation of promise was not barred by statute of limitations even though trust was created more than two years prior to repudiation. West's Ann.Code Civ.Proc. §§ 312, 339.

### 9. Limitation of Actions ☞49(1)

Where basis of recovery by daughter and her husband of money expended in improvement of real property was the repudiation of oral promise of owner to hold property for her lifetime with title to vest in daughter on owner's death and the unjust enrichment of owner, action was on implied promise to repay advances when original oral promise in reliance upon which money had been advanced could not be enforced because of statute of frauds, but until repudiation of oral promise, there was no implied promise to repay and no suit for restitution could have been maintained, and statute of limitations was no bar to such action even though more than two years had elapsed between expenditure of sums and commencement of action. West's Ann. Code Civ.Proc. §§ 312, 339.

DOOLING, Justice.

Plaintiffs appeal from a judgment of nonsuit. Plaintiffs are husband and wife and the wife, Doreen, is the daughter of the defendant.

The action went to trial on the third amended complaint. The first count of this complaint seeks a decree that the defendant holds certain real property in trust for the plaintiffs and the defendant in accordance with the terms of an oral agreement therein alleged. The other counts, four in number, seek a money judgment from defendant for moneys expended by plaintiffs in the improvement of the real property and the establishment of a chicken business thereon and for damages for breach of the oral agreement establishing the trust.

[1] It needs no citation of authority for the rule that if the evidence viewed most favorably for the plaintiffs would support a judgment for any of the relief prayed for the judgment of nonsuit to that extent is erroneous.

The real property involved is ranch property. This property was originally acquired by the father of plaintiff, Doreen, and the defendant while they were husband and wife. The father died in 1950 and the ranch property passed to defendant upon his death. The complaint alleges with regard to this property:

"That subsequent to the death of the said Alfred Rainoldi [the father], in the latter part of 1950, and more particularly in January of 1951 \* \* \* defendant \* \* \* told plaintiffs that she was not in a financial position to make the necessary improvements and repairs to the property and requested plaintiffs to do so, and that if they made such necessary improvements and repairs that she, the defendant, would hold legal title to the property in her name during her lifetime, and that during her lifetime she would share the use and enjoyment of said property and the improvements so requested to be made thereupon by plaintiffs, and cause said legal title to the

Frisbie & Hoogs, Berkeley, for appellants.

Carlson, Collins, Gordon & Bold, Robert Collins, John Ormasa, Richmond, for respondent.

property to pass to them upon her death \* \* \* that she would not sell the property during her lifetime unless she became financially destitute, and then only if plaintiffs were unable to care for her \* \* \*."

This is followed by allegations that plaintiffs accepted this proposal, went into the possession of said property and made extensive and substantial improvements thereon all in reliance upon the promise and agreement of defendant as alleged. The amount expended by plaintiffs in making such improvements as alleged to have been \$16,800. There is a further allegation that at a later date, and after such improvements were completed, with the consent of defendant plaintiffs spent \$20,000 to establish a chicken business upon said property in additional improvements thereon and the purchase of poultry. It is further alleged that in 1955 defendant informed plaintiffs that she intended to sell the property unless plaintiffs would themselves buy it from her for the sum of \$18,500.

Plaintiff Doreen testified that shortly after her father's death plaintiffs and defendant visited the ranch. At that time her mother stated:

"I don't have the money to take care of the ranch and fix it up in order to save it myself, but I don't want to sell it, but if you kids are willing to want to put some money in here to fix it up, well enough to save the house so that we can use it, then I would be happy and I could keep it. If not, I have to sell the place because I can't afford it myself and I can buy Telephone stock with the money. But after all,' she said, 'I want you to think this over because you are my only heir and even if I do marry it would never make any difference, you are still my daughter and you would get whatever I have.' And she said, 'Which would you rather have, would you rather have the Telephone stock or would you rather do something to save the ranch house? Does it mean that much to you, and if it does, you do

the things that are necessary to keep the house here so that we can use it, make it suitable to use and save it from going down the hill, and I will keep the ranch.' She really addressed the question to both of us. I have always been sentimental as all of the Rainoldis have been about the ranch, and I said, 'Gee, if it is a question of that and we can do something around here, I much rather have the ranch than the Telephone stock if I have a choice,' but we told her we didn't blame her, we understood her position, she was a widow, she was by herself and we weren't going to press her into doing one thing or the other, but we were both pleased that we had a choice of the ranch or the Telephone stock."

This witness further quoted defendant as saying: "\* \* \* that if we did this, paid for it ourselves, \* \* \* that she would keep the ranch no matter if she married or anything else happened, she would keep the ranch, she wanted to keep it in her name. \* \* \* So she said, 'If you do these things then I will keep the ranch house and when I pass away it will be yours and your children's' \* \* \* she said, 'There's one thing, I will have to say this: If I should become ill or if something should happen that I would be destitute and need the money, then in a case like that of course I would have to sell the ranch.' And we said '\* \* \* but if we could afford at the time to take care of her, would she sell the ranch then or would it be just as well if she had the proper care at that time,' and she said 'If you will take care of me, then I won't have to sell the ranch.'"

The witness further testified that at a later conversation, in discussing the amount that would need to be expended in improving the ranch house, defendant said: "I'll tell you what—those things have to be done that we have discussed and anything else that you kids want to do to make that house livable, I want you to go ahead and do. What I really want you



to do is feel that the place is yours as well as mine and I don't want you to wait until I die to fix it up so that you can enjoy it. I want you to fix it up now so that you and the kids and your friends and my friends and all the family can go up there and enjoy the ranch today, not after I am gone."

The plaintiff Robert gave similar testimony and there was testimony from another witness that the defendant had stated that "she had told them especially to go ahead and fix it up any way they wanted to fix it, because it was going to be theirs anyway \* \* \* she was happy they were fixing it \* \* \* because in time it would be theirs \* \* \*." Other witnesses testified to similar admissions.

The nonsuit as to the first count was granted on the ground that the action was barred by the statute of frauds. The agreement being one involving an interest in real property and not to be fully performed during the lifetime of the promisor is one required by the statute to be in writing. Civ.Code, § 1624, subs. 4, 6; Code Civ. Proc. § 1973, subs. 4, 6.

Appellants rely upon the rule stated in Restatement Trusts, section 50: "Although a trust of an interest in land is orally declared and no memorandum is signed, the trust is enforceable if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon \* \* \*."

An oral trust in land was held enforceable under this rule in *Mulli v. Mulli*, 105 Cal.App.2d 68, 232 P.2d 556, where "respondents with the consent of appellant made valuable improvements on the property in reliance upon the trust." 105 Cal. App.2d at pages 73-74, 232 P.2d at page 559.

Respondent says of the *Mulli* case: "In that case the complaint specifically set up the holding of a one-half interest in the property in trust by the defendant for the benefit of the plaintiff. The court at page 750 of its opinion [105 Cal.App.2d 75, 232 P.2d 559] specifically avoided the question

of whether a cause of action for a specific performance of an oral contract to convey real property had been stated."

[2,3] We are unable to follow the attempted distinction. While the complaint herein does not plead that defendant "holds the property in trust" (which would be a legal conclusion at best) it pleads the facts and asks for a judgment decreeing that defendant holds the property in trust with a declaration of the terms of such trust. If the facts establish the existence of a trust and its terms, those facts bring the case within the authority of *Mulli*. Plaintiffs, no more than in *Mulli*, are seeking specific performance of a contract. They are seeking the judicial establishment of the existence of a trust and its terms by court decree.

[4,5] While it is true that nowhere in the pleading (except in the prayer) or in the evidence is the word "trust" used it is well settled, as stated in *Mulli* (105 Cal. App.2d at page 73, 232 P.2d at page 558): "Where the owner of property declares that he holds it for the benefit of another, this may be a sufficient manifestation of intention to create a trust by declaring himself trustee of the property, although he does not use the word 'trust.'" *Luco v. De Toro*, 91 Cal. 405, 417, 18 P. 866, 27 P. 1082; *Lynch v. Rooney*, 112 Cal. 279, 283-285, 44 P. 565; *People v. Pierce*, 110 Cal. App.2d 598, 605, 243 P.2d 585; *Weiner v. Mullaney*, 59 Cal.App.2d 620, 631, 140 P.2d 704; *Cooper v. Cooper*, 3 Cal.App.2d 154, 160-161, 39 P.2d 820; *Scott on Trusts*, 2d Ed., § 24, pp. 181-182; *Restatement Trusts*, § 24(2). Measured by this rule the testimony above set out, if believed, is sufficient to support a finding that defendant agreed to hold the property in trust for the common use of plaintiffs and herself during her lifetime with title to vest in her daughter upon her death. The making of the valuable improvements herein testified to running into an amount several times in excess of the original value of the property clearly satisfies the rule taking the oral declaration of trust out of the statute of frauds. See *Haskell v. First Nat.*

Bank, 33 Cal.App.2d 399, 91 P.2d 934, similarly enforcing an oral trust against the estate of a decedent where the plaintiffs had made substantial improvements on the real property in reliance on the oral declarations of the decedent.)

[6] Respondent relies upon *Shive v. Barrow*, 88 Cal.App.2d 838, 199 P.2d 693. That case is distinguishable. In *Barrow* the plaintiff advanced money and performed services for the decedent. It is true money and services went into the improvement of the property, but the court treated the case as one in which the payment of money and performance of services were relied upon to take the oral promise out of the statute. See 88 Cal.App.2d 843-847, 199 P.2d 696-699. The mere payment of money has never been held sufficient to take the oral contract out of the statute (*Anderson v. Stansbury*, 38 Cal.2d 707, 716, 242 P.2d 305) nor has the performance of services which can be adequately compensated in money (cases cited in *Shive v. Barrow*, supra, 88 Cal. App.2d at page 844, 199 P.2d at page 697). Conversely it has always been the law, stemming from the early English cases, that the making of substantial improvements upon the real property involved in reliance upon the oral promise is sufficient for that purpose. *Pomeroy's Specific Performance of Contracts*, 3d Ed., § 126, p. 323 et seq.; 1 *Bogert, Trusts and Trustees*, § 92, p. 467; *Restatement Contracts*, § 197(a). In the first year of its existence our Supreme Court in *Tohler v. Folsom*, 1 Cal. 207, 212, said:

"The question \* \* \* is, whether there has been such a part performance by the plaintiff, as to put him into a situation, which would be a fraud upon him, unless the verbal agreement should be enforced. (*Story, Eq.Juris.*, sec. 761.) One case put by *Story (id. ibid.)* in which specific performance ought to be decreed, is, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in a confidence of the due completion of the contract. In such a case, he says, there would

be a manifest fraud upon the party, in permitting the vendor to escape from due and strict fulfilment of such agreement."

This rule has been consistently followed in our courts through 108 years. *Monarco v. Lo Greco*, 35 Cal.2d 621, 626, 220 P.2d 737; *Magee v. Magee*, 174 Cal. 276, 280, 162 P. 1023; *Calanchini v. Branstetter*, 84 Cal. 249, 253, 24 P. 149; *Burlingame v. Rowland*, 77 Cal. 315, 317, 19 P. 526, 1 L.R.A. 829; *Arguello v. Edinger*, 10 Cal. 150, 158; *Salmons v. Jameson*, 144 Cal.App. 2d 698, 705, 301 P.2d 431; *Frank v. Tavares*, 142 Cal.App.2d 683, 687, 298 P.2d 887. The court in *Shive v. Barrow* neither cited nor discussed any of the cases announcing this long-settled rule. The decision therefore cannot be considered an authority on the effect of the making of substantial improvements in reliance on the oral promise.

In the second place in *Shive v. Barrow* the case was not presented or decided on the theory of an express oral trust but solely on the theory of an oral contract to devise. If in spite of these differences there be thought to be any inconsistency between the *Barrow* and *Mulli* cases we must follow *Mulli*; it is not only the later decision but in *Mulli* the Supreme Court denied a petition for hearing (105 Cal.App.2d at page 75, 232 P.2d 556) while in *Barrow* no hearing in the Supreme Court was asked for (88 Cal.App.2d at page 850, 199 P.2d at page 700).

Of even less weight is *Trout v. Ogilvie*, 41 Cal.App. 167, 182 P. 333. The court in *Ogilvie* thought that because "part performance" was mentioned in the then section 1741 of the Civil Code in connection with agreements for the sale of lands the doctrine could not be extended to other provisions of the statute of frauds. 41 Cal. App. at page 174, 182 P. at page 335. Whatever force this reasoning may have had at that time is no longer valid since the repeal of that section 1741 in 1931 and the substitution in its place of the present section 1741 dealing with an entirely different subject, sales by auction. *Stats.1931*, p. 2242.

[7] That the estoppel, upon which the rule that "part performance" may take an oral promise out of the statute of frauds is based (*Monarco v. Lo Greco*, supra, 35 Cal.2d at page 626, 220 P.2d at page 741), may operate in the case of an oral contract not to be performed in the lifetime of the promisor is too well settled now to be subject to dispute. *Monarco v. Lo Greco*, supra, 35 Cal.2d 621, 220 P.2d 737; *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198. Nor does such estoppel require, as respondent argues "either (1) substantial reliance upon a misrepresentation that the Statute has been satisfied or (2) reliance on another's promise that he will reduce the oral contract to writing." That ghost was finally laid in definitive fashion in *Monarco* where the court considered a similar argument (35 Cal.2d at pages 625-626, 220 P.2d at pages 741-742) and concluded: "In reality it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it."

[8] The nonsuit of the four counts seeking restitution and damages was granted on the ground that they were barred by the two year statute of limitations, Code Civ.Proc. § 339. Count 5 sought damages for the breach and repudiation of the oral promise to hold the property in trust. It is obviously a count for alternative relief if for any reason the trust cannot be judicially enforced. Under the evidence produced by the plaintiffs if believed by the court the trust can be established by the court's decree as prayed for in count 1 and plaintiffs will not be entitled to the alternative relief sought under count 5. No cause of action on count 5, however, arose until the repudiation of the trust since no breach occurred until that time. The alternative cause of action stated in count 5 therefore was not barred by the statute of limitations.

[9] Counts 2, 3 and 4 were for the recovery of money expended in the improvement of the real property. More than two

years elapsed between the expenditure of these sums and the commencement of the action. The basis of such recovery is the repudiation of the oral trust and the unjust enrichment which would accrue to the oral trustor thereby. The action is on the implied promise which the law imposes to repay advances where the original oral promise in reliance upon which the money was advanced cannot be enforced because of the statute of frauds. *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84; *Paul v. Layne & Bowler Corp.*, 9 Cal.2d 561, 566, 71 P.2d 817; *Leoni v. Delany*, 83 Cal.App.2d 303, 310, 188 P.2d 765, 189 P. 2d 517. Here again if the trial court believes the plaintiffs' testimony and enters its decree establishing the existence of a trust the basis of the implied promise will not exist. Obviously plaintiffs would not be entitled to the double recovery which would be involved if the court both enforced the trust and allowed a recovery of the money expended in reliance upon it. It is therefore only in the case, which we cannot foresee, that the court should find the existence of the oral trust but also find itself unable to enforce it that plaintiffs would be entitled to a recovery of the money invested in reliance thereon. In that unlikely event plaintiffs would be entitled to such recovery, however, unless their action is barred by the statute of limitations.

The very basis of the cause of action, as we have seen, is the implied promise which the law raises because the oral promise cannot be enforced. It seems logical to hold that until the repudiation of the oral promise, or its breach in some other fashion, the law imposes no such implied promise to repay. Such is the rule in the case of actions to recover money paid the vendor under oral contracts to convey real property. *Laffey v. Kaufman*, 134 Cal. 391, 66 P. 471, 472. In that case the court said at page 393 of 134 Cal., at page 472 of 66 P.: "The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid, is by all the authorities confined to those cases



where the vendor has refused or become unable to carry out the contract \* \* \*." To the same effect: *Thompson v. Schurman*, 65 Cal.App.2d 432, 437-438, 150 P.2d 509; *Restatement Contracts*, § 355(4); 49 Am.Jur., *Statute of Frauds*, § 564, p. 870. The statute of limitations only commences to run "after the cause of action shall have accrued" (*Code Civ.Proc.* § 312) and the "cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time" (*Dillon v. Board of Pension Com'rs*, 18 Cal.2d 427, 430, 116 P.2d 37, 39, 136 A.L.R. 800).

We are satisfied that until defendant's oral promise was repudiated no suit for restitution could have been maintained and hence the statute of limitations is no bar to these counts. This question was not decided in *Long v. Rumsey*, 12 Cal.2d 334, 84 P.2d 146, nor in any of the other cases cited by respondent.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



163 Cal.App.2d 393

**Charles Terrance HATCH, an Infant, by Curtis C. Hatch, his Guardian ad litem and Curtis C. Hatch, Plaintiffs and Appellants,**  
v.

**FORD MOTOR COMPANY, a corporation,**  
Defendant and Respondent.  
Civ. 22861.

District Court of Appeal, Second District,  
Division 3, California.  
Sept. 10, 1958.

Action for consequential losses and for injuries sustained by six year old boy whose eyeball was pierced by radiator ornament when he ran into front of parked

automobile manufactured by defendant. The Superior Court of Los Angeles County, Leon T. David, J., dismissed the action, and plaintiffs appealed. The District Court of Appeal, Nourse, J. pro tem., held that statute prohibiting sale or operation of motor vehicle equipped with protruding radiator ornament was not designed to protect those who, solely by reason of their own act or omission, might come in contact with vehicle while it was lawfully standing unattended upon highway, and held that violation of that statute did not constitute negligence for which manufacturer could be held liable in this case.

Affirmed.

#### 1. Negligence ⚡2

Defendant in negligence action could only be held liable to plaintiff if it had breached duty which it owed him.

#### 2. Automobiles ⚡16

Risk of injury to those whose own acts or acts of others might cause them to collide with parked vehicle was not one which manufacturer of vehicle was required to anticipate or to protect against.

#### 3. Negligence ⚡136(2)

Whether duty on part of defendant exists is question of law for court in negligence action; but such duty once having been found to exist, it is question of fact as to whether there was breach of such duty.

#### 4. Negligence ⚡6

Unless person injured is within class of persons whom statute was designed to protect and hazard is one which statute was designed to protect against, no liability arises out of its violation.

#### 5. Automobiles ⚡16

Statute prohibiting sale or operation of motor vehicle equipped with protruding radiator ornament was not designed to protect those who, solely by reason of their own act or omission, might come in contact with vehicle while it was lawfully standing unattended upon highway; and violation of that statute would not con-

stitute negligence for which manufacturer could be held liable in action for injuries sustained by child whose left eyeball was pierced by ornament when he ran into front of parked vehicle. West's Ann.Vehicle Code, § 683.

#### 6. Automobiles ☞11

Statute prohibiting sale or operation of motor vehicle equipped with protruding radiator ornament is a penal one and may not be construed so as to make unlawful an act not included within its terms. West's Ann. Vehicle Code, § 683.

#### 7. Automobiles ☞16

In action for consequential loss and for injuries sustained by six year old boy whose eyeball was pierced when he ran into front of parked automobile manufactured by defendant, plaintiffs insufficiently alleged violation of statute prohibiting protruding radiator ornaments. West's Ann.Vehicle Code, § 683.

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Richard Rathbun and Gerald H. Gottlieb, Reseda, for appellants.

Moss, Lyon & Dunn, Fred C. Quimby, Jr. and Henry F. Walker, Los Angeles, for respondents.

NOURSE, Justice pro tem.

Defendant's demurrer to plaintiffs' second amended complaint having been sustained upon grounds that the causes of action plead were uncertain and on the further grounds that none of them stated a case of action and plaintiffs having failed to amend their complaint within the time limited by the court, plaintiffs appeal from the order dismissing the action.

By the first and second causes of action the plaintiff, Charles Terrance Hatch, a minor, seeks damages against the defendant. By the third and fourth causes of action plaintiff, Curtis C. Hatch, the father of Charles, seeks to recover damages sustained by him by reason of the injuries sustained by his son. The question as to whether a cause of action is stated is the same in the third and fourth causes of action as it is in the first and second and we

will therefore confine our discussion to the first two causes of action.

In substance the first cause of action alleges the following facts: On June 30, 1955, a certain automobile manufactured and assembled by the defendant and sold as new after January 1939 was parked at the edge of Stansbury Avenue; at the time of the sale of said motor vehicle and at the date above mentioned there was included as a part of said automobile a pointed radiator decoration or radiator ornament, approximately 9¾ inches in length, which was fastened to the front and center portion of said automobile *over* the radiator thereof and pointed forward so as to protrude beyond the front of that portion of the automobile to which it was attached. (It is not alleged that it protruded beyond the front of the vehicle.) On the aforementioned date the plaintiff, Charles Hatch, who was then 6 years of age proceeded on foot along Stansbury Avenue towards the front of said automobile (there being no sidewalks) and collided with said automobile with the result that said decoration pierced his left eyeball causing the loss of that eye. It is further alleged that said accident was caused solely and proximately by the negligence of the defendant in failing to exercise reasonable care in the manufacture, assembly and sale of said motor vehicle in that the defendant manufactured said vehicle under a plan or design by which defendant utilized the decoration above mentioned and thereby created "an unreasonable risk and danger that the anatomy of a person coming in contact with the front portion of the vehicle would be pierced, thus rendering the vehicle and decoration or ornament dangerous for the uses for which defendants manufactured the same" and in that the defendants failed and refused to exercise reasonable care in the adoption of a "*safe plan and design for \* \* \* said vehicle and decoration or ornament.*" (Italics ours.) It is further alleged that the plaintiff was a person whom the defendant might reasonably expect to be in the vicinity of the vehicle and its probable use.

[1] The question posed as to the first cause of action is: Did the defendant owe to the plaintiff a nonstatutory duty to manufacture an automobile with which it was safe to collide? Unless such duty existed this count of the complaint does not state a cause of action for defendant can only be held liable to the plaintiff if it breached a duty which it owed him. *Routh v. Quinn*, 20 Cal.2d 488, 491-492, 127 P.2d 1, 149 A.L.R. 215; *Richards v. Stanley*, 43 Cal.2d 60, 63, 271 P.2d 23; *Copfer v. Golden*, 135 Cal.App.2d 623, 634, 288 P.2d 90; 35 Cal. Jur.2d 495.

The facts here do not present the question as to whether defendant owed to the public a duty to so design its automobile as to lessen the severity of injuries that might be caused by it if it were negligently operated on the highways of this State but only the question as to whether it owed to the public, including the plaintiff, the duty above stated, i. e., to so design the vehicles sold by it as to prevent the type of injury sustained by the plaintiff when said automobile was at rest, properly parked upon the highway. Counsel for the plaintiff have not cited us to any authorities which uphold their contention that the defendant owed any such duty and our own research has not disclosed any.

There is not involved in this case any question of a defect which created a risk of injury to its driver or passengers therein or to persons upon the highway through its use in the normal manner for which it was manufactured to be used such as were involved in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696; *Olds Motor Works v. Shaffner*, 145 Ky. 616, 140 S.W. 1047, 37 L.R.A., N.S., 560; *Flies v. Fox Bros. Buick Company*, 196 Wis. 196, 218 N.W. 855, 60 A.L.R. 357.

[2] The vehicle in question here, in the condition in which it was by the complaint alleged to be, was safe to park and could cause no harm except to one whose own acts or the acts of some third person caused him to collide with it. Such a risk is not one which the defendant was required

to anticipate or to protect against. *Richards v. Stanley*, supra, 43 Cal.2d 60, 65-67, 271 P.2d 23.

[3] Whether a duty on the part of the defendant exists is a question of law for the court. *Richards v. Stanley*, supra; *Redington v. Pacific Postal Telegraph Cable Co.*, 107 Cal. 317, 324, 40 P. 432; 36 Cal.Jur.2d 84-85; *Prosser on Torts*, p. 281 and cases there cited under Note 9. The duty having been found to exist, whether it has been breached is a question of fact for the triers of the facts. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298-299, 195 P.2d 783; *Copfer v. Golden*, supra, 135 Cal.App.2d 623, 629-630, 288 P.2d 90; 36 Cal.Jur.2d 84-85.

If we were to hold that there was a duty to render a vehicle safe to collide with rather than simply a duty to so manufacture it as to make it safe for the use for which it is intended, i. e., to move upon the highways or to be safely parked, that duty would apply not only to ornaments such as that in question here but to functional parts of the vehicle. If, in the present case, the minor plaintiff had stumbled as he approached the vehicle and struck his face against a headlight lens causing it to fracture and lacerate his eye, the question of duty to make the vehicle safe to collide with would be clearly presented under a claim that if the headlight lens had been made of safety glass the plaintiff would not have lost his eye; or, if the plaintiff had collided with the side of the car and his eye been impaled upon a radio antenna which had been telescoped so that its point protruded but a few inches above the body of the car, again the claim might be made that this created a danger which might have been avoided by enclosing the radio antenna within the body of the car so as not to protrude therefrom. In other words, each case in which a person collided with a standing vehicle and received some injury from a part of the vehicle which injury he might not have sustained had the vehicle been constructed in some other manner would raise a question of fact as to whether the manufacturer was liable to that



person. In effect the triers of the facts would be the arbiters of the design of automobiles and the standard of design would be determined not when the automobile was manufactured but after the occurrence of an accident.

Plaintiff seeks to apply such cases as *Grimes v. Richfield Oil Co.*, 106 Cal.App. 416, 289 P. 245 and *Judy v. Doyle*, 130 Va. 392, 108 S.E. 6. They are not applicable. They do not involve any question of a manufacturer's liability for a design of the vehicle, but only the question of the negligent use of a vehicle by the operator in obstructing the highway by an overhanging or protruding load. In our opinion neither the first nor the third counts of the complaint states a cause of action against the defendant.

By his second cause of action plaintiff alleges that the vehicle in question was manufactured and sold by the defendant as a *new automobile* in this State after January 1, 1939, and then was and at the time of the accident was equipped with a decoration or radiator ornament *on top thereof* which extended and protruded to the front of the face of the radiator grill of said motor vehicle in violation of section 683 of the Vehicle Code of this State which provides in part as follows: "On and after January 1, 1939, no person shall sell any new motor vehicle, nor shall any person operate any motor vehicle sold as a new motor vehicle in this State after January 1, 1939, which is equipped with a *radiator cap* or *radiator ornament upon the top thereof* which extends or protrudes to the front of the face of the radiator grill of such motor vehicle." (Italics ours.)

[4, 5] It is plaintiff's contention that defendant's violation of the statute constitutes negligence as a matter of law and that but for its violation of the statute plaintiff would not have suffered the loss of his eye. We are of the opinion that the second count does not state a cause of action. A violation of the statute does not create liability on the part of the person violating it except towards persons whom the statute was designed to protect. Unless

the person injured is within the class of persons whom the statute was designed to protect and the hazard is one which the statute was designed to protect against, no liability arises out of its violation. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 497, 225 P.2d 497; *Boronkay v. Robinson & Carpenter*, 247 N.Y. 365, 160 N.E. 400; *Shearman and Redfield on Negligence*, Vol. 1, § 12; 35 Cal.Jur.2d 504-507 and cases cited thereat.

In the present case it is our opinion that the statute here was designed to decrease the hazard created by the driving of said automobiles upon the highways where its negligent operation might cause it to come in contact with others. It was not designed to protect those who, solely by reason of their own act or omission, might come in contact with it as an inert object lawfully standing unattended upon a highway.

The statute prohibits not only the sale of a car equipped in violation of the statute but its operation upon the highways of this State. Its violation therefore would impose liability only upon a lawful possessor of the car if he were operating it; i. e., if he were in actual physical control of the vehicle upon the highway. Veh.Code, §§ 69, 70; *Fairman v. Mors*, 55 Cal.App.2d 216, 130 P.2d 448. We do not believe it was the intent of the Legislature to impose liability on the manufacturer under conditions where it would not be imposed upon the possessor of the vehicle.

In our opinion the persons whom the statute was designed to protect are those against whom the vehicle might be brought in contact through its being driven upon a highway and the hazard which the statute was designed to alleviate was the hazard created by the pointed ornament when the car was in movement thus rendering the ornament capable through its own motion of piercing the anatomy of a person with whom the car collided.

[6] The statute is a penal one and may not be construed so as to make unlawful an act not included within its terms. 23 Cal. Jur. 790-791.

[7] The statute prohibits the sale of a motor vehicle equipped with a radiator cap or a radiator ornament on the top thereof, that is, on the top of the car, which extends or protrudes beyond the front or the face of the radiator grill. Plaintiff does not allege that the automobile in question was equipped with a radiator cap which so protruded or with a radiator ornament on top of a radiator cap which so protruded but alleges that the ornament was on top of the vehicle. That this was not unintentional is apparent from the allegations of the first cause of action where it is alleged that the ornament in question was on the front portion of the vehicle over the radiator, not upon the radiator. The facts pleaded did not, therefore, show a violation of the statute.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 489

**Robin HICKAMBOTTOM, a minor, by Ruby Hickambottom, her guardian ad litem,**  
Plaintiff and Respondent,

v.

**COOPER TRANSPORTATION CO., Inc., and Robert Lee Whisler, Defendants and Appellants.**  
Civ. 22944.

District Court of Appeal, Second District,  
Division 3, California.  
Sept. 12, 1958.

Action for death of decedent whose automobile parked partly on the highway at night was struck by the large truck of defendant. From a judgment in favor of plaintiff in the Superior Court, Los Angeles County, Bernard Lawler, J., the defendants appealed. The District Court of Appeal, Patrosso, J. pro tem, held that the

evidence did not justify an instruction on the last clear chance doctrine and that giving such instruction was prejudicial error.

Judgment reversed.

#### 1. Negligence ⚡83.1, 136(32), 141(9)

To justify implication of the last clear chance doctrine, all of the required elements must be present and if any one is lacking, an instruction upon the doctrine is improper and whether there is substantial evidence justifying the application of the doctrine is a question of law.

#### 2. Evidence ⚡8

It is common knowledge that a truck with a minimum length of 50 feet and weight of 32½ tons traveling at a speed of between 40 and 45 miles an hour may not within a matter of a second or two be brought to a stop or swerved to the right or left without grave danger of jackknifing or overturning.

#### 3. Negligence ⚡135(6)

The "last clear chance" doctrine not only presupposes a last chance but a clear chance, and one seeking to invoke the doctrine must adduce evidence direct or circumstantial, that defendant after becoming aware of plaintiff's danger in the exercise of reasonable care had a last clear chance to avoid injuring him.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

#### 4. Automobiles ⚡244(59)

In action for death of deceased whose automobile at night was stopped partly on the highway when struck by defendant's large truck, testimony that there was sufficient space on the roadway to have permitted defendant to drive around the decedent's vehicle was of no significance in applying the last clear chance doctrine unless defendant had time within which to do so after he first saw the decedent's automobile. West's Ann.Vehicle Code, §§ 582, 621, 705.

#### 5. Automobiles ⚡227(3)

In determining whether defendant truck driver had a last clear chance to

avoid collision with the decedent's automobile parked partly on the highway at night, it is not a matter of space alone that is to be considered, but the time within which the defendant had to take effective action in an endeavor to escape the sudden peril created by the presence of the decedent's automobile directly in the path of the truck. West's Ann.Vehicle Code, §§ 582, 621, 705.

**6. Automobiles** Ⓒ244(59)

In action for death of decedent whose automobile parked partly on the highway at night was struck by defendant's large truck, proof of defendant's negligence did not establish that the doctrine of last clear chance doctrine was applicable since such doctrine presupposes that the defendant is negligent.

**7. Negligence** Ⓒ83.7

One may not be held liable under the last clear chance doctrine upon the theory that he would have discovered the peril of the decedent in sufficient time to have avoided injuring him but for remissness upon his part.

**8. Automobiles** Ⓒ246(58)

In action for death of decedent whose automobile was parked partly on the highway at night and was struck by defendant's large trailer truck where there were no living eyewitnesses to the accident except that of the truck driver, evidence did not justify an instruction on the last clear chance doctrine absent evidence that the truck driver saw the decedent's vehicle in time to avoid colliding with it by ordinary care. West's Ann.Vehicle Code, §§ 582, 621, 705.

**9. Appeal and Error** Ⓒ1066

In action for death of decedent whose automobile parked partly on the highway was struck by the defendant's large truck at night, instruction on the last clear chance doctrine not supported by the evidence was prejudicial where there was evidence warranting finding that decedent was contributorily negligent. West's Ann.Vehicle Code, §§ 582, 621.

Hecker & Dunford, Orlan S. Friedman, Beverly Hills, for appellants.

George L. Vaughn, Jr., and Dion G. Morrow, Los Angeles, for respondent.

**PATROSSO, Justice pro tem.**

This is an appeal from a judgment in favor of the minor plaintiff entered upon the verdict of the jury in an action for the wrongful death of plaintiff's father.

On April 3, 1956, at about 3:20 a. m. a collision between two vehicles occurred on U.S. Highway 99 about two miles south of Traver, California. The collision involved an automobile of the decedent and a Peterbilt diesel tractor pulling two trailers (hereinafter referred to as the truck) being operated by the defendant Robert Lee Whisler who will hereinafter be referred to as the defendant. Upon the trial it was stipulated that the truck was owned by the defendant Cooper Transportation Co., Inc.; that the defendant Whisler was driving the truck in the course and scope of his employment by the last named defendant and that the decedent met his death as a result of the collision.

In the vicinity where the collision occurred Highway 99 is a four-lane divided highway with two lanes for northbound traffic and two lanes for southbound traffic. The width of the truck permitted it to travel entirely within one lane and the gross weight of the truck was 65,000 pounds.

There were no eye-witnesses to the accident other than the defendant and the following facts are made to appear by his testimony: Just prior to the collision the defendant was driving north on the right lane of the highway at a speed of between 40 and 45 miles per hour with his headlights on low beam which illuminated the highway in front of him for a distance of 150 feet. The condition of the weather does not appear other than that it was a dark night. Defendant first observed the decedent's automobile when he was within 75 or 100 feet from it. It then appeared to be stopped at an angle partly on and partly



off the right lane in which the defendant was traveling, approximately one-half of decedent's automobile being upon the highway and the remaining one-half upon the shoulder. The defendant testified that upon observing decedent's automobile he immediately applied his brakes, and swerved to the left but does not recall when the brakes took effect. At the time there was no other traffic upon the northbound portion of the highway and it was otherwise unobstructed. There was no testimony as to the distance within which the truck could be stopped when traveling at the speed at which it was, after the application of the brakes, and likewise there was no testimony as to the overall length of the truck.

The only ground assigned by the appellants for a reversal of the judgment is that the trial court erred in instructing the jury upon the doctrine of the last clear chance. There is no contention that the instruction was not a correct statement of law but rather that the evidence did not justify the application of the doctrine.

[1] The elements necessary to bring into play the doctrine of the last clear chance are well known. They have recently been restated in *Brandelius v. City & County of S. F.*, 1957, 47 Cal.2d 729, 743, 306 P.2d 432, and need not be repeated here. All of these elements must be present and if any one is lacking an instruction upon the doctrine is improper. *Clarida v. Aguirre*, 156 Cal.App.2d 112, 115, 319 P.2d 20; *Doran v. City & County of San Francisco*, 1955, 44 Cal.2d 477, 483, 283 P.2d 1, and whether there is any substantial evidence justifying the application of the doctrine in a given case is a question of law. *Nippold v. Romero*, 1956, 145 Cal.App.2d 235, 240, 302 P.2d 367; *Doran v. City & County of San Francisco*, supra, 44 Cal.2d at page 487, 283 P.2d 1.

Conceding that all of the other elements of the doctrine were present in the case at bar, the question is whether the evidence is sufficient to have warranted a finding that the defendant after becoming aware of the presence of decedent's automobile upon the

highway "had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure." *Brandelius v. City & County of S. F.*, supra [47 Cal.2d 729, 306 P.2d 411].

Viewing the testimony in the light most favorable to the respondent, for the purpose of this discussion we shall assume that the defendant first saw the decedent's automobile when he was within 100 feet of it. At a speed of between 40 and 45 miles per hour, at which defendant was then traveling, his vehicle was moving between 58 and 66 feet per second with the result that he had between approximately one and one-half and one and  $\frac{7}{10}$  seconds to react to the emergency, apply his brakes and swerve to the left in an endeavor to avoid striking the decedent's car.

[2] As previously stated there is no evidence as to the distance within which the defendant could have stopped his truck when traveling at this speed or the time required to change his course of travel from the right lane to the left lane so as to permit every portion of his truck to pass clear of decedent's automobile. While there was no testimony as to the overall length of defendant's truck, it is fairly evident that at a minimum it was 50 feet (see Veh.Code, § 705(b)) and common knowledge tells us that equipment of this size and weight (32½ tons) traveling at a speed of between 40 and 45 miles per hour, may not within a matter of a second or two be brought to a stop or be swerved to the right or left without grave danger of "jackknifing" or overturning.

As was said in *Bagwill v. Pacific Electric Ry. Co.*, 90 Cal.App. 114, 265 P. 517, quoted with approval in *Rodabaugh v. Tekus*, 1952, 39 Cal.2d 290, 297, 246 P.2d 663, 667:

"Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. We are not to tear down the facts of a case and rebuild the same so that, by a

trimming down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance.’”

[3] Absent evidence that the defendant saw the decedent's vehicle in time to avoid colliding with it by the exercise of ordinary care, there is no basis for the application of the doctrine of the last clear chance. As has frequently been said, the doctrine not only presupposes a last chance but a *clear* chance. One undertaking to invoke the doctrine must adduce evidence direct or circumstantial that the defendant after becoming aware of plaintiff's position of danger in the exercise of reasonable care had a clear chance to avoid injuring him. In the case at bar there is a total absence of any substantial evidence from which it may be reasonably inferred that defendant saw the decedent's vehicle in time to avoid the accident, much less that he had a clear opportunity of doing so.

The only evidence in the record to which respondent points as supporting her statement that the defendant had a clear chance to avoid the collision is found in the following portion of the cross-examination of the defendant:

“Q. By Mr. Vaughn: Mr. Whisler, given a highway such as Highway 99, in this area approximately two miles south of Traver, where there are, of course, two lanes for northbound traffic, and there is no traffic in the west lane, from the point where you first observed the vehicle with which you collided, that is, 75 to a hundred feet, was there, in your estimation, sufficient space for you to have pulled around that vehicle? A. Yes.

“Q. Now, Mr. Whisler, was there anything on the road itself, that is, Highway 99, in this area that we have been discussing that is approximately two miles south of Traver, was there any object on the road in either of the lanes which prevented you from pull-

ing around the vehicle with which you collided? A. I don't understand the question.

“Q. Was there anything in the roadway that prevented you from pulling your truck out and around the other vehicle? A. No.

“Q. Now, was there anything about the mechanism of the tractor and trailer itself which prevented you from pulling your vehicle out and around the other vehicle? A. No.”

[4] The respondent asserts that the foregoing testimony constitutes an admission by the defendant “that the doctrine of Last Clear Chance was applicable in this case.” We see nothing in the quoted testimony to support this statement. It is merely to the effect that there was sufficient space on the roadway to have permitted the defendant to drive around the decedent's vehicle, and there is no dispute concerning this in view of the uncontradicted testimony that it was a two-lane roadway and there were no other vehicles in the immediate vicinity traveling in the northbound lanes. The fact that defendant had the space within which to pass around the decedent's automobile, however, is of no significance unless the defendant had time within which to do so after he first saw the decedent's automobile. As said in *Hall v. Atchison, T. & S. F. Ry. Co.*, 152 Cal.App.2d 80, 85, 312 P.2d 739, 742: “The rule is that there must be ‘substantial evidence to show defendant had a last clear chance to avoid the accident.’ (Citing cases.) To the same effect is also the case of *Brandelius v. City & County of San Francisco*, 47 Cal.2d 729, 306 P.2d 432, holding that before the last clear chance doctrine may be applied the necessary elements, as there indicated, must be supported by substantial evidence. Time is such an element and an all-important factor. The time for defendant's exercise of any last clear chance commences only at such time as he has both actual knowledge of the injured person's ‘position of danger’ and actual or constructive knowledge that such

person 'cannot escape from such situation.' It affirmatively appears to us that in considering the evidence as a whole, there was no substantial evidence that all of these elements had been affirmatively established."

[5] As we have hertofore had occasion to point out, the defendant in the instant case had less than two seconds within which to react, apply his brakes and swerve to the left in an endeavor to avoid colliding with the decedent's automobile. In determining whether he had a clear chance to avoid the collision it is not a matter of space alone that is to be considered but as well the time which defendant had to take effective action in an endeavor to escape the sudden peril created by the presence of the decedent's automobile directly in his path. Cf. *Poncino v. Reid-Murdock & Co.*, 1934, 136 Cal.App. 223, 229, 28 P.2d 932.

In view of defendant's testimony that upon seeing the decedent's vehicle upon the highway he immediately applied his brakes and endeavored to swerve to the left the following language from *Jobe v. Harold Livestock Com. Co.*, 1952, 113 Cal.App.2d 269, 275, 247 P.2d 951, 955, is apposite here:

"In view of the fact that defendant did realize his danger and made a determined effort to stop, it would be wholly illogical and unreasonable for the jury to have found upon the circumstantial evidence that there was a considerable interval of time during which defendant realized the danger and made no effort to avoid the accident. Mere doubt as to the credibility of defendant or the accuracy of his estimate of distance would not amount to affirmative evidence of any material fact. An instruction on the doctrine of last clear chance would have been an invitation to the jury to speculate as to the existence of an essential fact of which there was no direct or circumstantial evidence."

[6-8] In support of the judgment respondent argues that the defendant's own testimony showed that he was guilty of

negligence. This may be conceded but proof of defendant's negligence does not serve to establish that the doctrine of the last clear chance is applicable. *Rodabaugh v. Tekus*, supra, 39 Cal.2d 290, 293, 246 P.2d 663; *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 477, 487, 283 P.2d 1. The doctrine of the last clear chance presupposes that the defendant was negligent. Nor may one be held liable under the last clear chance rule upon the theory that he would have discovered the peril of the decedent in sufficient time to have avoided injuring him but for remissness upon his part. *Dalley v. Williams*, 1946, 73 Cal.App.2d 427, 436, 166 P.2d 595.

[9] Finally the respondent contends that the "evidence presented at the trial is equally consistent with a holding that plaintiff's decedent was not contributorily negligent" from which she concludes that the judgment should be affirmed without regard to whether the giving of the instruction upon the doctrine of the last clear chance was proper. However, respondent's having requested this instruction is persuasive of the fact that she must have believed that there was evidence which would have warranted the jury in finding that the decedent was guilty of contributory negligence for the doctrine would not otherwise be applicable. *Sparks v. Redinger*, 1955, 44 Cal.2d 121, 124, 279 P.2d 971. And that there was such evidence may not be doubted. As previously noted the defendant testified that when he first observed the decedent's automobile it appeared to be stopped partly on and partly off of the highway. If the jury believed this testimony, it might have found that the decedent was guilty of negligence by virtue of Vehicle Code, section 582. There was also evidence from which the jury could have concluded that the decedent was guilty of violating section 621 of the Vehicle Code in that the tail lamps upon his vehicles were not lighted. Moreover, the record discloses that after the jury had retired to deliberate it returned to the court with the request that the instruction upon the doctrine of the



last clear chance be reread and less than five minutes later, returned with a verdict for the plaintiff which strongly suggests, if it does not operate to establish, that the jury reached its verdict upon the basis of this doctrine. Under the circumstances the giving of the instruction was clearly prejudicial. As said in *Dalley v. Williams*, supra, 73 Cal.App.2d 427, 437, 166 P.2d 595, 600: "Plaintiff next argues that the giving of the instruction, if erroneous, was only 'technical in nature,' not prejudicial, and that the sole proximate cause of the accident was the negligence of defendant. With this we cannot agree. The instruction may have governed the jury in arriving at a verdict for the plaintiff, and, in the absence of evidence to support it, may have been prejudicial. The jury, under the evidence, might well have found the plaintiff guilty of contributory negligence contributing proximately to his own injury."

The judgment is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



163 Cal.App.2d 630

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**George Welcome MASON, Defendant and**  
**Appellant.**

**Cr. 1356.**

District Court of Appeal, Fourth District,  
California.

Sept. 18, 1958.

Proceedings on defendant's petition to modify judgment. The Superior Court of San Diego County, John A. Hewicker, J., denied the relief sought, and defendant appealed. The District Court of Appeal,

Mussell, J., held that 1955 amendment, to Penal Code section proscribing issuance of checks without sufficient funds, had no retroactive application to crimes committed prior thereto and to judgments which had become final.

Affirmed.

#### 1. False Pretenses ☞2

1955 amendment, to Penal Code section proscribing issuance of checks without sufficient funds, had no retroactive application to crimes committed prior thereto and to judgments which had become final. West's Ann.Pen.Code, §§ 3, 476a; West's Ann.Gov. Code, § 9608.

#### 2. Criminal Law ☞996(2), 998

Trial court was without jurisdiction to vacate or modify sentences which had been entered in minutes of court and which defendant had already begun serving.

#### 3. Criminal Law ☞997(6)

Writ of error coram nobis does not lie to correct error of law, and proceeding for such writ was not intended to authorize any court to review and revise its opinion.

#### 4. Criminal Law ☞997(2)

Contentions which could have been raised on timely appeal from judgment are not within scope of writ of error coram nobis.

#### 5. Criminal Law ☞996(2)

Delay of more than five years in filing petition to modify judgment foreclosed defendant of all right to relief under it.

Edmund Herman, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

On December 18, 1951, appellant entered a plea of guilty in the Municipal Court in San Diego to the crime of issuing a check without sufficient funds in violation of

Penal Code, section 476a. The matter was certified to the Superior Court (Case No. 169855) and appellant was granted probation. Subsequently, this order was vacated and on March 31, 1952, it was ordered that appellant be sentenced to the State's prison for the term prescribed by law, the sentence to run concurrently with relation to the sentence imposed by the said superior court on the same date in action No. 171444.

In San Diego Superior Court No. 171444 appellant was also charged with the crime of issuing a check without sufficient funds, a felony, in violation of section 476a of the Penal Code and on March 6, 1952, he entered a plea of guilty in the Municipal Court to said crime. This matter was also certified to the Superior Court, where, on March 31, 1952, appellant, having admitted a prior conviction as alleged in the amended complaint, was sentenced to the State's prison for the term prescribed by law. It was further ordered that this sentence run concurrently with the sentence imposed in said superior court action No. 169855. No appeal was taken in either of said superior court actions. On January 7, 1958, appellant filed in said actions a "Petition to Modify Judgment" in which he contends that the amendment in 1955 to section 476a of the Penal Code affected his status of imprisonment and rendered the crimes committed by him in 1951 and 1952 mere misdemeanors, since the total of the two checks involved amounted to less than the sum of \$50.00. This petition was denied and this appeal is from the order denying it.

[1] Appellant was not entitled to be sentenced as a first offender in superior court action No. 171444 because of his previous conviction. (Pen.Code, sec. 476a, as amended.) Moreover, the amendment to said section has no retroactive application to crimes committed prior thereto and to judgments which have become final. Government Code, section 9608, provides that termination or suspension of any law creating a criminal offense does not constitute a bar to punishment of an act already committed in violation of the law so terminated or suspended unless the intention to bar

such punishment is expressly declared by an applicable provision of law. No part of the Penal Code is retroactive unless expressly so declared (Pen.Code, sec. 3), and there is no such declaration indicated in section 476a of said code, as amended.

In *Sekt v. Justice's Court*, 26 Cal.2d 297, 306, 159 P.2d 17, 22, 167 A.L.R. 833, it is said:

"The second well-settled exception is that repeals by implication are not favored, and where a new statute is passed in a field already occupied by an older statute, the new statute will not be held to have repealed by implication the old statute as to crimes already committed at the time the new statute is passed. As to such crimes the offender will be punished under the old law and the new law will be held to be prospective in operation. This exception is based upon the presumed intent of the Legislature. See many cases collected and commented upon in majority and dissenting opinions in *People v. Lowell*, 250 Mich. 349, 230 N.W. 202—both opinions approving this rule."

[2-5] The trial court herein was without jurisdiction to vacate or modify the sentences imposed since the sentences had been entered in the minutes of the court and appellant had already begun serving them. *People v. Avelino*, 81 Cal.App.2d 934, 935, 185 P.2d 361. In *People v. McVicker*, 37 Cal.App.2d 470, 473, 99 P.2d 1110, it was held that an attack on a judgment by motion to vacate it is in legal effect a proceeding for a writ of error coram nobis, whether it be called by that name or not. Such a writ does not lie to correct error of law and is not intended to authorize any court to review and revise its opinion. *People v. Tuthill*, 32 Cal.2d 819, 822, 198 P.2d 505. Appellant's contentions herein could have been raised on a timely appeal from the judgment and are not within the scope of a writ of error coram nobis. *People v. Cardwell*, 153 Cal.App.2d 377, 379, 314 P.2d 484. Moreover, appellant's long delay in filing his petition forecloses him of

all right to relief under it. *People v. Krout*, 90 Cal.App.2d 205, 209, 202 P.2d 635.

The order denying appellant's petition is affirmed.

GRIFFIN, P. J., and COUGHLIN, J. pro tem., concur.



163 Cal.App.2d 559

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Jerry D'ALLESANDRO, Joe Mike Mangipane**  
and **Edgar Kelley**, Defendants,

**Joe Mike Mangipane**, Appellant.

Cr. 2857.

District Court of Appeal, Third District,  
California.

Sept. 16, 1958.

Defendant was convicted of willfully secreting, destroying and disposing of truck with intent to defraud insurer and with conspiracy to do so. The Superior Court, Stanislaus County, H. L. Chamberlain, J., granted probation and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Schottky, J., held that testimony of admitted accomplice's wife to effect that defendant in two telephone conversations had asked if accomplice had talked and had stated that accomplice should not involve others, was insufficient corroboration of accomplice's testimony to sustain conviction.

Judgment and order reversed.

#### 1. Criminal Law §1023(12, 13)

Where defendant was found guilty and probation was granted, and defendant's motion for new trial was denied, even though no judgment was entered, order granting probation was an appealable order and ap-

peal was proper both as to order granting probation and an order denying motion for new trial.

#### 2. Criminal Law §511(4)

In prosecution for willfully secreting, destroying and disposing of truck with intent to defraud insurer and conspiracy to do so, testimony of admitted accomplice's wife to effect that defendant in two telephone calls had asked her if accomplice had talked and had stated that accomplice should not involve others was insufficient corroboration of accomplice's testimony to sustain conviction. West's Ann.Pen.Code, §§ 182, 548, 1111.

A. M. Frad, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

The above named defendant, Joe Mike Mangipane, was charged with violating section 182 of the Penal Code, in that he conspired with Jerry D'Allesandro and Edgar Kelley to violate section 548 of the Penal Code by wilfully secreting, destroying and disposing of a truck with intent to defraud an insurer. He was also charged with violating section 548 of the Penal Code.

[1] Defendant waived a jury trial, and the cause was tried before the court. The court found the defendant guilty, and probation was granted. Defendant's motion for a new trial was denied. This appeal is from the judgment and the order denying a new trial. No judgment was entered but since an order granting probation is an appealable order the appeal is proper both as to the order granting probation and the order denying the motion for a new trial.

The only question on this appeal is whether or not the testimony of an admitted accomplice was sufficiently corroborated as required by Penal Code, section 1111, which reads:

"A conviction can not be had upon the testimony of an accomplice unless



it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The testimony produced at the trial disclosed that Jerry D'Allesandro was the owner of a 1954 Mac rebuilt Sterling Tractor Truck which was insured by Lloyds of London. A Joe Trombetta, an admitted accomplice, who was in the trucking business, testified that he had known appellant who had been doing some sub-hauling for him. In May, 1955, Trombetta and appellant had a conversation at which time appellant told Trombetta where there was a Diesel truck which "could be had." Trombetta indicated that he would be interested, and about a week later appellant and Trombetta had another conversation at which time Trombetta was told that the owner of the truck was D'Allesandro and that it could be arranged to have the truck parked at any place Trombetta desired. On a third occasion the matter was again discussed. At this time it was agreed where the truck would be parked and Trombetta was told that the truck would not cost him anything. Trombetta about this time also had a conversation with Edgar Kelley, a codefendant, who was an employee of his. Trombetta told Kelley that Mangipane had approached him about a truck being available and Kelley said, "let's get it." Later Kelley was told where the truck would be located, and on June 24, 1956, after Trombetta was informed by appellant where the truck could be found in Los Angeles, Kelley and Trombetta drove to Los Angeles where they found D'Allesandro's truck at the agreed location. The name A. L. Clausen Trucking Company was on the decals on the door. The

two purchased some paint, returned to the location where Kelley got into the truck and drove it away. Several miles away the truck was stopped and mudflaps attached to the rear. Kelley then drove the vehicle to Oklahoma. Later the truck was dismantled in Oklahoma by Kelley and Trombetta and most of the parts were taken back to California. The identification numbers on the engine block were changed.

D'Allesandro filed a claim for loss with the insurer and subsequently was paid.

The only corroborative evidence to link appellant with the crime, and the evidence relied on by respondent, was testimony given by Mrs. Helen Trombetta, wife of Joe Trombetta. She testified that after her husband was incarcerated in March, 1956, appellant phoned her. The testimony regarding this conversation was as follows:

"Q. What did he tell you at that time? Will you relate the conversation? A. The best I can remember the conversation was about Joe.

"Q. What did he say to you? A. He said—he asked me what was happening, where Joe was and when he was coming home.

"Q. And what did you tell him? A. I don't remember what I told him.

"Q. Did you tell him where your husband was? A. Yes, I told him he was still in jail.

"Q. And then what happened? A. He asked me if Joe had talked and I told him that I didn't know.

"Q. Then what happened? A. Well, he told me that there was no need for anyone else to be involved, that one was enough to take the responsibility of what had happened."

Mrs. Trombetta also testified as follows:

"A. Well, he did add that he would help the family, me and my family financially if Joe were gone and we needed more assistance."

Mrs. Trombetta had a later telephone conversation with the appellant and also talked with him in person. These conver-

sations were related by the witness as follows:

"Witness: Well, the best I can remember, the last conversation I had on the telephone with him was that if I would meet him somewhere, he wanted to talk with me.

"Mr. Lacoste: Q. Did he tell you why he wanted to meet you somewhere? A. He didn't want to come to the house.

"Q. Did he tell you why? A. No, he didn't.

"Q. So then what happened? A. So I met him at the Modesto High School and I talked to him there.

"Q. Will you relate what was said at that time? A. He said he wanted to know what was taking place and what was said and what I knew.

"Q. What did you tell him? A. Whatever I knew that had taken place.

"Q. Do you recall what you told him? A. That Joe was still not at home and as far as I knew that nothing had happened, that they were not going to let him come home on bail and I didn't know what was going to happen and again he told me that there was no need for a lot of people to get involved, that one could take the responsibility and it would save dragging others into it.

\* \* \* \* \*

"A. He had told me that there was no need to drag anyone else into it and that if one was to take the blame, that there was no need to drag anyone else into it."

Appellant contends most earnestly that there is insufficient corroboration of the testimony of the accomplice Joe Trombetta and that therefore the judgment must be reversed. Respondent contends that the testimony of Mrs. Trombetta, hereinbefore set forth, is sufficient to corroborate the testimony of the accomplice.

There have been numerous decisions dealing with the question of the sufficiency of

evidence to corroborate the testimony of an accomplice. However, recent decisions of our Supreme Court have stated the principles which we must follow.

In *People v. MacEwing*, 45 Cal.2d 218, at page 225, 288 P.2d 257, at page 261, the court said:

"The decisions applying section 1111, relating to accomplices, hold that the corroborative evidence required by that provision must be considered without the aid of the testimony which is to be corroborated and that it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. [Citing cases.] There are two opinions which, although not clear, indicate that a similar rule applies with respect to section 1108. See *People v. Crain*, 102 Cal.App.2d 566, 579, 228 P.2d 307; *People v. Murphy*, 60 Cal.App.2d 762, 772, 141 P.2d 755. In our opinion both statutes must be construed to mean that corroboration is not adequate if it requires aid from the testimony of the person to be corroborated in order to connect the defendant with the commission of the offense charged. The instruction was therefore erroneous."

In *People v. Brown*, 49 Cal.2d 577, at page 584, 320 P.2d 5, at page 9, it is stated:

"The People rely also upon the testimony of Dr. Randall, who treated Clara on January 30, 1956, as corroboration. The doctor's testimony does not meet the test of connecting defendant with the abortion which Clara underwent. *People v. Ramsey* (1948), 83 Cal.App.2d 707, 713, 717 [4], 189 P.2d 802, is inconsistent with *People v. MacEwing* (1955), supra, 45 Cal.2d 218, 225 [7], 288 P.2d 257, insofar as it suggests that testimony which does not itself connect the defendant with the criminal abortion is sufficient corroboration; in this respect the *Ramsey* case does not represent the law and, to avoid possible confusion, is to that extent disapproved."

In *People v. Lyons*, 50 Cal.2d 245, 324 P.2d 556, 562, the court said:

"The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. [Citing cases.]"

In *People v. Santo*, 43 Cal.2d 319, at page 327, 273 P.2d 249, at page 253, the court said:

"The accomplice need not be corroborated as to every fact to which he testifies. The evidence which corroborates the accomplice need not be direct; it may be circumstantial. Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant. (*People v. Henderson* (1949), 34 Cal.2d 340, 342-343, 209 P.2d 785; *People v. Barclay* (1953), *supra*, 40 Cal.2d 146, 156, 252 P.2d 321; *People v. Wayne* (1953), 41 Cal.2d 814, 822, 264 P.2d 547.) To be sufficient the implicating evidence 'must relate to some act or fact which is an element of the offense.' (*People v. Gallardo* (1953), 41 Cal.2d 57, 63, 257 P.2d 29.)"

Applying the foregoing principles to the instant case we are of the opinion that the testimony of Mrs. Trombetta, relied on by respondent, is insufficient corroboration of the accomplice, Joe Trombetta. Section 1111 of the Penal Code states that "a conviction can not be had unless it be corroborated by such other evidence as shall tend to connect the defendant with the commis-

sion of the offense," and our Supreme Court has stated in *People v. MacEwing*, *supra*, that "corroboration is not adequate if it requires aid from the testimony of the person to be corroborated in order to connect the defendant with the commission of the offense charged."

There is nothing in Mrs. Trombetta's testimony which, when considered without the aid of the testimony of the accomplice, can be held to connect appellant with the offenses with which he was charged.

Mrs. Trombetta states twice in her testimony that the conversations with the appellant were about Joe, her husband. One may speculate as to why appellant asked Mrs. Trombetta if her husband had talked and that he should not involve others, but such statements do not show even the slightest connection with the taking of a truck some 300 miles distant some nine months before. Mr. Trombetta testified to a many-year acquaintance with appellant which at times involved daily meetings of each other. There is nothing in the record to indicate but that appellant and Trombetta were friends. Thus, the advice and help which appellant offered to Mrs. Trombetta were entirely consistent with their long-time family acquaintance and the obvious distressing situation in which Mrs. Trombetta and family were placed by the jailing of her husband.

Respondent does not point out how the testimony of Mrs. Trombetta meets the test set forth in *People v. MacEwing*, *supra*, and the other cases hereinbefore cited, but respondent seems to rely strongly on *People v. Andrew*, 43 Cal.App.2d 126, 110 P.2d 459. Respondent states that in that case the evidence was sufficient to corroborate the testimony of the accomplice where such corroborating evidence consisted of testimony to the effect that the defendant attempted to visit the accomplice after the latter had been arrested and was in jail, but upon being refused permission to see the accomplice wrote to him three different times as follows:



"(1) 'Roy Jones \* \* \* Can't see you. They won't let me. Please don't testify against me.' (2) 'Ask if you can receive any books or magazines. Anything you wish will be sent. \* \* \* Regardless of what the law does or tries to do it cannot break down those sincere friendships of which there are so few. One who does not stick by his friend in time of trouble is not worthy of the name. Just remember that. \* \* \* When and if you are released and you wish to make a trip and are allowed to, a ticket will be provided by the company, to any point in the U. S. you wish to go. So don't worry about your condition when you get out. \* \* \* A new and different venture will be invested in soon and part or all of the profits will be yours, so that you will be self maintaining when you are free.' (3) 'It won't be so very long now and probably you will be out. It would be nice to take a vacation somewhere when you do, mountains or something, and you can if you want to.'"

Respondent also quotes the following from page 129 of 43 Cal.App.2d, from page 461 of 110 P.2d of *People v. Andrew*:

"\* \* \* The rule as to what extent corroboration is necessary to connect or tend to connect a defendant with the commission of a crime appears in the case of *People v. Negra*, 208 Cal. 64, 69, 280 P. 354, 356, where the court states: 'The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. \* \* \* The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to

connect the accused with the commission of the offense.'"

We are unable to agree with respondent's statement that "on the authority of the *Andrew* case it should be held that the testimony of the accomplice Joe Trombetta is sufficiently corroborated." For in the *Andrew* case the corroborating evidence was far stronger than the testimony of Mrs. Trombetta in the instant case. Appellant *Andrew* was charged with having committed an act of sexual degeneracy with Roy Jones. *Andrew* wrote Jones, who was in jail, stating among other things, "Please don't testify against me," and made a number of promises as to benefits he would confer upon Jones. The words "Please don't testify against me" point at no one but the writer of the letter. There is no doubt as to who is meant by "me." The words "testify against" clearly imply that there was something which the accomplice could testify to, which would be against the writer and connect the writer to both the accomplice and the testimony he might give against the writer.

As hereinbefore pointed out, the statements of appellant in his conversation with Mrs. Trombetta were far different. Furthermore, in the *Andrew* case there was additional corroborating evidence as the opinion states that "Appellant while testifying in his own behalf made inconsistent statements and many replies to questions propounded to him that are not consistent with his innocence."

We believe that the decision in *People v. Andrew*, supra, is distinguishable from the instant case and neither justifies nor requires us to hold that the testimony of the accomplice Trombetta was sufficiently corroborated. We believe further that if *People v. Andrew* is susceptible of the construction placed upon it by respondent it is out of harmony with the later cases of our Supreme Court hereinbefore cited. It is to be noted that no hearing in the Supreme Court was sought in *People v. Andrew* and that the decision has not been referred to or cited in the later cases.

[2] For the reasons hereinbefore set forth we conclude that the testimony of Mrs. Trombetta was insufficient to corroborate the testimony of the accomplice, Joe Trombetta, and that inasmuch as it is conceded that there was no other corroborating testimony, the judgment must be reversed.

The judgment and the order are reversed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



163 Cal.App.2d 541

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Donna Mae PHILLIPS, Defendant and Appellant.**  
Cr. 1368.

District Court of Appeal, Fourth District,  
California.

Sept. 15, 1958.

Defendant was convicted in the Superior Court of San Diego County, Gerald C. Thomas, J., for violating Penal Code subdivisions, and she appealed. The District Court of Appeal, McCabe, J. pro tem., held that, not having pursued her remedy under Penal Code sections, defendant was precluded from controverting facts stated in affidavit upon which search warrant had been based.

Affirmed.

# 1. Searches and Seizures ⚡3(10)

If, prior to trial, defendant had desired to challenge the validity of search warrant and resulting effect of it she could have (1) made motion to quash it, (2) petitioned for writ of mandamus for return of property, (3) made motion to suppress or

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exclude evidence, or (4) sought writ of prohibition.

## 2. Searches and Seizures ⚡3(10)

Not having pursued her remedy under Penal Code sections, defendant was precluded from controverting facts stated in affidavit upon which search warrant had been based. West's Ann.Pen.Code, §§ 1539, 1540.

## 3. Criminal Law ⚡1141(2)

Burden is upon appellant to present record reflecting error affirmatively.

## 4. Searches and Seizures ⚡3(10)

Burden of establishing invalidity of search warrant was upon defendant.

## 5. Searches and Seizures ⚡3(10)

Search warrant is presumed valid.

## 6. Arrest ⚡63(3)

### Gaming ⚡60

Officers searching premises for which they had valid search warrant and finding defendant occupying room with betting paraphernalia and engaged in bookmaking had right to arrest defendant and to seize paraphernalia. West's Ann.Pen.Code, § 337a, subs. 1, 2.

## 7. Witnesses ⚡216

Where defendant had been arrested, by officers searching premises for which they had search warrant, when they found defendant committing a crime, it was not error, in ensuing prosecution, to refuse to require officers to reveal name of their informant.

## 8. Criminal Law ⚡395

It was proper to refuse to exclude evidence seized under search warrant, notwithstanding fact that inventory had not been taken in defendant's presence and that no copy of it had been given to her. West's Ann.Pen.Code, § 1535.

## 9. Criminal Law ⚡395

Information that telephone was subscribed to by "Jack L. Thompson at 717 El Cajon Boulevard" and that certain utilities were listed under his name at that address was information on which, in part, affidavit for search of the "premises of Jack L.

Thompson at 717 El Cajon Boulevard" could be made, and mere fact that defendant, rather than Thompson, was found occupying premises would not require exclusion of evidence seized pursuant to warrant. West's Ann.Pen.Code, § 337a, subs. 1, 2.

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Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman B. Peek, Deputy Atty. Gen., for respondent.

McCABE, Justice pro tem.

From judgments of conviction entered after verdicts of a jury for violation of section 337a, subs. 1 and 2, Penal Code, and from the order denying a new trial, defendant appeals.

A police officer had received information concerning bookmaking operations at 717 El Cajon Boulevard, City of El Cajon. An affidavit of a police officer was sworn to before a magistrate of the municipal court and a search warrant was issued on August 3, 1957, which read in part:

"You are commanded, in the daytime or nighttime to make immediate search on the premises of Jack L. Thompson, 717 El Cajon Boulevard, El Cajon, California, for the following property, to wit: books, papers or paraphernalia,"

and a police officer testified that the warrant also provided "for the purpose of recording and registering bets on horse races." On August 4, at about 2:00 p. m. police officers, with the search warrant, went to the house at the El Cajon address. Just prior to going to this address, the officers had a part-time matron place a telephone call to the house, a woman's voice answered "Roger", the matron said "Hi Mabel", the woman's voice replied "This isn't Mabel; there is no Mabel here". Later the matron identified defendant's voice as being the same the matron had heard over the telephone.

Upon arriving at 717 El Cajon Boulevard two officers went to the front door and two officers proceeded to the rear of the house. Although the officers at the locked front door demanded admission, no one admitted them. The officers in the rear of the house entered by a window and the other officers were admitted by their brother officers through the front door. Officers entered a room described as a "bed room" but which in fact was not furnished as such. No other room in the house was furnished for living quarters and no clothing was found. In this "bed room" defendant was seated at a table on which rested two telephone instruments. On this table and about the room the officers observed pads of paper, racing forms, radio and other paraphernalia which was testified to, and the defendant does not deny, is commonly used in bookmaking. Defendant was placed under arrest. While in the "bed room" two police matrons received numerous telephone calls. In answering telephone calls the matrons used the introductory word "Roger". These calls concerned themselves with the placing of bets, the "scratching" of bets, the request for information regarding races, or horses or race tracks. In at least one or two incidences inquiry was made for "Donna", defendant's given first name.

From the time of her arrest, defendant refused to give any statement, however at different times and in different locations the following occurred: The arresting officer said "Then you are making the book?", to which defendant replied "That's about it". Upon being asked how she had gotten into this she replied she was well paid; she was asked "if there were any prearranged agreements in case she was arrested and she said no"; when questioned if she knew what she was getting into when she started she replied she did but didn't realize it was that big; she was told that "her country boy" had called and defendant laughed ("country boy" referred to above was the name given by the calling party in a telephone conversation received by one of the police matrons); defendant questioned the part-time police matron as



to whether it was she who called prior to the arrest and the police matron replied in the affirmative.

One of the telephones was subscribed to by one Rogers and the other by one Thompson. The utilities for the house were under the name Thompson. This was known to the police officer prior to swearing to the affidavit. Who rented the house from the owner is not clear from the record. No police officer who testified at the trial knew or had ever seen Thompson or Rogers, and had not known defendant prior to the entry. In the mail box the officers found an envelope addressed to Rogers.

It appears from the testimony that an inventory of the premises was taken while the officers were at the house but not in the presence of defendant. Defendant never received a copy of the inventory. The warrant and inventory were filed on August 9, 1957, in the municipal court.

On the day of trial in the trial judge's chambers defendant revealed to the judge and prosecution the objections she had to the admission into evidence of the property taken. During the trial, the affidavit, search warrant and property taken were admitted to evidence, and the objections to the admissibility of the evidence as revealed in the judge's chambers were noted in the record. Essentially these objections are now translated into the contentions on this appeal.

On this appeal defendant contends (1) the search was illegal because the search warrant was issued improperly and not made upon any factual information in the hands of the officers; (2) the search and seizure was not made under the authority of the search warrant and was therefore illegal; (3) the trial court erred in refusing to require the officer to reveal the name of his informant; (4) evidence taken under the search warrant is inadmissible because the statutory requirements regarding the return of the inventory was improperly made; (5) under the search warrant the evidence was improperly admitted because the warrant authorized search of the

"premises of Jack L. Thompson at 717 El Cajon Boulevard" and did not authorize the search of any premises at 717 El Cajon Boulevard; (6) the evidence is insufficient to support the verdict and the verdict is against the evidence.

[1,2] California cases indicate that, if prior to trial, defendant had desired to challenge the validity of the search warrant and the resulting effect of it she could have (a) made a motion to quash it (*People v. Berger*, 44 Cal.2d 459, 461, 282 P.2d 509); (b) petitioned for a writ of mandamus for the return of the property (*People v. Berger*, supra); (c) made a motion to suppress or exclude the evidence (*People v. Alaniz* [dissenting opinion], 149 Cal.App.2d 560, 571, 309 P.2d 71, citing *United States v. Kind*, 2 Cir., 87 F.2d 315, 316); (d) sought a writ of prohibition (*Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36). Also, defendant had certain rights under sections 1539 and 1540, Penal Code, which apparently she did not exercise. Not having pursued her remedy under these code sections she should be precluded from controverting the facts stated on the affidavit. *Arata v. Superior Court*, 153 Cal.App.2d 767, 315 P.2d 473; see also *State v. Best*, 150 A. 44, 8 N.J.Misc. 271; *United States v. McKay*, D.C., 2 F.2d 257, 259, 260. She did not make use of any of these processes prior to trial.

The above quoted portion of the search warrant was read into evidence but the exact verbiage of the affidavit and search warrant is unknown to us since the exhibits are not before us.

[3,4] On an appeal it is the general rule that matters not shown by the record will not be considered on appeal. 3 Cal.Jur.2d, Appeal and Error, Section 261 and cases therein cited. When there are affidavits which are made the basis of a complaint on appeal they must be part of the record. 3 Cal.Jur.2d, Appeal and Error, Section 262 and cases cited. Therefore, this court will not presume there was error on the part of the magistrate who issued the warrant. The burden is upon the appellant to

present a record reflecting the error affirmatively. *Romine v. Cralle*, 80 Cal. 626, 628, 22 P. 296; *Boyer v. Pacific Mutual Life Insurance Co.*, 1 Cal.App. 54, 55, 81 P. 671. The burden of establishing the invalidity of the search warrant is upon defendant. *People v. Acosta*, 142 Cal.App.2d 59, 62, 298 P.2d 29; *United States v. Goodwin*, D.C., 1 F.2d 36.

If defendant is now making a request to have us attempt to piece together bits of disconnected testimony to establish the contents of the affidavit, she has landed on an unfertile plateau. We will not subscribe to the request, particularly since defendant had methods open to her to make the documents part of the record on appeal.

In part, defendant's argument is that the warrant must be issued only upon "factual information". This point has been determined in *People v. Acosta*, 142 Cal. App.2d 59, 298 P.2d 29, and *Arata v. Superior Court*, *supra*.

In sole support of her contention (2) defendant cites without argument *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513; A perusal of the *Cahan* case does not reveal that a search warrant was issued. We cannot discern any possible argument whereby the *Cahan* opinion is applicable to defendant's contention (2).

[5,6] Defendant's point (3) is based upon a misconception. As heretofore stated, a warrant is presumed to be valid unless the defendant successfully attacks it, which she has not done. Therefore, the police officers in entering the house at 717 El Cajon Boulevard did so armed with a valid search warrant. They were properly in the house to search the premises described in the warrant for the property described in the warrant. In searching the premises they entered a room where bookmaking was taking place and which had in it property similar to that described in the warrant. They had a right to seize this property and to take it with them. The evidence in the record is substantial and justifies a finding that defendant was occupying a room with betting paraphernalia

therein and was engaged in bookmaking. The defendant was seated at a table on and around which much of the property used in bookmaking was situated. The officers had a right to believe that crimes under section 337a, subds. 1 and 2, were being committed in their presence. This being true, the officers had a right to arrest defendant, which they did.

During the trial and upon cross-examination of the police officer, defendant asked the following question: "Now, you said you got that information from some reliable source. Would you tell us who the reliable source was?" Prosecution's objection to this question was sustained by the trial court. Defendant can gain no comfort from the fact that in many cases, both in California and in other jurisdictions, an arrest being made upon information supplied by a tipster without other showing, it is decided that the officers did not have reasonable grounds for the arrest. In those cases the crime not being committed in the presence of the officers the question is as to whether the officers had reasonable and probable cause to make the arrest under a felony charge. Defendant has confused the "reasonable cause" to justify an arrest based upon information obtained from others and the "probable cause" for the issuance of a search warrant. In *Willson v. Superior Court*, 46 Cal.2d 291, 294, 294 P.2d 36, 38, cited by defendant to support her contention, it is said:

"Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, see *People v. Kilvington*, 104 Cal. 86, 92-93, 37 P. 799 [43 Am.St.Rep. 73], an arrest may not be based solely on such information. *United States v. Kind*, 2 Cir., 87 F.2d 315, 316; *United States v. Blich*, D.C., 45 F.2d 627, 629; *United States v. Keown*, D.C., 19 F. Supp. 639, 646; *State v. Arregui*, 44 Idaho 43, 254 P. 788, 793-794, 52 A.L.R. 463; *Hill v. State*, 151 Miss. 518, 118 So. 539, 539-540; *Smith v. State*, 169 Tenn. 633, 90 S.W.2d 523, 524, and

evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. See, *People v. Boyles*, supra, 45 Cal.2d 652, [656] 290 P.2d 535. In some cases the identity of, or past experience with, the informer may provide such evidence, see, *Aitken v. White*, 93 Cal.App.2d 134, 145, 208 P.2d 788, and in others it may be supplied by similar information from other sources or by the personal observations of the police."

[7] The *Willson* case, supra, did not concern itself with the "probable cause" for the issuance of a search warrant. In the instant case, the court's ruling not requiring the officer to reveal the name of the informant was correct because a crime was being committed in the presence of the officers who were legally on the premises. In making this arrest they were not relying upon any information supplied by an informant.

[8] By contention (4) defendant seeks to exclude certain evidence obtained by use of the search warrant. We have decided the search warrant was a valid instrument capable of being used by the officers for the purposes described in it. Defendant contends because the inventory was not taken in her presence and no copy of it was given to her, the warrant is vitiated. No California cases are cited by the defendant to support the position, and we have found none. However, cases from without this jurisdiction have held under a statute very similar to section 1535, Penal Code, that the required act by the officer was a ministerial one and created a defect, but did not

void the effectiveness of the warrant or contaminate the evidentiary value of the property seized under the warrant. See 79 C.J.S. Searches and Seizures § 84, p. 906; *Giles v. United States*, 1 Cir., 284 F. 208, 211, 215; *United States v. Kaplan*, D.C., 286 F. 963; *United States v. Callahan*, D.C., 17 F.2d 937. We think this is the correct view.

[9] We can see no validity to defendant's contention (5). The officers had information regarding the activity of one Jack L. Thompson at 717 El Cajon Boulevard, they knew a telephone was subscribed to by Jack L. Thompson, 717 El Cajon Boulevard, and certain utilities were listed under his name at that address. This was information on which, in part, an affidavit could be made. A warrant could be issued properly in the form set forth, in part, above.

Defendant's contention (6) is intertwined with other contentions. This contention has been fully answered above.

Defendant's last point is that the evidence is insufficient to support the verdict and judgment. We have outlined the evidence against defendant. The jury, from the evidence, admissions against interest and the inferences reasonably to be drawn from the evidence, could and did find her guilty of the crimes charge. There is substantial legal evidence to support the verdicts and the judgments. They will not be disturbed on this appeal.

Judgments and order affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.





50 Cal.2d 742

**DEPARTMENT OF MENTAL HYGIENE**  
of the State of California, Plaintiff  
and Respondent,  
v.

**Laurence MCGILVERY, as Executor of the**  
**Estate of Annie Christabel Girard,**  
**Deceased, Defendant and Appellant.**  
**L. A. 24830.**

Supreme Court of California,  
In Bank.  
Sept. 12, 1958.

Action by Department of Mental Hygiene to enforce payment of its claim for support and maintenance of mentally ill patient in state hospital against estate of patient's mother. From adverse judgment of the Superior Court, Los Angeles County, Burnett Wolfson, J., the executor of mother's estate appealed. The Supreme Court, Shenk, J., held that statute providing that husband, wife, father, mother, or children of a mentally ill person and the administrators of such relative's estates shall be liable for the care, support and maintenance of such mentally ill person in a state institution does not create an improper classification as to relatives and persons receiving assistance in a mental institution.

Judgment affirmed.

Schauer, and Carter, JJ., dissented.

Opinions, 323 P.2d 65 and 316 P.2d 46, vacated.

**I. Statutes**  $\S$ 223.2(23)

Section of Welfare and Institutions Code providing that husband, wife, father, mother or children of a mentally ill person shall cause him to be properly and suitably cared for and that such persons and the administrators of their estates shall be liable for mentally ill person's care, support and maintenance in a state institution of which he is an inmate, must be considered with other sections in *pari materia*. West's Ann.Welfare & Inst.Code,  $\S\S$  6650, 6651, 6652, 6653.

329 P.2d—44

**2. Mental Health**  $\S$ 74

Statute providing that husband, wife, father, mother, or children of a mentally ill person and the administrators of their estates shall be liable for care, support and maintenance of such mentally ill person in a state institution imposes an unconditional liability and mere inability to pay does not of itself constitute a reduction, remission or cancellation of the obligation, but the amounts due thereunder may be reduced, remitted, or canceled by administrative action. West's Ann.Welfare & Inst.Code,  $\S\S$  6650, 6651, 6652, 6653.

**3. Mental Health**  $\S$ 74

Mere failure of Department of Mental Hygiene to enforce obligation of husband, wife, mother, father, or children of a mentally ill person or administrators of such relatives' estates to pay for care, support and maintenance in a state institution of such mentally ill person does not constitute such administrative action as will result in modifying, remitting or canceling the obligation, constructively or otherwise, the only effect of such failure being to make unenforceable those portions of obligation which were outstanding for more than four years. West's Ann.Welfare & Inst.Code,  $\S\S$  6650, 6651, 6652, 6653; West's Ann.Code Civ.Proc.  $\S$  345.

**4. Executors and Administrators**  $\S$ 202(1)  
**Mental Health**  $\S$ 74

Under statute providing that husband, wife, father, mother, or children of a mentally ill person and the administrators of such relatives' estates shall be liable for care in a state institution of such mentally ill person, obligation to pay is unconditionally created by statute and no administrative order is required to perfect it and such obligation continues in absence of effective administrative action to modify, remit or cancel it, and amounts due from an estate for past obligations within period of limitations are collectible from later acquired assets of estate. West's Ann.Welfare & Inst.Code,  $\S\S$  6650, 6651, 6652, 6653.

**5. Estoppel** ⇨62(2)**Mental Health** ⇨75

Where daughter was committed to state mental institution in 1935, Department of Mental Hygiene did not waive its right to collect for care and maintenance of daughter at such institution, by failing to make a demand for payment until after death of mother in 1955 nor was state estopped from demanding payment for four years preceding mother's death, when there was no substantial evidence of injury to executor occasioned by delay in bringing the action. West's Ann.Welfare & Inst. Code, §§ 6650, 6651, 6652, 6653.

**6. Statutes** ⇨72

Section of constitution requiring that all laws of a general nature have a uniform operation requires a reasonable classification of persons upon whom the law is to operate and the classification must be one that is founded upon some natural or intrinsic or constitutional distinction and those persons within the class must be subjected to equal burdens. West's Ann. Const. art. 1, § 11; U.S.C.A.Const. Amend. 14.

**7. Constitutional Law** ⇨211

Equal protection of the law is not afforded when a statute imposes a particular disability upon a class arbitrarily selected from a larger number of persons, all of whom stand in same relation to burden imposed, and between which class and the others no reasonable distinction or substantial difference can be found to warrant inclusion of the one and exclusion of the other. West's Ann.Const. art. 1, § 11; U.S.C.A.Const. Amend. 14.

**8. Constitutional Law** ⇨208(1)

Distinction upon which classification is based or upon which different treatment is accorded must have some reasonable and substantial relation to purpose for which legislation was designed. West's Ann. Const. art. 1, § 11; U.S.C.A.Const. Amend. 14.

**9. Constitutional Law** ⇨208(1)**Mental Health** ⇨72

Statute providing that husband, wife, father, mother, or children of a mentally ill person and the administrators of such relatives' estates shall be liable for care, support and maintenance of such mentally ill person in a state institution does not create an improper classification as to relatives and persons receiving assistance in a mental institution. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

**10. Constitutional Law** ⇨48

Supreme court has duty to uphold constitutionality of a statute if it can be done on any reasonable theory.

**11. Constitutional Law** ⇨299**Mental Health** ⇨72

Statutes providing that certain relatives of a person committed to a state mental institution shall be liable for care and maintenance of such person at mental institution does not violate due process clauses of state and federal constitutions on ground that such a relative cannot obtain an administrative determination of ability to pay by director of mental hygiene or obtain a judicial review of proceedings if such administrative action has been obtained. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

**12. Eminent Domain** ⇨2(1)

Sections of Welfare and Institutions Code imposing obligation upon certain relatives of a mentally ill person, to pay for care and support of such mentally ill person in a state institution, are not unconstitutional on ground that they constitute a taking of private property without just compensation. West's Ann.Welfare & Inst.Code, §§ 6650, 6651, 6652, 6653.

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Carter, Young, Zetterberg & Henrie and Richard T. Young, Pomona, for appellant.

Edmund G. Brown, Atty. Gen., and Ariel C. Hilton, Deputy Atty. Gen., for respondent.



SHENK, Justice.

A rehearing was ordered to consider the contention of the defendant, first elaborated upon in the petition for rehearing, that the provisions of the Welfare and Institutions Code, sections 6650 et seq., held by the court in the former opinion to impose an absolute liability on a mother to pay for the care, support and maintenance of her mentally ill daughter in a state institution, is a deprivation of property without equal protection of law and without just compensation in violation of the state and federal Constitutions.

In 1935 Joan McGilvery, daughter of the decedent, was adjudged mentally ill and from that time has been confined in state hospitals and maintained and provided for by state agencies whose interests the Department of Mental Hygiene now represents. When first confined Joan was the wife of Neil McGilvery. Their son Laurence, was three years of age. In 1936 the husband disappeared and his whereabouts remain unknown. Joan's mother took Laurence into her home and provided for his support and education. In 1955 she died. Her will was admitted to probate and Laurence, then an adult, was named as executor. Other than a \$1,000 trust fund for the benefit of Joan, the estate was left to Laurence.

It appears that at the time of Joan's commitment, Mrs. Girard was a single woman, 63 years of age. She owned a home in Oakland from which she had an annual income of approximately \$200. She supplemented that income with her earnings as a nurse, found to be about \$20 a month. The only evidence of her earnings between the time of Joan's commitment and Mrs. Girard's death relates to the last four years of her life. During those years she had an income of approximately \$100 a month, \$50 a month from an investment fund derived, apparently, from the sale of her home, and \$50 a month from federal old age benefits. At her death her estate was appraised at \$14,504.69. It increased to \$18,984.69 during administration.

The plaintiff Department of Mental Hygiene presented to the executor its claim against the estate for \$4,737 for Joan's support and maintenance for the four year period immediately preceding Mrs. Girard's death. The executor rejected the claim and this action was commenced by the department to enforce payment. Judgment in the amount sought was for the plaintiff and the executor appealed. There is no dispute as to the amount of the claim. The only question is the liability of the estate for its payment.

The department's claim is based upon legislation found in the Welfare and Institutions Code which provides for the care and maintenance of mentally ill persons. Section 6650 provides in its pertinent parts: "The husband, wife, father, mother, or children of a mentally ill person \* \* \* shall cause him to be properly and suitably cared for and maintained \* \* \*. The husband, wife, father, mother, or children of a mentally ill person \* \* \* and the administrators of their estates \* \* \* shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. \* \* \*". Section 6651 provides in part: "The monthly rate for the care, support, and maintenance of all mentally ill \* \* \* persons \* \* \* at the state hospitals for the mentally ill where there is liability to pay for such care, support, and maintenance, shall be reviewed once each fiscal year and fixed at the state-wide average per capita cost of maintaining patients in all state hospitals for the preceding fiscal year, as determined by the Director of Mental Hygiene, and shall be payable in advance. \* \* \*. The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care; support, and maintenance of any mentally ill \* \* \* person \* \* \* who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care, support, and maintenance. \* \* \*". In section 6652 the Department of Mental Hygiene is given the authority to

take such action as may be necessary to effect the collection of the charges mentioned in section 6650.

In section 6653 it is provided that "The department shall, following the admission of a patient into a State hospital for the insane \* \* \* make an investigation to determine whether the patient has any relative or relatives responsible under the provisions of Section 6650 for the payment of the costs of \* \* \* maintenance, and shall ascertain the financial condition of such relative or relatives to determine whether in each case such relative or relatives are in fact financially able to pay such charges. \* \*"

Following Joan's commitment an investigation was conducted regarding Mrs. Girard's financial circumstances. No charge or other exaction was attempted to be collected from her under section 6650 of the Welfare and Institutions Code, either at that time or during her lifetime.

[1] It is claimed by the defendant that section 6650 does not impose on the persons named therein an absolute and unconditional liability for the support and maintenance of a mentally ill relative, but that liability is imposed only if the investigation mentioned in section 6653 reveals that those persons "are in fact financially able to pay such charges." It is obvious that the language of section 6650 cannot be considered alone, but that it must be considered with other sections in *pari materia*. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526. Section 6650 was enacted in 1937. It was based on the former Political Code, section 2176. That section contained the provisions, now set forth in all material respects in sections 6652 and 6653, as well as 6650, including the provision that the department shall make an investigation to determine the financial ability of named relatives to pay the charges for the support and maintenance of the mentally ill. Under the circumstances sections 6650 and 6653 "shall be construed as restatements and continuations \* \* \* and not as new enactments" (Welf. & Inst.Code, § 2), and are to be considered together. Accordingly we must look

to the construction given section 2176 of the Political Code prior to 1937.

Section 2176 when first enacted in 1903 (Stats.1903, p. 505) clearly made ability to pay a condition of liability. It provided that " \* \* \* the husband, wife, father, mother, or children of an insane person, if of sufficient ability \* \* \* shall be liable for the care, support and maintenance of any insane person in a state hospital \* \*." In 1909 that section was modified and the words "if of sufficient ability" were deleted. Stats.1909, p. 71. In 1921 the section was again modified by the addition of a second paragraph requiring an investigation into the financial circumstances of the responsible parties to determine whether they were "in fact financially able to pay such charges" provided for in the first paragraph. Stats. 1921, p. 1335. In 1931 a further amendment did not alter the provisions of the same section in any respect material to the present inquiry. Stats.1931, p. 322. It was in 1937 that the section was divided. The first paragraph, providing for charges as against responsible relatives, became section 6650 of the Welfare and Institutions Code. The second paragraph, providing for an investigation into the financial circumstances of responsible relatives, became section 6653 of the same code.

It is significant that the Legislature had first expressly specified the relatives who were responsible as those "of sufficient ability" to pay and thereafter deleted that requirement. The defendant contends that regardless of the deletion, the Lunacy Commission, then performing the functions of the Department of Mental Hygiene, continued to use ability to pay as a criterion in making charges after 1909. It appears in several of the Commission's biennial reports to the Legislature that ability to pay was considered as a factor in determining whether the Commission enforced its monthly charges. (See Reports of the State Commission in Lunacy, Attorneys' Reports: Vol. 4, Appendix to Journals of Senate and Assembly of California, 41st Session (1915), p. 24; Vol. 6, Appendix to Journals of Senate and Assembly of Cali-

fornia, 42nd Session (1917), p. 32; Vol. 1, Appendix to Journals of Senate and Assembly of California, 44th Session (1921), p. 19.) But there is nothing to indicate in either the statutes or in the administrative practices that ability to pay was a factor in determining liability for the charges after 1909. Likewise in 1921, when the provision for the investigation of the financial circumstances of responsible relatives was added there was no indication that the purpose of the added provision was to determine liability of relatives already made unequivocally liable. The language of the first paragraph of section 2176 and the change of the law in 1909 too clearly provided for the imposition of an initial liability to permit any other construction. The investigation provided for in the 1921 legislation must be deemed to serve some purpose and that purpose is apparent from companion sections first enacted in 1903. Section 2180 of the Political Code then enacted provided for the amount of monthly support to be paid by relatives of the mentally ill, and further provided that "the medical superintendent of a state hospital for the insane shall, on the order of the commission, reduce or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care, support, maintenance and clothing of any insane person committed thereto and confined therein, on satisfactory proof that said estate or said relatives, as the case may be, are unable to pay the said sum \* \* \*." Stats.1903, p. 506. The foregoing has been carried through and appears today in its material aspects in section 6651 of the Welfare and Institutions Code above set out. The legislation of 1921, in providing for an investigation of financial circumstances of responsible relatives, was intended to furnish state agencies with knowledge sufficient to enable them to reduce or remit the amounts for which the relatives were liable if the circumstances justified it.

[2, 3] It therefore appears that while an unconditional liability is imposed, the amounts due thereunder may be reduced, remitted, or cancelled by administrative ac-

tion. Mere inability to pay cannot of itself constitute a reduction, remission or cancellation of the obligation. As stated, proper consideration of the statutory provisions clearly indicates that the Legislature intended liability to attach regardless of ability to pay. It is true that the Director of Mental Hygiene (or his predecessor, the Director of Institutions) might have cancelled or remitted the amounts due, following an investigation and determination of inability to pay on the part of the deceased, in accordance with section 6651 of the Welfare and Institutions Code. But there is no evidence that such action was taken following the initial investigation. On the other hand it does appear that during the four years for which recovery is sought the Department of Mental Hygiene, through its director, made determinations as to the monthly rate for the care, treatment, support and maintenance of mentally ill patients and that the claim of the department filed in the present case was in accord with those rates. Mere failure to enforce the obligation cannot be deemed to constitute such administrative action as would result in modifying, remitting or cancelling the obligation, constructively or otherwise. The only effect of such failure, insofar as the obligation to pay is concerned, is to make unenforceable those portions of the obligation which, in accordance with the applicable statute of limitations (Code Civ. Proc. § 345), were outstanding for more than four years.

The plaintiff relies on a decision of the Appellate Department of the Superior Court. *Department of Mental Hygiene v. Shane*, 142 Cal.App.2d Supp. 881, 299 P.2d 747. In that case a father did not have the ability to pay for the support of his son, an inmate in a state hospital. Nevertheless his estate was held liable in an action against the executor, although no attempt had been made to collect the amounts due from the father during his lifetime. The present case cannot be distinguished from that case. Decisional law in other states is based on legislative enactments not the same as those here involved and for that reason are not controlling.



[4] It is contended by the defendant that our statutory provisions provide "only for prospective collection, in advance, by order duly made and modifiable." The argument assumes that an order must be made before the obligation is collectible. But the obligation to pay was unconditionally created by statute upon Joan's commitment, and no administrative order was required to perfect it. It continued in the absence of effective administrative action to modify, remit or cancel it. Thus it cannot be said that after Mrs. Girard's death the state purported for the first time to create an obligation to pay for Joan's maintenance. Nor can it properly be contended that the amounts due from an estate for past obligations within the period of limitations are uncollectible from the later acquired assets of the estate. In *Re Estate of Phipps*, 112 Cal.App.2d 732, 247 P.2d 409, 412, 33 A.L.R.2d 1251, the Department of Mental Hygiene brought an action under section 6655 of the Welfare and Institutions Code against the estate of an incompetent for care and maintenance furnished prior to his acquisition of the estate. It was contended that there was a legislative intent to limit liability to those obligations which arose after the acquisition of assets by the estate. The court held that "Section 6658, which provides that the department may bring an action to enforce payment for a patient's care against any person, guardian or relative, does not limit such action to a situation in which the judgment is collectible." While the provisions of the law applicable to the present case are not quite the same as those there involved they are found in the same article of the Welfare and Institutions Code and require a consistent construction.

[5] Likewise there is no merit in the contention that the department has waived its right by failing to make a prior demand for payment, or that it is now estopped from demanding payment. In *Re Estate of Fassetta*, 14 Cal.App.2d 239, 57 P.2d 1336, 1337, it was claimed that "the director [of the Department of Institutions] is estopped to present said demand on account of leading the guardian to understand that no demand

of the kind would be made, but that the same was waived." There, as here, the defendant relied upon the state's silence over the years; but there was no proof that the state gained any advantage by its conduct, or that the defendant changed his position or suffered any disadvantage in reliance upon the claimed waiver, and the court affirmed a judgment for the Department of Institutions. Nor, is the action barred by laches. "[T]here can be no laches in delaying the bringing of an action if it is brought within the period of limitation \* \* \* unless there are some facts or circumstances attending the delay which have operated to the injury of the defendant." *Meigs v. Pinkham*, 159 Cal. 104, 112 P. 883, 886; see, also, *Burns v. Ross*, 190 Cal. 269, 278, 212 P. 17; *Handyspot Co. of Northern California v. Buegeleisen*, 128 Cal.App.2d 191, 195-196, 274 P.2d 938; 18 Cal.Jur.2d 208. In the present case there is no substantial evidence of injury to the defendant occasioned by the delay in bringing the action.

From time immemorial it has been the natural primary obligation of the parent to bear the financial burden of caring for an afflicted child. In this humanitarian age the state has assumed that obligation in the absence of the parent's ability to do so. This fact has not, however, entirely abolished the parental obligation. It has done so only to the extent provided by statute. There is no apparent reason why the state should not provide that the parent's financial responsibility created during her lifetime should not continue as an obligation of her estate. The fact that, because of circumstances, the obligation created during her lifetime was not then collected did not extinguish it as a valid claim against her estate in an amount within the statute of limitations.

The construction of sections 6650 et seq. of the Welfare and Institutions Code as above outlined and as dealt with in the prior hearing, was not attacked in the petition for rehearing. But the defendant now argues that if it was the intention of the Legislature to impose an absolute liability on the named relatives of mentally ill persons the statutory provisions are unconstitutional.

The contention is based on alleged arbitrary and discriminatory classification in that the responsible relatives of other groups of persons receiving public assistance are claimed to have only a conditional obligation to furnish support and maintenance based upon their ability to pay.

[6] Article I, section 11 of the California Constitution requires that all laws of a general nature have a uniform operation. This has been held generally to require a reasonable classification of persons upon whom the law is to operate. The classification must be one that is founded upon some natural or intrinsic or constitutional distinction. *Serve Yourself Gasoline Stations Ass'n v. Brock*, 39 Cal.2d 813, 820, 249 P.2d 545; *City of Pasadena v. Stimson*, 91 Cal. 238, 251-252, 27 P. 604. Likewise, those within the class, that is those persons similarly situated with respect to that law, must be subjected to equal burdens. *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 284, 298 P. 481. The clause of the Fourteenth Amendment to the federal Constitution which prohibits a state from denying to "any person within its jurisdiction the equal protection of the laws" has been similarly construed.

[7,8] Equal protection of the law is not afforded when a statute imposes a particular disability upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the burden imposed, and between which class and the others no reasonable distinction or substantial difference can be found to warrant the inclusion of the one and the exclusion of the other. *Franchise Motor Freight Ass'n v. Seavey*, 196 Cal. 77, 81, 235 P. 1000; *City of Pasadena v. Stimson*, supra, 91 Cal. 238, 27 P. 604; 11 Cal.Jur.2d 719, and cases cited there. The classification in the present case would be justified if there is a reasonable distinction or substantial difference which warrants the exclusion of the class of which the decedent was a member from those who owed only a conditional obligation to support and maintain a relative in a public

institution. It further appears that the distinction upon which classification is based or upon which different treatment is accorded must have some reasonable and substantial relation to the purpose for which the legislation was designed. *Serve Yourself Gasoline Stations Ass'n v. Brock*, supra, 39 Cal.2d 813, 249 P.2d 545; *Sei Fujii v. State of California*, 38 Cal.2d 718, 242 P.2d 617; 11 Cal.Jur.2d 719, and cases there cited. The obvious purpose of the particular provisions of the statute here involved is to minimize the cost to the state and its agencies in providing assistance to the needy and distressed, by exacting contributions from persons standing in close relationship to those assisted. Accordingly, the classification which is claimed to have placed the deceased in a class apart must be shown to have a reasonable and substantial relation to the accomplishment of that purpose if the code provisions which are attacked are to withstand the claims of invalidity.

[9] The defendant's claim of improper classification is based, first, upon the whole of the Welfare and Institutions Code. The purpose of the code "is to provide for protection, care, and assistance to the people of the State in need thereof, and to promote the welfare and happiness of all of the people of the State by providing public assistance to all of its needy and distressed. \* \* \*" *Welf. & Inst.Code*, § 19. It appears that the code deals with six categories of persons who may receive the assistance of the state: children in division 2, youths in division 2.5, aged persons in division 3, indigent persons in division 4, physically handicapped persons in division 5, and mentally irresponsible persons in division 6. The defendant claims that in each of the first five categories where a relative or relatives of persons receiving assistance are made liable for their support and maintenance the obligation, in the express language of the code, is made conditional on ability to pay.

It is to be noted that the support of minor children by their parents is provided for in the Civil Code. Section 196 of that Code

provides that "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. \* \* \*" Section 205 provides for means of recovery by a county from the estate of a parent for the support of a child. Section 207 provides for a means of recovery against a parent for support furnished by a third person to a child under the parent's charge. The obligation to support a child is an absolute one and accordingly provisions in the Welfare and Institutions Code relating to reimbursement to public agencies for support and maintenance furnished are intended to provide only a means of collecting an obligation which the law already has imposed. Thus, references to ability to pay in such provisions are a condition only to collectibility, the obligation itself being an absolute one. Provisions in section 6650 et seq. of the Welfare and Institutions Code are herein construed to a similar effect.

In accordance with the foregoing the plaintiff contends, arguendo, that section 864 in division 2 of the Welfare and Institutions Code makes ability to pay a condition prior to the making of an order by the juvenile court for the support of a ward. That section provides: "If the court finds that there are earnings, property, or estate of such ward or other minor person, sufficient therefor, or that the parents or guardian of such ward or other minor person, or other person liable for the support of such ward, or other minor person is able to pay, either in whole or in part, for the expense of his support and maintenance, the court shall further order, and direct that the county be reimbursed, in whole or in part, for its expense of support and maintenance of him \* \* \*."

A similar contention is made as to the purpose of section 1506.5 in division 2 of the Welfare and Institutions Code, relating to assistance furnished to needy children. That section provides that suit may be brought against a parent to recover the amount of assistance granted a needy child "if \* \* \* the parent of a recipient has been gainfully employed or has had suffi-

cient assets to enable him to reasonably assist the recipient during the period in which the child was receiving aid \* \* \*."

While the obligation to support a minor child is an absolute one and for that reason not distinguishable from that imposed on the decedent in the present case, nevertheless there are grounds which justify a different classification of minor children and certain other groups receiving assistance for purposes of seeking recovery for assistance from responsible relatives. Statutory provisions relating to needy children in division 2 (§§ 1501.5, 1504, 1511), to aged persons in division 3 (§§ 2024 and 2025) and to physically handicapped persons in division 5 (§§ 3004 and 3007), all operate within the provisions of the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., and funds utilized in those programs are derived from federal sources as well as from local governments. Accordingly, there is not as urgent a necessity that the local government recover the funds expended in such programs in order that its costs be minimized and that the purpose of the recovery provisions be realized. [This is urged as a reasonable ground upon which to justify the imposition of a conditional liability of responsible relatives of persons receiving assistance in those programs as against the responsible relatives of persons receiving assistance under a program not subsidized by federal funds, as in the present case.

In division 3, dealing with assistance given to aged persons, section 2181 provides a "Relatives' Contribution Scale" for the relatives of aged persons making application for assistance. No contribution is required where a relative's financial obligations are such that he may be deemed not to have the ability to contribute. In section 2224 it is provided that action may be undertaken against a "spouse or adult child found by the board of supervisors \* \* \* pecuniarily able to support said person \* \* \*." This plan is one which is supported by the federal Social Security program, as stated, and for that reason is properly classified apart from those persons who



are mentally ill. Furthermore, a recipient of aid under this program need not be a person wholly without assets. He may be a person who has limited means of support and may have real property, the assessed value of which does not exceed \$5,000 and personal property not in excess of \$1,200. (§§ 2163, 2164.) Such an estate may exceed that of a responsible relative who is required to contribute to the aged person's support. Such a situation further justifies the imposition of a conditional liability on responsible relatives.

In division 5, dealing with aid to the needy blind, section 3088 provides that if a recipient of aid thereunder has a spouse, parent, or adult child, "pecuniarily able to support him" and who fails to furnish support, the board of supervisors may request that proceedings be commenced against that person. Again, as this program is supported by federal funds, there is a valid basis for discrimination in seeking reimbursement from responsible relatives.

As to other assistance programs not supported in part by the federal government, there is at the present time no obligation, absolute or conditional, for the reimbursement of the cost of support and maintenance of youths committed to the Youth Authority under the provisions of division 2.5 (See Welf. & Inst. Code, § 1742). However, there appear to be natural and intrinsic reasons for classifying persons committed under the provisions of division 2.5 differently from those who are mentally ill. Section 1700 of the Welfare and Institutions Code states that the "purpose of this chapter is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. \* \* \*" The Authority performs functions which in many instances would have to be performed by our penal institutions. As such it does not impose an additional drain on the financial resources of government for which reimbursement may properly be sought. Furthermore, persons committed thereto are

gainfully employed (Welf. & Inst. Code, §§ 1760.5 and 1760.6), and for that reason constitute a lesser financial burden. Accordingly, there is good reason why government should not look to responsible relatives for the support and maintenance of youths committed to the Authority.

In division 4, relating to aid rendered to indigent persons, section 2576 provides in part that the board of supervisors shall determine if the spouse, parent or adult child of a recipient of aid has "the financial ability to support or contribute to the support of the recipient and were pecuniarily able to support or contribute to the support of the recipient during the time aid was rendered," and if in the opinion of the board "pecuniary ability existed when the aid was given and exists when the matter comes before the board of supervisors" the board shall institute proceedings against the responsible relative or relatives. The foregoing is claimed to constitute a conditional obligation to pay on the part of responsible relatives. However, it does not constitute the whole of section 2576. That section commences: "All aid rendered by the county under this chapter shall be a charge against the spouse, parent and adult child of the recipient thereof and the county rendering aid shall be entitled to reimbursement therefor." This would appear to impose an absolute liability on the named relatives. See *County of Los Angeles v. Frisbie*, supra, 19 Cal.2d 634, 122 P.2d 526. The further provisions of the section would seem to relate only to the collectibility of the obligation and to condition proceedings in that regard on ability to pay. Again, the foregoing construction is consistent with that attached to sections 6650 et seq.

In addition to an asserted improper classification as to the relatives of persons receiving assistance under the provisions of the various divisions of the Welfare and Institutions Code, the defendant further claims that within division 6, itself, dealing only with mentally irresponsible persons, those persons in the class of the decedent have been discriminated against. However, in section 5077 of the Welfare and Institu-

tions Code dealing with a person determined "to be mentally disordered and bordering on mental illness but not dangerously mentally ill" (Welf. & Inst.Code, § 5076), responsible relatives are unconditionally liable for the expenses incurred by a county in maintaining such mentally ill person. Section 5077 states that the cost of maintenance of such a person "shall be defrayed out of the estate of the patient so committed or shall be a charge upon his relatives liable for his maintenance." Ability to pay is not even made a condition to collectibility in that case, it being further provided in that section that all "funds expended by the county for the maintenance of such patient \* \* \* shall be a charge against such patient or against his husband, wife, father, mother, or children, in the order named and the county shall be entitled to reimbursement therefor."

Furthermore, in section 5402.5 of the Welfare and Institutions Code, relating to the commitment of dipsomaniacs and inebriates, it is provided that the "cost of maintenance of a person committed or confined under the provisions of Section 5402 to a branch of the county jail, in a sum to be fixed by the court at the time of the commitment or confinement, shall be a charge against the person committed or confined, or if such person be indigent against his relatives liable for his maintenance." The foregoing seems to impose an absolute liability to pay although later provisions in the section make collectibility conditional upon ability to pay. Again such an interpretation is consistent with sections 6650 et seq.

[10] From the foregoing sections of division 6 of the Welfare and Institutions Code it does not appear that there is a discriminatory classification as against the relatives of mentally ill persons committed under the provisions of section 6650 et seq. There is a sound basis for the plaintiff's contention that responsible relatives in all cases, including the decedent in the present case, are treated in substantially the same manner insofar as their obligation to support is concerned. In all cases, it is con-

tended, the obligation to support is an absolute one, and it is only the collectibility of that obligation which is made conditional upon the ability of particular relatives and others to pay. The present case, insofar as research has disclosed, is the first in which this court has dealt with this specific question in relation to any of the various assistance programs in the Welfare and Institutions Code. It is obvious that the various statutory provisions have not dealt with the many and complex problems of humanitarian relief in the same way. Such a requirement is not laid upon legislative action and discrimination does not result if the classification is reasonable. As stated in *People v. Western Fruit Growers*, 22 Cal.2d 494, at pages 506-507, 140 P.2d 13, at page 20: "[T]he mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary', or the legislative determination as to what is a sufficient distinction to warrant classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. [Citations.]" In view of the injunction laid upon us to uphold the constitutionality of a statute if it can be done on any reasonable theory, it is concluded that the present claim of unlawful classification may not properly be sustained.

[11] The defendant further contends that sections 6650 et seq. of the Welfare and Institutions Code are unconstitutional in that they violate the due process clauses of both the state and federal Constitutions. This contention is based on the claim that the decedent could not, of her own initiative, have obtained an administrative determination of her ability to pay by the Di-

rector of Mental Hygiene, or to have obtained a judicial review of the proceedings, had she obtained the administrative action.

No attempt was made by the decedent during her lifetime to obtain the administrative determination the lack of which the defendant now complains. In *Re Estate of Stobie*, 30 Cal.App.2d 525, 86 P.2d 883, 886, where sections 6650 et seq. of the Welfare and Institutions Code were involved, the court stated: "There is a presumption that an administrative officer, charged by the legislature with an administrative duty, will perform that duty in accordance with the Constitution and laws of the state of California. Such a presumption will prevail until it is attacked and some evidence presented that the officer has been guilty of dereliction and that the action taken by him has been arbitrary or discriminatory. *People v. Globe Grain & Milling Co.*, 211 Cal. 121, 294 P. 3." It must be presumed in the present case that if an application had been made for a determination of the decedent's inability to pay, and satisfactory proof presented, the director might have reduced, cancelled or remitted the amount to be paid in accordance with section 6651.

As to the claim that a judicial review of administrative action is not provided, and hence constitutes a denial of due process, it is further stated in *In re Estate of Stobie*, supra, 30 Cal.App.2d at page 530, 86 P.2d at page 885: "The fact that this case is before this court is sufficient answer to appellant's argument of lack of due process of law. The statute requires the state to go into the superior court to collect the money due it. There the guardian is brought into court, after notice, and is given a tribunal in which to present his evidence and, in any lawful manner, resist the claim against the estate. A right of appeal from the judgment is given. Due process of law can require no more." See, also, *County of Los Angeles v. Frisbie*, supra, 19 Cal.2d 634, 645, 122 P.2d 526.

[12] The defendant finally contends that sections 6650 et seq. of the Welfare and Institutions Code are unconstitutional

in that they constitute a taking of private property without just compensation. This contention was refuted in *State Commission in Lunacy v. Eldridge*, 7 Cal.App. 298, at page 304, 94 P. 597, at page 599, 94 P. 600, where the court stated: "\* \* \* certainly the payment of the expense or a part thereof for the care and maintenance of one's relative, incapable of taking care of himself could not be the taking of private property for a public use without compensation, since for the expenditure required a substantial equivalent is given by the agents of the state having management of the institution. \* \* \*"

The defendant has failed to establish any good reason why the estate of the decedent should not defray the charges incurred during the four years immediately preceding her death.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

The majority's holding that the liability mentioned in section 6650 of the Welfare and Institutions Code is unconditionally imposed, regardless of ability to pay, is, in my view, neither required by the statute nor, if we read the section in context, is the holding reasonable. The majority's construction is not reasonable in that (1) other provisions of the subject legislative plan indicate that the liability of relatives to reimburse the state is conditioned on ability to pay and (2) substantial portions of the scheme, vital to the integrity of its objectives, are rendered constitutionally void by the majority holding.

As hereinafter developed, the majority construction offends not only the salutary statutory plan but converts it into an implement whereby private property may be taken without compensation, an arbitrary classification is made, equal protection of the laws is denied, and a gift of "public money or thing of value" is authorized.

The Welfare and Institutions Code, with its comprehensive provisions for the lia-



bility of responsible relatives to reimburse the appropriate public agency for the support of the needy, is the measure of the subject liability; its sections, read together, constitute a complete system which occupies the field of such liability. (See *County of San Bernardino v. Simmons* (1956), 46 Cal.2d 394, 399, 296 P.2d 329; *County of Contra Costa v. Lasky* (1954), 43 Cal.2d 506, 509, 275 P.2d 452) When the pertinent portions of the code are read together it appears that the liability of the responsible relatives, declared in general terms but not fully defined or delimited in section 6650, is subject to the condition, stated in section 6653, that investigation disclose, and official determination be made, that "such relative or relatives are in fact financially able to pay such charges."

It is, of course, to be presumed that "official duty has been regularly performed" (Code of Civ.Proc. § 1963, subd. 15), and, accordingly, that the Director of Mental Hygiene and the Departments of Mental Hygiene and of Institutions performed the duties imposed upon them by section 6651 of the Welfare and Institutions Code. That section provides that "The monthly rate for the care, support, and maintenance of all mentally ill or insane persons and inebriates at the state hospitals for the mentally ill *where there is liability to pay for such care, support, and maintenance, shall be [reviewed once each fiscal year and fixed at the state-wide average per capita cost of maintaining patients in all state hospitals for the preceding fiscal year, as<sup>1</sup>] determined by the Director of Mental Hygiene, and shall be payable in advance. \* \* \** The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be \* \* \* on satisfactory proof that the estate or relatives \* \* \* are unable to pay the cost of such care, support, and maintenance. \* \* \*" (Italics added.)

In section 6652 of the same code it is further provided that "The Department of

Mental Hygiene *shall collect all the costs and charges mentioned in Section 6650 \* \* \**" (Italics added.) Further defining the powers and indicating the duties of the Department, section 6658 provides, "The Department of Mental Hygiene may in its own name \* \* \* bring an action to recover for the use and benefit of any state hospital or for the State the amount due for the care, support, maintenance, and expenses of any patient or inmate therein, against any county, or officer thereof, or against any person, guardian, or relative, liable for such care, support, maintenance, or expenses."

Inasmuch as we must presume that the Director and the Department faithfully performed the duties imposed upon them, and inasmuch as the record shows that the Department did carry out the mandatory duty imposed upon it by section 6653 to "make an investigation \* \* \* and \* \* \* determine whether \* \* \* such relative or relatives are in fact financially able to pay such charges," but made no attempt to collect any charges from the relative here involved during her lifetime, we are further bound to accept the record as establishing that the Department actually determined that such relative was in fact *not* financially able to pay such charges.

Further, as already noted hereinabove, section 6651 of the code provides that "The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care \* \* \* of any mentally ill or insane person \* \* \* who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care \* \* \*" The power to "reduce, cancel or remit" must, if it is to survive constitutional tests, be correlative to the power to impose, and where such liability is not ascertained and imposed during the lifetime of the responsible relative it does not appear consonant with leg-

1. The language in brackets was added by 1954 amendment. Other amendments,

not here material, were also made in 1953 and 1954.

islative intent to impose it after the relative's death. Certainly where, as here, a determination of no liability has been made during the relative's lifetime, the post mortem attempt to surcharge that relative's estate should fail. Upon a proper construction of the statutory plan, and on the facts appearing in this record, there was never an occasion for the director or the department to "cancel or remit the amount to be paid" because no "amount to be paid" was ever fixed and, hence, never accrued or became a liability of the deceased.

I would not analogize *Re Estate of Phipps* (1952), 112 Cal.App.2d 732, 247 P.2d 409, 33 A.L.R.2d 1251 (majority opinion, 329 P.2d 694). The question there was the liability of the estate of an incompetent for care furnished the incompetent at a State hospital prior to the acquisition of any estate by the incompetent. It may fairly be said that the liability of the estate of the incompetent under section 6655 of the Welfare and Institutions Code, once the incompetent has died, is "unconditional" as opposed to the conditionally imposed liability of the estate of a responsible relative under sections 6650, 6651, and 6653. It is obvious that the estate of the incompetent, *in the absence* of statute, would be primarily liable for the incompetent's own support. It is equally clear that the estate of a relative (other than a spouse) would not ordinarily be liable for the support of an adult. In the *Phipps* case it is said (at page 735 of 112 Cal.App.2d, at page 411 of 247 P.2d) that "The liability of both [the estate of the incompetent and the responsible relatives] is there, although there may be no collectibility due to absence of estate or funds." This statement, insofar as it indicates that the estate of a responsible relative would be liable even though during the lifetime of the relative there was no determination of ability to pay, is mere obiter and was pronounced in a case not analogically close to the case at bar. Manifestly, the liability of a decedent's estate for necessities of life furnished the decedent himself during his lifetime is quite a different thing from seek-

ing to impose liability for such necessities upon another person or the latter's estate.

From what has been said it is apparent that I disagree with *Department of Mental Hygiene v. Shane* (1956), 142 Cal.App.2d Supp. 881, 299 P.2d 747 (majority opinion, 329 P.2d 693). There, there was no evidence that the department ever made demand upon the decedent, during his lifetime, for the support of his insane son. After his death the department filed a claim in his estate. The court said (at page 883 [1] of 142 Cal.App.2d Supp., at page 748 of 299 P.2d), "We don't see any connection between the fact that the decedent did not have the ability to pay for his son, the inmate, while he was living and the fact that his estate would be liable." However, it appears that there is a connection between the fact that the department was not shown to have made claim to payments and established the ability of the decedent to make such payments during the period for which support was sought rather than waiting to make claim therefor after (if its theory be accepted) the asserted liability had accrued and the responsible relative had died.

As stated in the majority opinion (329 P.2d 692), section 2176 of the Political Code when enacted (Stats.1903, p. 505) "clearly made ability to pay a condition of liability." It provided, in material part, that "The husband, wife, father, mother, or children of an insane person, *if of sufficient ability*, \* \* \* shall be liable for the care, support and maintenance of any insane person in a state hospital for the insane \* \* \*" (*Italics added.*) When the Legislature deleted the phrase "if of sufficient ability" in 1909 (Stats.1909, p. 71) it added to the Political Code a form of commitment which expressly provided for a statement of financial ability (Pol.Code, § 2171, Stats.1909, p. 70). And in 1921, as the majority opinion points out, the Legislature added to section 2176 of the Political Code the provision that "The commission shall \* \* \* make an investigation to determine whether the patient has any relative or relatives as mentioned in this section, and who are herein



made responsible for payment for the care \* \* \* of such patient, \* \* \* and shall ascertain the financial condition of such relative or relatives, to determine whether in each case such relative or relatives are in fact financially able to pay such charges." (Stats.1921, p. 1335.) It thus appears that the Legislature has always had in mind financial ability as a condition of the liability of responsible relatives.

Moreover, with respect to the question posed by plaintiff's contention that sections 6650 et seq. of the Welfare and Institutions Code are unconstitutional in that they constitute a taking of private property without just compensation, it may first be noted that State Commission in Lunacy v. Eldridge (1908), 7 Cal.App. 298, 304, 94 P. 597, 600, relied upon by the majority (329 P.2d 699), was decided at a time when, as already mentioned herein, section 2176 of the Political Code "clearly made ability to pay a condition of liability," and hence constitutes no authority whatsoever for holding that the imposition of unconditional liability is permissible under our constitutional guaranties. Further, I am in accord with the view expressed by Chief Justice Beatty of this (Supreme) court in dissenting from the order denying a hearing in the Eldridge case, "for the reason that there is, in my opinion, a serious question as to the constitutionality of an act of the legislature which seeks to impose the obligation of support upon the father or mother of an adult son who, at the instance of the state, has been committed to an insane asylum because he is a dangerous lunatic." (at page 307 of 7 Cal.App., at page 601 of 94 P.)

Particularly do I believe that there is a serious question of the constitutional right of the Legislature to impose liability for the maintenance of an adult person upon any other person who has not voluntarily (as in the case of marriage, for example) assumed an obligation to answer for such support and who in the nature of things, if the legislation be sustained, can do nothing to secure relief therefrom short of himself joining the class of needy and impoverished persons whom the welfare legislation

ostensibly seeks to assist. That the Legislature did not intend this result is made obvious by the provision of section 6655 that even the estate of the patient himself shall not be drained beyond reasonable ability to pay if there is likelihood of his recovery. ("Payment for the care, support, maintenance, and expenses of a person at a State hospital shall not be exacted \* \* \* if there is likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital.") Do the majority of this court intend to tell the people of California that this State is more concerned in protecting the estate and solvency of the incompetent than it is in conserving the independence of his relatives? Do they mean to hold that the incompetent's estate may be left intact to ensure his financial independence, at the same time that absolute liability is imposed on the relatives, regardless of ability to pay? That any nonconsenting adult person should have imposed upon him, by act of the Legislature, absolute responsibility for support and maintenance of another adult over whom and whose estate the law grants him no correlative right of control or conservation, suggests to me not only the taking of property without due process and denial of equal protection of the laws, but an open invitation from the State to irresponsibility both by those upon whom liability is sought to be imposed and by those in whose favor it is sought to be created. I am impelled to the view that these basic constitutional questions deserve more thorough exploration than has been accorded them in the majority opinion.

Another grave question appears on the face of the majority opinion. It is there declared (329 P.2d 693) that "while an unconditional liability is imposed, the amounts due thereunder may be reduced, remitted, or cancelled by administrative action \* \* \* following an investigation and determination of inability to pay." Would not remission or cancellation of an unconditional debt owing to the State of California con-



stitute a gift of "public money or thing of value" in violation of section 31 of article IV of the Constitution of California? It is our duty to construe statutes, which reasonably admit of such construction, so as to avoid running afoul of constitutional proscription. We would accomplish that result here by construing the statute as making financial ability a condition of liability. Certainly we should apply that very obvious and apparently contemplated construction here. (*Bodinson Mfg. Co. v. California Employment Comm.* (1941), 17 Cal.2d 321, 326-327 [6], 109 P.2d 935; 11 Cal.Jur.2d 384, and authorities there cited.)

In addition, if remission is to be permitted by administrative action upon a determination of inability to pay, then, as likewise mentioned by Chief Justice Beatty in the *Eldridge* case (*State Commission in Lunacy v. Eldridge* (1908), *supra*, 7 Cal.App. 298, 307-308, 94 P. 597, 600), by what standard is ability to pay to be determined? Does the support obligation "continue until the father or mother, or wife or child, has been stripped of all his or her possessions except property exempt from execution, or has the court or commission discretion to say how far the exaction shall be pressed? Upon the former supposition the operation of the law would in many instances result in grievous hardship, upon the latter its operation would be lax or oppressive according to the idiosyncracies of the officers, executive and judicial, charged with its enforcement." And we may add, does this absolute liability concept intend that the available relatives shall themselves be reduced to the point of needing support from the State when no further solvent relatives can be found? Lastly, for the purposes of this dissent, but by no means all that might be said on the subject, it is noted that the majority opinion strains to the end it reaches against the express provision of section 6651 that "The monthly rate for the care, support, and maintenance of all mentally ill or insane persons and inebriates at the state hospitals for the mentally ill where there is liability to pay for such care, support, and maintenance, shall be \* \* \* determined by the Director of

Mental Hygiene, and *shall be payable in advance*. \* \* \*" (Italics added.)

For the reasons above stated, I cannot concur in the philosophy, the reasoning, or the law of the majority opinion. The judgment should be reversed.

CARTER, J., concurs.



163 Cal.App.2d 507

**William GALEPPI, Plaintiff and Respondent,**

**v.**

**George H. WAUGH and Lassen County Title Guaranty Company, a corporation, Defendants and Appellants.**

Civ. 9433.

District Court of Appeal, Third District,  
California.

Sept. 12, 1958.

Principal's action to recover from broker for fraud. The Superior Court, Lassen County, Ben V. Curler, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence would sustain finding that broker had had no authority to include hay and horses in sale negotiated and that he had fraudulently procured principal's signature to contract for sale of those items in addition to lands, machinery and farm equipment which he had been authorized to sell.

Affirmed.

#### **I. Brokers §38(1)**

Broker practicing fraud upon his principal to induce him to accept terms other than those set out in written listing may be held liable to principal in damages for his fraud.

**2. Brokers** Ⓒ38(4)

In principal's action to recover from broker for fraud, evidence would sustain finding that broker had had no authority to include hay and horses in sale negotiated and that he had fraudulently procured principal's signature to contract for sale of those items in addition to lands, machinery and farm equipment which he had been authorized to sell.

**3. Appeal and Error** Ⓒ1011(1)

Even though findings were, in the main, based on plaintiff's testimony, which was in conflict with defendant's testimony, such findings were binding upon reviewing court.

**4. Appeal and Error** Ⓒ931(1)

On appeal, all conflicts must be resolved in favor of prevailing party, and evidence must be viewed in light most favorable to him.

**5. Brokers** Ⓒ34

Broker was under duty to disclose to his principal contents of deposit receipt. West's Ann.Civ.Code, § 2020.

**6. Brokers** Ⓒ34

Principal was entitled to rely upon broker's representation that contract called only for sale of property which broker had been authorized to sell. West's Ann.Civ.Code, § 2230.

**7. Brokers** Ⓒ19

As agent of principal, broker stood in fiduciary relationship and was bound to same standards of conduct—of undivided service and loyalty—of integrity and good faith—as a trustee. West's Ann.Civ.Code, § 2230.

**8. Brokers** Ⓒ36**Sales** Ⓒ96

Where broker had been clothed with ostensible or apparent authority to sell hay and horses for principal, innocent purchaser could have enforced contract of sale against principal, and principal could not have rescinded contract without such purchaser's consent; and, therefore, principal was not, by reason of having completed transaction as called for by con-

tract, precluded from recovering from broker for fraud in inducing principal to enter into contract for sale of hay and horses which broker had not been authorized to sell.

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Anderson & Pancera, Susanville, for appellants.

Pardee & Cady, Susanville, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment entered in favor of respondent against appellant George H. Waugh in the sum of \$4,000 and directing defendant Lassen County Guaranty Company to pay and deliver to respondent the \$4,000 held by it as commission due the appellant George H. Waugh, as realtor, for the sale of respondent's ranch.

The action is founded on fraud practiced upon respondent by Waugh in selling property in excess of his authority, and fraudulent statements in connection therewith made by Waugh to respondent which induced appellant to sign a contract for the sale of said property. Since Waugh is the only party appellant affected by this appeal, hereafter when we use the word "appellant" we are referring to Waugh, unless otherwise stated.

The facts and the evidence most favorable to respondent are: In 1956 respondent listed his 4,854-acre ranch, together with the farm machinery and equipment, for sale with the appellant, a realtor. Under the terms of the "Authorization to Sell" appellant was employed to find a purchaser, and was granted the authority to sell the ranch for \$90,000 and the farm machinery and equipment for \$10,000, also approximately 400 head of cattle at market price. For his services he was to receive 5 per cent commission on the sale.

Appellant was unable to find a purchaser willing to pay the listed price, but did receive from a Mr. Buckner an offer of \$80,000 for the land, including the ma-

chinery and farm equipment. This offer was not acceptable to respondent. However, after receiving the offer, he orally authorized appellant to sell the ranch for \$80,000, and the machinery for \$10,000, and at the same time it was agreed that appellant should receive a 5 per cent commission on the selling price of the land only for making the sale of the ranch together with the farm machinery and equipment.

Appellant apparently informed Mr. Buckner of respondent's unwillingness to accept the offer. Mr. Buckner then countered with an offer to purchase the land "and everything" but the cattle for \$90,000, provided the purchase price of the land was put at \$85,000 and the personal property at \$5,000. Without consulting respondent, appellant then wrote up a contract, in the form of a deposit receipt, by the terms of which Mr. Buckner offered to purchase the land at \$85,000 and the personal property, consisting of approximately 200 tons of hay, 9 horses, all farm machinery and trucks and miscellaneous equipment, at \$5,000. Mr. Buckner signed the receipt and delivered to appellant his \$5,000 check as a down payment.

Appellant then took the signed deposit receipt to the State Creek property in Lassen County, where respondent was busy rounding up his cattle at the time, and informed respondent that he had made the deal for him and had a purchaser who would pay \$80,000 for the land and \$10,000 for the machinery. Appellant then presented to respondent the reverse side of the signed deposit receipt which, so far as material, reads:

"Acceptance ..

"The undersigned accepts the offer on the reverse side hereof and agrees to sell the property described thereon on the terms and conditions therein set forth.

"The undersigned agrees to pay Broker therein named and employed by the undersigned to sell said prop-

erty as commission the sum of Four Thousand Dollars (\$4000.00) \* \* \*.

"The undersigned acknowledges receipt of a copy hereof." (This was followed by date and place for signature.) Appellant requested respondent to sign it.

In his complaint respondent pleaded, and at the trial testified, that when he signed the deposit receipt he did not read it and did not know that the hay and horses were included in Mr. Buckner's offer. However, after learning of the terms of the offer as set forth in the deposit receipt, respondent, presumably upon the advice of counsel, executed a deed and bill of sale conveying the real property and the personal property, including 200 tons of hay and the 9 horses to Mr. Buckner in accordance with the terms of the contract.

The trial court found that appellant was the agent of respondent for the purpose of finding a purchaser for said lands and machinery and farm equipment and that it was agreed that appellant was to receive a \$4,000 commission for his services; that at no time was appellant authorized by respondent to sell, find a purchaser for, or otherwise dispose of the 200 tons of hay and the 9 horses, and that in procuring respondent's signature to the contract (Deposit Receipt) which provided for the sale of the hay and the horses appellant exceeded the authority granted him as respondent's agent. The trial court also found that appellant stated to respondent that he (appellant) had found a purchaser who would pay \$80,000 for the real property and \$10,000 for the machinery and that he did then and there present to respondent for his signature a certain document (the Deposit Receipt) in writing and then and there represented to respondent that said document, on the face thereof, was a contract for the sale of said property to George E. Buckner, Sr., at a price of \$80,000 for the real estate and \$10,000 for the machinery, and requested respondent to sign said document on the reverse side thereof and did not show or exhibit the face or obverse side thereof to re-



spondent; that said document showed on the face thereof that said real property was sold for \$85,000 and the farm machinery and equipment, plus 200 tons of hay and 9 horses were sold for \$5,000; that in signing said document on the reverse side thereof appellant understood and believed that he was agreeing to sell the real property for \$80,000 and the machinery and equipment for \$10,000 and did not know or believe that he was also thereby agreeing to sell Mr. Buckner 200 tons of hay and the 9 horses.

[1] Appellant contends, first, that he did not exceed his authority to sell the ranch by including the hay and the horses. In support of this contention he cites *Palmtag v. Danielson*, 30 Cal.2d 517, 521, 183 P.2d 265, and *Twogood v. Monnette*, 191 Cal. 103, 108, 215 P. 542, which hold that a written listing for the sale of property by an agent may be changed by a parol understanding or agreement and that if the seller accepts modified terms communicated to him by the purchaser, through the agent, the seller cannot then refuse to pay the agent his commission. Neither of the cited cases holds that an agent may practice a fraud upon his principal to induce him to accept other terms than those set out in the written listing and then escape liability in damages for his fraud. This is not an action resisting payment of an agreed commission, but to recover damages for fraud. Respondent admits that appellant earned the \$4,000 agreed commission. Coincidentally, the damages awarded respondent were the same as the commission. The judgment for fraud must stand.

[2] Nor is there any merit in appellant's second contention that the evidence does not support a finding of fraud. Since appellant had no authority to sell the hay and the horses, we feel that it was a fraud for him to include them in the contract (Deposit Receipt) and then procure respondent's signature to the "acceptance" in the manner found by the trial court. The evidence shows that he not only did not

inform or show respondent that these items were included in the contract, but misrepresented the facts by stating to respondent, "I made the deal for you for ninety thousand, I am getting eighty thousand for the land, and ten thousand for the machinery." Without further explanation he asked for and received, in reliance upon his statement, respondent's signature upon the reverse side of the deposit receipt without showing him the obverse side.

[3, 4] While it is true the findings are, in the main, based on respondent's testimony, which is in conflict with the testimony produced on behalf of appellant, they, nevertheless, are binding upon this court. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183. On appeal all conflicts must be resolved in favor of the prevailing party and the evidence viewed in the light most favorable to him. *O'Banion v. Borda*, 32 Cal.2d 145, 147, 195 P.2d 10.

[5-7] As respondent's agent, appellant was under a duty to disclose to his principal the contents of the deposit receipt. Civil Code, Sec. 2020; *Calmon v. Sarraille*, 142 Cal. 638, 76 P. 486; *Ratray v. Scudder*, 28 Cal.2d 214, 169 P.2d 371, 164 A.L.R. 1356; Civil Code, Sec. 2230; *Lawrence v. Tye*, 46 Cal.App.2d 514, 116 P.2d 180. Respondent was entitled to rely upon the representations of appellant that the contract called only for the sale of the land and the machinery. *Hoffman v. Patterson*, 179 Cal. 253, 176 P. 162. As the agent of respondent, appellant stood in a fiduciary relationship and was bound to the same standards of conduct—of undivided service and loyalty—of integrity and good faith—as is a trustee (2 Cal.Jur.2d 771, Sec. 104; Civil Code, Sec. 2322(3)), and a violation of duty on his part is to be treated in the same manner as a violation of duty by a trustee, viz., as a fraud upon his principal. *Darrow v. Robert A. Klein & Co., Inc.*, 111 Cal.App. 310, 295 P. 566. Measured by the foregoing rules, appellant was liable to the respondent in damages for the fraud practiced upon him.

[8] Appellant next contends that the respondent's act in completing the transaction with Mr. Buckner and accepting the benefits of the contract amounted to a ratification of appellant's act in exceeding his authority and perpetrating the fraud upon his principal and that he is, therefore, precluded from recovering damages. We do not agree with appellant. Here the appellant, so far as Mr. Buckner is concerned, was clothed with the ostensible or apparent authority to sell the hay and the horses. Therefore, Buckner, as an innocent purchaser, could have enforced the contract of sale against respondent. Nor could respondent have rescinded the contract without Buckner's consent. Under such circumstances, appellant, by completing the transaction as called for by the contract, was not precluded from recovering from appellant those damages which he sustained by reason of the fraud. As stated in *Conklin v. Benson*, 159 Cal. 785, 793, 116 P. 34, 38, 36 L.R.A.,N.S., 537:

"Under such circumstances \* \* \*, the rule established by the overwhelming weight of authority is that the equities of innocent purchasers are protected, even if injury be done to the party who has been imposed upon or defrauded by her agent. \* \* \* 'In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but if that fraud was productive of injury, the injury must result to the plaintiffs [appellant in the instant case], for they placed it in the power of the wrongdoer to perpetrate the fraud. The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty, because of a fraud practiced upon the vendors by their own agent.'" (See also *Shirey v. All Night & Day Bank*, 166 Cal. 50, 134 P. 1001, and 2 Cal.Jur.2d 706.)

Applying these rules to the instant case, it follows that respondent was legally obligated to complete the transaction with Buckner, he being an innocent party.

In his closing brief appellant for the first time contends that the court's finding that appellant exceeded the authority granted him as respondent's agent is outside the issues of the case, because the complaint recites only facts of an alleged fraud and that any award in damages that is based solely upon that finding does not authorize the judgment. This might be true if the court had limited its findings to excess of authority. However, such is not the fact. The trial court, as heretofore mentioned, specifically found that appellant had practiced fraud on respondent in other respects.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



163 Cal.App.2d 673

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Thelma Fern DUFFORD, Defendant  
and Appellant.

Cr. 1387.

District Court of Appeal, Fourth District,  
California.

Sept. 19, 1958.

Defendant pleaded guilty to charge of murder. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment and denied motion for withdrawal of plea of guilty, and defendant appealed. The District Court of Appeal, Mussell, J., held that where defendant admitted she was fully advised by counsel when she changed her plea of not guilty to guilty, defendant was present when stipulation as to punishment for offense was entered into and defendant understood nature and consequences of her plea, denial of motion to with-

draw plea of guilty was not an abuse of discretion in absence of clear and convincing evidence establishing factors overreaching her free and clear judgment at time she entered her plea of guilty.

Affirmed.

#### 1. Criminal Law §998

In proceeding on motion to set aside judgment and plea of guilty previously entered, on ground that defendant did not personally plead guilty to murder of first degree, evidence established that defendant personally and through her counsel entered plea of guilty to crime of murder and that degree of offense was properly determined by trial court.

#### 2. Criminal Law §274

Where defendant admitted she was fully advised by counsel when she changed her plea of not guilty to guilty, defendant was present when stipulation as to punishment for offense was entered into and defendant understood nature and consequences of her plea, denial of motion to withdraw plea of guilty was not an abuse of discretion in absence of clear and convincing evidence establishing factors overreaching her free and clear judgment at time she entered her plea of guilty.

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Howard A. Muhleman, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with the murder of LaVerne Elvis Dufford. She was arraigned and entered pleas of not guilty and not guilty by reason of insanity. Two doctors were appointed by the court to examine her and report at the time of trial. On April 21, 1958, the cause came on for trial. A jury was empaneled and after an opening statement by the prosecution, several exhibits were introduced in evidence and two doctors were examined. The trial was then recessed until the following day

at 10 o'clock a.m., at which time a continuance was granted at the request of appellant until 1:30 p.m. of that day, when the following took place in the trial court's chambers:

"The Court: May it be stipulated that the defendant and her counsel, Mr. Muhleman, are here, and the Deputy District Attorney, Mr. Brown, and the matron and the clerk and the reporter and myself are in chambers?

"Mr. Muhleman: So stipulated.

"Mr. Brown: So stipulated.

"The Clerk: Your true name is Thelma Fern Dufford?

"The Defendant: (Nods head affirmatively.)

"The Clerk: You are represented by Mr. Howard A. Muhleman?

"The Defendant: (No response.)

"The Clerk: Mrs. Dufford, you have heretofore on March 4, 1958, in this Department, entered a plea of not guilty and not guilty by reason of insanity to one count of murder. At this time you wish to move the Court to withdraw those pleas and enter another plea?

"Mr. Muhleman: It is so moved by counsel.

"The Court: Do you wish to withdraw your plea of not guilty?

"Mr. Muhleman: Answer yes or no, Thelma.

"The Defendant: I can't think clearly.

"Mr. Muhleman: Do you want to stand up? Maybe you will feel a little better. Do you wish to withdraw your plea of not guilty at this time and enter a plea of guilty?

"The Court: Did you say yes or did you say no?

"The Defendant: Yes.

"The Court: Okay.

"The Clerk: And what is your plea at this time, Mrs. Dufford? Do you plead guilty?



"The Defendant: Guilty.

"Mr. Brown: May we have a stipulation, counsel, that this is murder of the first degree, the maximum penalty that may be assessed being life imprisonment, to which the People will consent?

"Mr. Muhleman: So stipulated.

"The Court: Does she understand that?

"Mr. Muhleman: Yes, your Honor.

"The Court: She is agreeable to it?

"Mr. Muhleman: Are you agreeable to that? Will you read that stipulation back? (The record read by the reporter.)

"Mr. Muhleman: Do you understand that?

"The Defendant: I believe I do.

"The Court: Very well."

Appellant's counsel then waived time for pronouncement of judgment and appellant was sentenced to confinement in a state prison for the term prescribed by law, and was committed to the California Institution for Women at Corona. A stay of execution was granted to April 24, 1958, at which time appellant moved to set aside the judgment and the plea of guilty previously entered. This motion was in the handwriting of the appellant and is as follows:

"I Thelma Dufford move the court to change my Plea of Guilty to not Guilty because of following reasons—

"My judgement and reasons were for the benefit and considerations of others and not myself. I was fully advised by consul but did not understand the situation clearly. I was advised it was for the best of my intrest but feel I was infullunced by others and that it was against my own decision. I within my own heart do not feel guilty and do not feel Justice will be done until I have been tried.

"Thelma Dufford

"I do not feel it was of my own free will and volition.

"Thelma Dufford."

During the arguments on the motion, as reflected by the reporter's transcript, the deputy district attorney, on April 22, took appellant's counsel to his office and there played a tape recording which indicated the degree of the crime charged in the information and the evidence which the prosecution could produce. It also appears that appellant's counsel had discussed the matter of entering a plea with appellant and, after hearing the tape recording and talking with the deputy district attorney, counsel went back and talked to appellant and advised her to enter a plea of guilty and that the punishment would only be life imprisonment.

A deputy sheriff testified at the hearing on the motion that on February 2, at 1:30 a.m., he had a conversation with appellant at the county jail in the presence of appellant's sister; that there were no promises of immunity or reward made to appellant and she made a free and voluntary statement concerning the details of the crime. This statement was recorded on a tape recorder and the record thereof was admitted in evidence and considered by the trial court in ruling on the motion.

Appellant, in her attack on the judgment and order denying her motion, first argues that she did not personally enter a plea of guilty to murder of the first degree. This argument is without merit. The record shows that appellant was represented by counsel and advised by him at all stages of the proceedings involved in her change of plea; that before she withdrew her plea of not guilty she was advised by the clerk that she had entered a plea of not guilty and not guilty by reason of insanity to one count of murder, and was asked if she wished to withdraw her plea of not guilty. Her counsel then moved to withdraw the plea and the trial judge then asked appellant: "Do you wish to withdraw your plea of not guilty?", and appellant answered, "Yes". Immediately thereafter the clerk asked appellant "And what is your plea at this time, Mrs. Dufford? Do you plead guilty?", to which appellant replied "Guilty". It was then stipulated by counsel for

the People and appellant that the maximum penalty to be assessed would be life imprisonment and the court determined the degree of the offense as required by section 1192 of the Penal Code.

[1] It clearly appears that appellant personally and through her counsel entered a plea of guilty to the crime of murder and that the degree of the offense was properly determined by the trial court.

Appellant's second and final contention is that there was an abuse of discretion on the part of the court in refusing to allow appellant to withdraw her plea of guilty. This contention is likewise without merit. In *People v. Singh*, 156 Cal.App.2d 363, 365, 319 P.2d 697, 698, the court said:

"The applicable statute, Penal Code, section 1018, provides that in the case of a defendant represented by counsel the court may, for good cause shown, permit the plea of guilty to be withdrawn. The statute further provides that it is to be liberally construed to promote justice. The granting or denial of a motion to withdraw a plea of guilty rests in the sound discretion of the trial judge and his decision will not be disturbed on review unless an abuse of that discretion is clearly shown. *People v. Moffett*, 137 Cal. App.2d 626, 290 P.2d 667. The basis of the application for relief must be established by clear and convincing evidence. *People v. Cooper*, 123 Cal. App.2d 353, 266 P.2d 566."

In *People v. Cooper*, 123 Cal.App.2d 353, 266 P.2d 566, 567, it is said that:

"While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor

that overcame the defendant's exercise of a free judgment, the basis of the motion for relief 'must be established by clear and convincing evidence.' Moreover, the reviewing court is justified in concluding that the motion was properly denied when it is shown that the accused 'acted with knowledge of the facts and on advice of his counsel.' In any event, the granting of such a motion rests in the sound discretion of the court."

In *People v. Griffin*, 100 Cal.App.2d 546, 548, 224 P.2d 47, 49, it was held:

"While a plea of guilty may be withdrawn for mistake, ignorance, inadvertence or for any other factor overreaching a defendant's free and clear judgment, the fact of such mistake, fraud, duress or overreaching must be established by clear and convincing evidence, and an appellate court may conclude that the motion was properly denied where the defendant acted with knowledge of the facts and on advice of his counsel." (Citing cases.)

[2] In the instant case appellant admitted that she was fully advised by counsel. The record shows that she was present when the stipulation as to the punishment for the offense was entered into and understood the nature and consequences of her plea. It is apparent that there was a lack of clear and convincing evidence establishing factors overreaching her free and clear judgment at the time she entered her plea of guilty. There was no abuse of discretion in denying her motion to withdraw this plea.

Judgment and order affirmed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem., concur.

163 Cal.App.2d 474

**Thomas S. HAFEY et al., Plaintiffs,****Alice M. Robinson and George L. Johnson,  
Jr., Plaintiffs and Respondents,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Clementine PARHAM, Plaintiff and  
Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Norman HARSTAD, Plaintiff and  
Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****William E. BAIRD, Plaintiff,****Syles S. Browning and Annle C. O'Keefe,  
Plaintiffs and Respondents,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Lawrence G. BUCHENERY et al.,  
Plaintiffs,****James W. Davis, Plaintiff and Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Joseph R. MANSFIELD et al., Plaintiffs,****William O. Truelson, Plaintiff and  
Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Frank J. GLAESER et al., Plaintiffs,****Donald Gray, as executor, etc., Plaintiff  
and Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.****Britton STICKLER, Plaintiff and  
Respondent,**

v.

**CITY OF BERKELEY, a Municipal  
Corporation, et al., Defendants  
and Appellants.**

Civ. 18061-18063.

District Court of Appeal, First District,  
Division 2, California.

Sept. 12, 1958.

Rehearing Denied Sept. 22, 1958.

Actions brought to determine rights under police and fire department retirement ordinances of the City of Berkeley. The Superior Court, Alameda County, Ralph E. Hoyt and Richard H. Chamberlain, JJ., directed payment of additional amounts and declared plaintiffs' right to like larger payments in the future, and defendants appealed. The District Court of Appeal, Draper, J., held, inter alia, that it was salary paid to those of same rank at retirement date, rather than average salary paid to those of that rank during three years preceding retirement, which fixed amount of pension to be paid to Berkeley policeman or fireman (retiring before June 16, 1944) for period running from date of retirement to date of first pay increase of rank.

Judgments modified and affirmed.

**1. Municipal Corporations**  $\S$  187(7), 200(7)

1944 amendments did not affect those who were members of service before their effective date, and Berkeley policemen and firemen retiring prior to effective date of 1944 ordinance amendments were entitled to retirement pensions based upon current salaries of ranks at which they retired.

**2. Municipal Corporations**  $\S$  187(7), 200(7)

It was salary paid to those of same rank at retirement date, rather than average salary paid to those of that rank during three years preceding retirement, which fixed amount of pension to be paid to Berkeley policeman or fireman (retiring before June 16, 1944) for period running



from date of retirement to date of first pay increase of rank.

### 3. Pensions ☞1

Pension provisions must be liberally construed in favor of applicant.

### 4. Municipal Corporations ☞187(7), 200(7)

1944 ordinance amendments were inapplicable to limit pensions of widows of Berkeley policemen and firemen whose husbands had rendered service before amendments, whether they retired before or after effective date of amendments.

### 5. Municipal Corporations ☞187(7), 200(7)

Pension of widow of Berkeley fireman or policeman rendering service before 1944 ordinance amendments was subject to change upon increase in pay upon which his retirement pension was based at date of his death.

### 6. Municipal Corporations ☞1002

In actions brought to determine rights under police and fire department retirement ordinances of the City of Berkeley, it was error for trial court, directing payment of additional amounts and declaring plaintiffs' right to like larger payments in the future, to allow interest before judgment.

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Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for appellants.

Cornish & Cornish, Berkeley, Robert H. Fouke, San Francisco, for respondents.

DRAPER, Justice.

These actions (consolidated on appeal) seek determination of rights under the police and fire department retirement ordinances of the City of Berkeley. Plaintiffs are retired department members and widows of firemen and policemen, all of whom were receiving retirement pensions. They asserted a right to retirement allowances in excess of the amounts being paid to them. Judgment directed payment of additional amounts, and declared plaintiffs' right to like larger payments in the future.

Defendants (the city and its pension boards) appeal.

[1] The ordinances provide for payment to retired policemen and firemen of a proportion (one-half or two-thirds, depending upon length of service) "of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement." This provision has been construed as basing the pension upon the fluctuating salary of the rank at which the employee retired. Thus, when the salary of the rank held at retirement is increased, the retirement pension increases proportionately. *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833; see also *Eichelberger v. City of Berkeley*, 46 Cal.2d 182, 293 P.2d 1. In 1944, the ordinances were amended to provide for a fixed pension based on average salary of the last three years before retirement. However, the 1944 amendments do not affect those who were members of the service before their effective date, June 16, 1944. *Glaeser v. City of Berkeley*, 148 Cal.App.2d 614, 307 P.2d 61. All plaintiffs who are retired members of either department were employed before that date. Thus appellants concede that, as soon as there is an increase in the pay of the rank from which each such respondent retired, the retirement pension is to be based upon current salary of such rank.

[2,3] The issue here concerns only the amount of the pension to which a retired employee is entitled from date of retirement to the date of the first pay increase of the rank from which he retired. Appellants contend that for this period the employee is to receive the average salary paid, during the three years before retirement, to the rank at which he retired. Respondents contend that each is entitled, until the first salary increase after his retirement, to a pension based upon the salary paid at the time of his retirement to the average rank which he had held for the preceding three years. Each of the retired respondents had at least one pay increase in the three years before his

retirement, and thus, under respondents' construction, would receive a larger pension, over the period from retirement to first subsequent increase in pay, than under the construction urged by appellants.

In *Terry v. City of Berkeley*, supra, 41 Cal.2d 698, 700, 263 P.2d 833, 834, the Supreme Court quoted plaintiff's contention that "the three year period defines only the rank held and not the salary earned" and (41 Cal.2d at page 701, 263 P.2d at page 835,) the contention that the language of the three-year provision "merely changes the method of determining the 'rank' on which the pension payments are to be based." That decision did not pass upon the precise point here involved, but the court clearly held that the three-year period is looked to only to determine rank, rather than average salary.

The application of this interpretation is shown in the case of respondent Davis, who was assistant chief of the fire department for 19½ months of the three years preceding his retirement, and deputy chief (a higher paid rank) for 16½ months of that period. The trial court held that his pension, at the outset of his retirement, was the average reached by taking into account 19½/36ths of the salary of an assistant chief as at date of retirement, and 16½/36ths of the salary of the deputy chief at the same time. Upon any increase of salary of either or both ranks, the base of his pension is recomputed upon the same proportions. This approach gives effect to an "average" not only at date of retirement, but also after the first subsequent increase in pay. Appellants' contention would give effect to a three-year average only for the period from retirement to first salary increase.

It is difficult to reconcile appellants' contention with the *Terry* decision. If the base for retirement pay is the average salary received by the employee in his last three years of active service, that base should continue in effect regardless of changes in salary of the rank at which he retired. But it is precisely that con-

tention which was rejected by the Supreme Court, which held that the three-year period applies to rank, and not to salary. It is the current salary of the rank which determines the amount of pension. We find no language in the ordinance or in the *Terry* decision which would indicate that another rule applies between date of retirement and date of first increase in salary thereafter. Reason suggests strongly that the rule fixing current salary as the base should apply at date of retirement, as well as at date of first subsequent salary increase. The same language which admittedly precludes reference to the three-year salary average after the first increase can hardly be relied upon to require such reference before that date.

Further, in resolving any ambiguity in the language of the ordinance, we are bound by the "general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant." (*Gibson v. City of San Diego*, 25 Cal.2d 930, 935, 156 P.2d 737, 740.) We conclude that the trial court properly found the pension base to be the average salary paid, at time of retirement, to the rank or ranks held for the preceding three years.

Four respondents are widows. Three survive department members who retired after the effective date of the 1944 amendments (those changing the pension base to a fixed, rather than a fluctuating, salary). One survives a department member who, although not retired, was eligible for retirement at the date of his death in 1948. The ordinance provides for a pension to the widow of such an employee.

[4] As to these widows, appellants argue that each is entitled to a pension in accordance with the ordinance in effect at the date of her husband's retirement, and that her pension right does not become vested until her husband's death. Thus, it is asserted, the right of each widow is limited to that prescribed by the 1944 amendments—a fixed pension unaffected by increases in salary of the rank

at which her husband retired—even though all four deceased husbands had been in department employ well before 1944. Since the judgments herein, the Supreme Court has held that a like amendment to the Los Angeles charter could not apply to limit the pensions of widows whose husbands had rendered service before the amendment, whether they retired before or after the effective date of the amendment. *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484. Thus appellants' contention cannot be sustained.

[5] Appellants further contend, however, that even before the 1944 amendments the pension of a widow was based upon the fixed amount of her husband's pension at the time of his death, and was not subject to change upon an increase in the pay upon which his retirement pension was based at the date of his death. This contention is based upon the ordinance provision that a widow's pension shall be a proportion of "the average salary upon which (the pension of the husband) was based."

We cannot agree. The Supreme Court, in *Eichelberger v. City of Berkeley*, supra, 46 Cal.2d 182, 293 P.2d 1, determined the measure of pensions before the 1944 amendments. One of the plaintiffs in that case received her pension as the widow of a fireman who died in line of duty. The court held that all plaintiffs were, for the 1939-44 period, entitled to have their pensions based upon current salary, rather than that of date of retirement. We find in the ordinance no intention to use a different pension base for the widow of a fireman who died in line of duty (as in *Eichelberger*) than for the widow of an employee who retired before his death (as in the case at bar).

In any event, appellants' reliance upon the past tense in this section of the ordinance appears unsound. The section applies only after the death of the pensioned husband. To refer to his pension in the past tense does not imply an intention that the widow's pension base be limited

to the salary upon which decedent's last retirement allowance was based. Rather, it merely recognizes the fact that the retirement allowance to the husband ceased upon his death. The salary upon which his pension "was based" during his lifetime is the fluctuating salary of the rank involved. *Terry v. City of Berkeley*, supra, 41 Cal.2d 698, 263 P.2d 833. To say that the widow's pension is based upon the salary upon which her husband's pension was based is to say she receives a proportion of the fluctuating salary which was there determined to be the basis of his allowance.

[6] The allowance of interest before judgment was improper. *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484.

The judgments are modified by striking therefrom the portions allowing interest before judgment and as so modified they are affirmed, without costs to any party.

KAUFMAN, P. J., and DOOLING, J.,  
concur.



June WILBORN, Petitioner,  
v.

The SUPERIOR COURT of the State of  
California, IN AND FOR The COUNTY  
OF HUMBOLDT, Respondent.\*  
Civ. 9519.

District Court of Appeal, Third District,  
California.

Sept. 10, 1958.

Rehearing Denied Oct. 6, 1958.

Hearing Granted Nov. 5, 1958.

Original proceeding on petition for a writ of prohibition to restrain a superior court from proceeding with trial of petitioner for having taken a minor child away from its parents, guardian or other person having lawful charge of such child. The District Court of Appeal, Schottky, J.,

\* Opinion vacated 337 P.2d 65.



held that where petitioner, working in concert with minor child's father, removed such child from her grandfather's home, where the child was living with her mother, at a time when the child's mother and father were separated, and before a decree had been entered awarding custody of the child to mother, under such circumstances, petitioner did not take the child's custody from a parent having lawful charge of the child and petitioner therefore could not be guilty of violation of section of Penal Code proscribing such a taking.

Writ issued.

### 1. Kidnapping ☞1

A father who takes his minor child from the custody of the child's mother, when the custody has not been placed in mother by a decree of a court of competent jurisdiction is not guilty of kidnapping. West's Ann.Pen.Code, § 278.

### 2. Kidnapping ☞1

Where petitioner for a writ of prohibition to restrain a Superior Court from trying her for a certain violation of the Penal Code, working in concert with minor child's father, removed such child from her grandfather's home, where the child was living with her mother, at a time when the child's mother and father were separated, and before a decree had been entered awarding custody of the child to mother, under such circumstances, petitioner did not take the child's custody from the parent having lawful charge of the child and petitioner therefore could not be guilty of violation of section of Penal Code proscribing such a taking. West's Ann.Pen. Code, § 278.

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Falk & Falk, Eureka, for petitioner.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., and Harold L. Hammond, Dist. Atty., Humboldt County, Eureka, for respondent.

SCHOTTKY, Justice.

Petitioner filed in this court a petition for a writ of prohibition to restrain the Su-

Cal.Rep. 329-330 P.2d-29

perior Court of Humboldt County from proceeding with the trial of petitioner on a charge of violating section 278 of the Penal Code. Said section reads as follows:

"Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years."

We issued an alternative writ and the matter was heard by this court.

Petitioner contends that she was held to answer at the preliminary examination without reasonable or probable cause. At the preliminary examination the evidence showed that the parents of the child, Mr. and Mrs. James, were separated. Mrs. James had moved into her father's home with the child, a four-months-old baby girl. On the night of March 31, 1958, petitioner knocked on the door of the grandfather's house and told him that she had a flat tire and needed help. Mrs. James was not at the house. The grandfather opened the door and petitioner walked in. Becoming suspicious of petitioner because of her answers to some of his questions the grandfather started to shove her out of the door and as he did so Mr. James jumped on him, cursed him and held him down. While Mr. James was holding the grandfather down, petitioner went into another room, wrapped the baby in a blanket and went out of the front door with the baby. Mr. James followed, and petitioner, Mr. James and the baby left together in an automobile.

Sometime subsequent to the taking of the child, Mrs. James saw petitioner carrying the child into a house. Mr. James was not seen at this time but his car was seen. At the present time no one seems to know of the whereabouts of either Mr. James or the baby.

On April 1, 1958 (after the taking of the baby) Mrs. James was granted custody of the child pending annulment proceedings.

Petitioner argues that since the father, Mr. James, had an equal right to the custody of the child on March 31st, he could not have been guilty of the crime charged. Petitioner then argues that petitioner, who accompanied and aided the father, could not be guilty of the crime.

[1] The general rule is well expressed in an annotation in 77 A.L.R. at page 317, as follows:

"In the absence of an order or decree affecting the custody of a child, it is generally held that a parent, or one assisting such parent, does not commit the crime of kidnapping by taking exclusive possession of the child."

And as stated in *Biggs v. State*, 13 Wyo. 94, 77 P. 901:

"That a father who takes his minor child from the custody of its mother, when the custody has not been placed in the mother by the decree of a court of competent jurisdiction, is not guilty of kidnapping, is settled by law. \* \* Not only is this proposition true when negatively expressed, but we think it may be positively stated that in no case, in the absence of an express provision of statute, can a parent be guilty of kidnapping his or her own minor child, unless the forcible taking is from the custody established by the decree of a competent court."

Respondent in reply argues that the sole question in the instant proceeding is whether there was reasonable or probable cause for the magistrate to believe that a crime had been committed and that petitioner was guilty thereof. Respondent argues that petitioner is neither the father nor the mother of the child who was taken and that the question of whether or not she was an agent of the father was a matter to be developed at the trial.

[2] After a careful study of the evidence introduced at the preliminary examination and the language of section 278 of the Penal Code, we do not believe that the record shows reasonable or probable cause for holding petitioner to answer. For the

testimony leaves no room for an inference other than that the petitioner worked in concert with the father of the child; that the father, accompanied by petitioner, went to the house for the purpose of obtaining the child and that the father and petitioner left together with the child. Under section 197 of the Civil Code the father was equally entitled to the custody of the child, and in assisting in the taking of the child under the circumstances here present petitioner did not take the child from the custody of the parent having lawful charge of such child, and could not be held to have violated section 278 of the Penal Code.

We therefore conclude that there was no reasonable or probable cause for holding petitioner to answer for the offense charged and that a writ of prohibition should issue.

Let the writ issue.

VAN DYKE, P. J., and PEEK, J.,  
concur.



163 Cal.App.2d 534

**STAR & CRESCENT BOAT CO., a California Corporation, Plaintiff and Respondent,**

**v.**

**COUNTY OF SAN DIEGO, a County in the State of California, and City of San Diego, a Municipal Corporation in the County of San Diego, State of California, Defendants and Appellants.**

Civ. 5865.

District Court of Appeal, Fourth District,  
California.

Sept. 15, 1958.

Hearing Denied Nov. 12, 1958.

Action for refund of taxes paid under protest on tugboats owned and operated by plaintiff. The Superior Court of San Diego County, Arthur L. Mundo, J., rendered the judgment challenged by defendants' appeal. The District Court of Appeal, Mussell, J.,

held that since plaintiff was engaged in business of transporting freight rather than towage business and since tugboats were used primarily for transportation of petroleum products, tugboats were exempt from taxation, under constitution section granting exemption from city and county taxes to vessels engaged in transportation of freight; but held that since there was no provision in constitution section for prorating exemption, exemption should have been allowed in its entirety, even though tugboats were also used in salvage operations, etc.

Affirmed.

### 1. Municipal Corporations ☞967(1)

#### Taxation ☞219

Where owner of tugboats was engaged in business of transporting freight rather than in towage business and tugboats were used primarily for transportation of petroleum products, tugboats were exempt from taxation, under constitution section granting exemption from city and county taxes to vessels engaged in transportation of freight; and there being no provision in constitution section for prorating exemption, exemption should have been allowed in its entirety, even though tugboats were also used in salvage operations, etc. West's Ann.Civ.Code, § 2110; West's Ann.Const. art. 13, § 4.

### 2. Appeal and Error ☞161, 878(2)

Right to accept fruits of judgment and right to appeal therefrom are not concurrent but are wholly inconsistent, and an election of either is a waiver and renunciation of the other; and plaintiff, having failed to appeal, was bound by judgment denying tax exemption in part, even though reviewing court held, on defendant's appeal, that exemption should have been allowed in its entirety.

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James Don Keller, Dist. Atty. and County Counsel, and Carroll H. Smith, Deputy Dist. Atty., San Diego, for appellant County.

J. F. DuPaul, City Atty., and Aaron W. Reese, Asst. City Atty., San Diego, for appellant City.

Donnelley, MacNulty & Butler, San Diego, for respondent.

MUSSELL, Justice.

This is an action for refund of county and city taxes paid by plaintiff under protest on three tugboats owned and operated by plaintiff. Recovery is sought for the sum of \$13,836.92 in taxes assessed against the tug "San Diegan" and paid by plaintiff for the years 1955 and 1956; also for the sum of \$17,397.31 in taxes assessed against the tug "Challenger" and paid by plaintiff for the years 1953, 1954, 1955 and 1956; and for the further sum of \$11,467.95 assessed against the tug "Cuyamaca" and paid by plaintiff for the years 1953, 1954, 1955 and 1956. Plaintiff bases its right to recover said taxes on the ground that the three tugboats were exempt from city and county taxes under Article 13, section 4 of the Constitution of this state, which provides as follows:

*"Exemptions; vessels; restriction.*

All vessels of more than 50 tons burden registered at any port in this State and engaged in the transportation of freight or passengers shall be exempt from taxation except for state purposes \* \*".

The facts were stipulated at the trial and are embodied in two written stipulations. It appears therefrom that each of the three tugs, namely, the "San Diegan", the "Challenger" and the "Cuyamaca" were vessels of more than fifty tons burden; that each of said three vessels were registered in the Port of San Diego; that respondent Star & Crescent Boat Company was the owner of said three tugs and was also the owner of three oil barges bearing numbers 23, 24 and 25; that respondent had contracts in writing for the transportation of petroleum products with the following companies: General Petroleum Corporation, Richfield Oil Corporation, Shell Oil Company, Inc., Standard Oil Company of California, The Texas Company, Union Oil Company, Tide-water Oil Company, and the United States Navy; that petroleum products owned by the above named companies were transported in the three barges owned by respondent



and towed from the Los Angeles area to the San Diego area by respondent's tugboats; and that in connection with the transportation of said petroleum products the Star & Crescent Boat Company has paid to the United States government, pursuant to section 4271 of the Internal Revenue Code, 26 U.S.C.A. § 4271, during the years 1953, 1954 and 1956, the sum of \$86,400.19 for transportation taxes. It was further stipulated that approximately 95 per cent of the gross revenue earned by said tugs during the period when such taxes were assessed and levied was derived from towing barges carrying petroleum products belonging to others. It was also stipulated and agreed by the parties that the time spent by the individual tugs for the periods in question in towing these barges loaded with petroleum products under contracts of affreightment was as follows: "Cuyamaca" 95.83 per cent, "Challenger" 91.09 per cent, and "San Diego" 83.15 per cent.

The trial court concluded, inter alia, that said tugboats were engaged in the transportation of freight for hire during that percentage of time when they were engaged in the performance of affreightment contracts, and for said proportionate time were, and are, exempt from ad valorem property taxes; that said vessels were not engaged in the transportation of freight for hire for the balance of the time but for said period were engaged in the performance of coastwise towage and salvage contracts and in towing operations in San Diego Harbor, and for said proportionate times were not exempt from ad valorem property taxation. The trial court then prorated the exemption pursuant to the percentage of time spent by each tugboat under the affreightment contract to its total time spent in operation for the calendar years in question.

[1] The principal question for determination on this appeal is whether the said tugboats were "engaged in the transportation of freight" during the times involved so as to be exempt from taxation under the provisions of Article 13, section 4, of the Constitution of this state. Apparently the

appellate courts of California have not passed upon the precise question involved.

In a superior court action in San Francisco brought by the Shipowners and Merchants Tugboat Company, a corporation, against the City and County of San Francisco, case numbered 373602, the tugboat owners sought to recover taxes alleged to have been collected in violation of section 4, Article 13, of the Constitution. According to the memorandum of opinion filed in that case, as set forth in respondent's brief, the tugs involved conducted towing operations and engaged in coastwise, car float and general towing on San Francisco Bay and tributaries. The court therein quoted from *White v. The Mary Ann*, 6 Cal. 462, at page 470, where the court said:

"\* \* \* We think that the towing of a vessel out to sea by a steamer (tug) is the transportation of property, without resorting to any other than the necessary construction arising from the generic and common meaning assigned to the word 'transport'."

It was further stated in said memorandum that towing service is the employment of one vessel to expedite the voyage of another just as a locomotive is necessary to transport the freight carried in freight cars or a truck is necessary to transport the freight carried in a trailer; that they become an integral part of commerce as, of course, a barge or other floating vehicle without motive power could not move without the assist of a tug; that the authorities are uniform in holding that the services performed by tugboats constitute transportation and are uniform in holding that the transportation is of the *freight or passengers* as well as of the vessel or barges containing them; that it appears that the intent and purpose of the constitutional exemption "was to assist the shipping industry in this State" and a review of the proceedings in the legislature would confirm this conclusion; that therefore all activities of the tugboats were "engaged in transportation" within the meaning of the constitutional exemption; that it is immaterial whether particular tugboats may

have done one type or another or whether they furnished part or in other cases all of the motive power; and that they are therefore entitled to the benefit of the constitutional exemption. It was ordered that judgment be entered for and on behalf of plaintiffs. This case was not appealed and it was stipulated herein that since 1949, based upon the opinion therein, the administrative construction placed by the assessor's office of the City and County of San Francisco upon the constitutional provision of Article 13, section 4, has been to declare tugboats of over 50 tons burden and properly registered as exempt from taxation under and by virtue of said provision. In this connection the parties herein further stipulated that the administrative construction placed upon this provision since 1934 by the assessors of San Diego county, based upon an opinion by the District Attorney, has been to declare said tugboats not exempt from taxation under said provision, and that for the past twenty years the administrative construction placed upon said provision by the County of Los Angeles has been to deny the exemption.

In section 209 of the Public Utilities Code "transportation of property" is defined as including every service in connection with or incidental to the transportation of property. In 49 U.S.C.A. section 902(h) the term "transportation" is said to include the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and section 902(g) of said code defines "transportation facility" as including any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind, used in or in connection with transportation by water subject to that chapter.

In *Cornell Steamboat Co. v. United States*, D.C., 53 F.Supp. 349, 353, the court stated that, nautically, to transport is "to haul a vessel by hawsers", and that a barge is both a "vessel" and "property." In *Ohio River Sand Co. v. United States*, D.C., 60 F.Supp. 563, 564, the court said:

"It seems clear that the towing of barges containing petroleum products

constitutes transportation of property by water within the provisions of the statute. It is not necessary that the motive power applied to move the barges be in the barges themselves. The movement of barges by tugs is similar to the transportation of freight over highways in trailers attached to motor trucks. Transportation implies the taking up of persons or property at some point and putting them down at another. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203, 5 S.Ct. 826, 29 L.Ed. 158."

In *Gulf Coast Towing Co. v. United States*, 5 Cir., 196 F.2d 944, 946, plaintiff sued to recover alleged overpayment of federal transportation taxes and the court said:

"There can be no question that the compensation received by the towing company was that for the operation of a fully manned tugboat for towing barges, loaded and unloaded, used by the cement corporation in transporting raw materials used in its cement manufacturing business. Both the barges and the raw materials loaded thereon and towed by appellant's tug under the towage agreement were the 'property' of the cement corporation. Such towage was the transportation of property."

In *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 47 S.Ct. 368, 369, 71 L.Ed. 663, it is said that:

"To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for, not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end."

In the instant case the record shows that plaintiff was engaged in the business of transporting freight rather than of towage. Plaintiff entered into contracts of affreightment with General Petroleum Corporation, Richfield Oil Corporation, Shell Oil Company, Inc., Standard Oil Company of California, The Texas Company, and the Tidewater Oil Company. These contracts referred to plaintiff as the "carrier" and are each entitled "Transportation Agreement". They provide that the carrier undertakes to act as contract carrier of the products belonging to the oil companies. These companies agree to deliver to carrier's vessels at the oil companies' docks in San Pedro gasoline, fuel oil and other petroleum products. The oil companies agree to pay the carrier for the performance of such transportation in accordance with schedules set forth in the agreements. No distinction is made between the tug and the barge and the barges and tugs are owned by the plaintiff. The cargo carried is clearly freight (Civ.Code, sec. 2110), and it is obvious that plaintiff could not transport the fuel and other products in the barges without the use of the tugs. It is likewise clear that plaintiff's tugs were engaged in the transportation of freight within the meaning of Article 13, section 4, of the Constitution.

Defendants argue that the court erred in prorating the exemption. However, there is no provision in Article 13, section 4, of the Constitution for prorating the exemption and since we have concluded that the tugs involved were engaged in the transportation of freight, it follows that the exemption should have been allowed in its entirety.

In *County of Los Angeles v. Craig*, 38 Cal.App.2d 58, 100 P.2d 818, 821, in an action to recover personal property taxes on a vessel, the evidence showed that said vessel was designed for the transportation of freight and passengers; that it had been actively used for that purpose for many years and had never been used for any other purpose; and that it was laid up temporar-

ily because of business conditions. The court there said:

"To hold that a vessel designed for the transportation of freight and passengers and used solely for that purpose is not 'engaged in the transportation of freight or passengers' within the meaning of said section while temporarily laid up for repairs or because of business conditions would lead to absurd results and would go far toward defeating the purpose of the exemption. It would mean that such vessel would be exempt from taxation only while being actively and continuously used for such transportation and would not be exempt during any period of temporary, enforced idleness. This could not have been the intention of the framers of the section or the intention of the people in adopting the same."

In *Standard Oil Co. v. King County*, 180 Wash. 631, 41 P.2d 156, it was held that to qualify as being engaged in "interstate commerce" so as to be exempt from county taxation, a vessel must be exclusively so engaged or at least primarily so engaged.

In the instant case it is apparent that the tugs of plaintiff boat company both as to revenue and as to time were primarily engaged in the transportation of petroleum products.

[2] Plaintiff has not appealed from the judgment herein and is bound by it and by the provision denying exemption as to approximately 10 per cent of the refund claimed. As is said in *San Bernardino County v. Riverside County*, 135 Cal. 618, 620, 67 P. 1047, 1048, "The right to accept the fruits of a judgment or order and the right to appeal therefrom are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." The judgment herein is therefore affirmed.

GRIFFIN, P. J., and COUGHLIN, J. pro tem., concur.



163 Cal.App.2d 429

Juanita KOENIG, Plaintiff and Appellant,

v.

Clarence S. COE, Defendant and  
Respondent.

Civ. 22963.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 11, 1958.

Action for personal injuries sustained by guest passenger when automobile in which he was riding collided at an intersection with defendant's automobile. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where defendant testified that after stopping his automobile at an intersection and observing automobile in which plaintiff was riding about 200 or 250 feet away he attempted to cross in front of such automobile, and that such automobile was traveling approximately 50 miles an hour, and did not appear to be slowing down, plaintiff was entitled to an instruction that while one has the right to expect the driver of an approaching vehicle to perform their duty under the law, such right does not exist when it is reasonably apparent to one in the exercise of ordinary care that another is not going to perform his duty, and that one is not justified in ignoring obvious danger although it is created by another's misconduct, and failure to give such instruction was prejudicial error, since under the testimony, jury could have found that it should have been apparent to defendant that driver of plaintiff's automobile was not going to stop at the intersection.

Reversed.

#### 1. Appeal and Error ⇐928(2)

Where, in personal injury action, only specification of error was that court failed and refused to correctly instruct the jury, on appeal, evidence and reasonable inferences to be drawn therefrom would be stated in the light most favorable to plaintiff.

329 P.2d—46

#### 2. Appeal and Error ⇐928(1)

On appeal in a personal injury action, in determining whether instructions were correct, the District Court of Appeal was required to assume that the jury might have believed the evidence on which the cause of action of plaintiff was predicated, and that if correct instructions had been given on that subject jury might have rendered a verdict in favor of plaintiff.

#### 3. Appeal and Error ⇐1067

##### Automobiles ⇐246(9)

In action for personal injuries sustained by guest passenger in an intersectional automobile collision, where defendant testified that after stopping his automobile at intersection and observing automobile in which plaintiff was riding about 200 to 250 feet away he attempted to cross in front of such automobile, and that such automobile was traveling approximately 50 miles an hour, and did not appear to be slowing down, plaintiff was entitled to an instruction that while one has the right to expect the driver of an approaching vehicle to perform his duty under the law, such right does not exist when it is reasonably apparent to one in the exercise of ordinary care that another is not going to perform his duty, and that one is not justified in ignoring obvious danger although it is created by another's misconduct, and failure to give such instruction was prejudicial error since under the testimony jury could have found that it should have been apparent to defendant that driver of plaintiff's automobile was not going to stop at the intersection.

#### 4. Appeal and Error 1062(3)

Where trial court erred in instructing the jury as a matter of law on a question that was one of fact on conflicting evidence, and a determination favorable to the losing party might have been made if the error had not been committed, such error was prejudicial.

#### 5. Negligence ⇐93(8)

Negligence of driver of an automobile may not be imputed to a guest passenger.

Joseph G. Hurley, North Hollywood, and Henry F. Walker, Los Angeles, for appellant.

Dryden, Harrington, Horgan & Swartz and Vernon G. Foster, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant Clarence S. Coe entered on a jury verdict in an action for damages for personal injuries.

[1,2] The only specification of error is that the court failed and refused to correctly instruct the jury. Consequently the evidence and the reasonable inferences to be drawn therefrom will be stated in the light most favorable to plaintiff. In determining whether the instructions are correct we must assume that the jury might have believed the evidence on which the cause of action of plaintiff was predicated, and that if correct instructions had been given on that subject the jury might have rendered a verdict in favor of plaintiff. *Clement v. State Reclamation Board*, 35 Cal.2d 628, 643-644, 220 P.2d 897.

The accident, between two automobiles, happened shortly before midnight on November 11, 1955 at the intersection of Western Avenue and Palos Verdes Drive North in county territory of the County of Los Angeles.

Western Avenue is 60 feet in width and runs generally north-south. Palos Verdes Drive North is 30 feet in width and runs generally east-west. The intersection was a 4-way stop—there was a stop sign at each corner. The area was "open rural country." Defendant testified it was clear and dry in the area of the intersection at the time of the collision.

George Dietrich was driving his Buick north on Western in the lane next to the center line. Plaintiff was riding in the Buick as Dietrich's guest. She had worked all day with her corneal contact lenses in place, and as her eyes had begun to water and to be annoyed by the lenses she had removed them. As they approached the in-

tersection and for at least a half mile before it was reached, she was sitting on the right-hand side of the car resting her eyes and she saw nothing of the events prior to the accident.

Defendant Coe testified: he was driving a Jaguar west on Palos Verdes; he lived about four miles from the intersection and "frequently" had driven by or through it; there was a stop sign at the intersection for westbound traffic with a limit line on the street about one foot east of the easterly edge of Western; he stopped "several feet behind the limit line"—to the east of it; he remained stopped about 10 to 20 seconds, during which time no traffic passed through the intersection in any direction; his view to the south (for northbound traffic) was unobstructed; he looked south and saw the only car approaching northbound; it was in the lane next to the double center line; it was about 200 or 250 feet away; he continued to watch the northbound car from 1 to 3 seconds; he "assumed that it was safe to proceed"; there was no other traffic about or around; when the Buick was about 200 or 250 feet away he put his car in gear and moved from 5 or 6 feet east of the easterly curb of Western into the intersection; he took his eyes off the Buick for an instant; at the time he did so it had traveled from where he first had seen it to within 150 or 100 feet or less of his car; the Buick did not stop; when his front wheels were about on the center line of Western his car was struck by the Buick; he heard the tires screeching shortly before the Buick hit; he was going between 5 and 15 miles an hour when his car was struck; the Buick was going 50 to 55 miles an hour when it struck his car; during the 1 to 3 seconds that he watched the Buick approach to within 150 or 100 feet or less of his car, it did not appear to be slowing down.

Defendant further testified: "Q. Now, at any time while you were in a stopped position did you make any observation to your left, in other words southerly on

Western Avenue? A. Yes. Q. All right. Now, did you see anything when you made that observation? A. I saw a car coming. Q. Did you make any observation at that time regarding the speed of this vehicle? A. Approximately 50 miles an hour."

Plaintiff requested the court to give the first paragraph and either the second or third paragraph, but not both, and the fourth paragraph of this instruction:

"A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate an accident which can be occasioned only by a violation of law or duty by another.

"[However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.]

"[However, certain circumstances qualify the foregoing rules as follows: A person does not have the rights which they define when it is reasonably apparent to him, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.]

"[One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.]"<sup>1</sup>

The trial judge gave the first part of the instruction only and refused to give the second, third, and fourth paragraphs. Plaintiff asserts it was error not to give

either the second or third paragraph and not to give the fourth paragraph.

The instruction, as requested by plaintiff, was given and approved in *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 166, 195 P.2d 416. In *Beseau v. George*, 111 Cal.App.2d 807, at page 809, 245 P.2d 542, at page 544, this court stated:

"While one has the right to expect the driver of an approaching vehicle to obey the law, and is not necessarily negligent in failing to anticipate danger that would come only through violation of law, the requirements of due care do not permit him to be indifferent to the movements of such other vehicle. He must exercise ordinary care to observe whether the driver of the other vehicle is proceeding in violation of law, and he must conform his own conduct to standards of common prudence and caution."

In *Carlson v. Shewalter*, 110 Cal.App.2d 655, at page 658, 243 P.2d 549, at page 551, the court instructed the jury: "One lawfully using a public highway is entitled to rely on the presumption that others will not violate the law, and no negligence can be predicated on the failure to anticipate an unlawful movement in another on the highway." It was held (110 Cal.App.2d at page 658, 243 P.2d at page 551):

"The instruction should have included the qualification: 'One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed.'"

In *Wilson v. Los Angeles Trona Stages*, 133 Cal.App.2d 756, 284 P.2d 951, the plaintiff was riding in the defendant's bus. A Buick coming toward the bus on the wrong side of the road collided head-on with the bus. The court gave this in-

Court. BAJI told the trial judge to "use either the second or third paragraphs, not both."

1. This was BAJI No. 138. The request was by number, as permitted by rule 16a, Judicial Council Rules for the Superior



struction (133 Cal.App.2d at page 760, 284 P.2d at page 954): "The driver of the bus in question, if exercising the care required of him under the law, had a right to assume and act upon the assumption that the drivers of other vehicles upon the highway would obey the law and would not in violation thereof interfere with the operation of the bus. Therefore, under such circumstances, it was not negligence on the part of the driver of the bus to fail to anticipate that some other driver might violate the law, if you should find such to have been the case at the time and place of this accident." The verdict was for the defendant bus company. Reversing, this court stated (133 Cal.App.2d at page 761, 284 P.2d at page 954):

"[T]he preliminary condition stated in the above-quoted instruction, namely, 'if exercising the care required of him [bus driver] under the law,' was not an adequate qualification of an instruction to the effect that a driver may assume that other drivers will obey the law. A reference to the original file of the case (in the county clerk's office) shows that a notation at the bottom of the instruction is 'See Form 138 - BAJI.' That form includes the substance of the instruction as given herein, and it also includes, as a second part thereof, the following statement: 'However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.' It is to be noted that the principle of law referred to in the second part of that form (either as the principle pertains to the use of ordinary care or utmost care) was omitted from the instruction as proposed by defendants. In *Edlund v. Los Angeles Ry. Co.*, 14 Cal.App.2d 673, at page 675, 58 P.2d 928, at page 929, wherein only ordinary care was required of the driv-

ers, it was said: 'One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed.' In *Angier v. Bruck*, 56 Cal. App.2d 55, at page 58, 131 P.2d 876, at page 878, wherein automobiles collided at an intersection, the jury was instructed at the request of plaintiff that if plaintiff "was at all times pertinent to this case driving plaintiff's automobile in a careful and prudent manner, and exercising that degree of care which is ordinarily exercised by cautious persons, then he had a right to assume that the defendant, James Platt, would drive his automobile in a lawful manner and would exercise for his own safety, the care and caution which an ordinarily prudent person would exercise under the same or similar circumstances." It was held therein that the instruction was erroneous in that it did not include the qualification that one may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed. In reversing the judgment for plaintiff, it was said therein, 56 Cal.App.2d at page 60, 131 P.2d at page 879: 'Plaintiff attempts to escape this result by pointing to the preliminary condition stated in the instruction, "if Raymond Angier [plaintiff] was at all times pertinent to this case driving plaintiff's automobile in a careful and prudent manner \* \* \* then he had a right to assume" etc. This apparently, and as the jury must have understood it, refers to acts done before the making of the assumption referred to. It cannot serve the purpose of a plain statement of the qualification of the rule, which relates to conduct of the driver after he has made the assumption referred to in the instruction. \* \* \* The qualification which was omitted is an essential part of the rule attempt-

ed to be stated. Defendant was entitled to have it enunciated in clear and positive language.”

[3, 4] The failure to qualify the instruction was, under the facts of this case, prejudicial error. There was evidence from which the jury might have found that defendant stopped at the limit line and after having observed the high speed of the Buick and noting its approximate distance and observing that it was not slowing down, he nevertheless put his own car in gear and proceeded into the intersection, taking his eyes off the rapidly approaching Buick when it was 150 or 100 or less feet from the intersection, and then continued forward into its path; and that in the exercise of ordinary care he could have avoided the collision either by not proceeding forward or by stopping his vehicle before reaching the lane in which the Buick was approaching. The jury could have found on ample evidence that in the exercise of ordinary care Coe was not entitled to assume that Dietrich would stop at the intersection. In other words, the jury could have found that it was reasonably apparent to Coe, or in the exercise of ordinary care should have been apparent to him, that Dietrich was not going to stop at the intersection and, if they so found, that he had no right to rely and act on the assumption that Dietrich would stop, and consequently that Coe was negligent and that his negligence was a proximate cause of the accident. The effect of the instruction as given without the qualification was to tell the jury Coe had the right to assume Dietrich was going to obey all duties imposed on him by law and that Coe had a right to rely and act on that assumption. If the jury had been specifically instructed as stated in paragraph two or three of the instruction, we cannot say their verdict would not have been for plaintiff under the evidence. The qualification was not covered in other instructions. “Where, as here, the error consisted in instructing the jury as a matter of law on a question that is one of fact on conflicting evidence, and a determination

favorable to the losing party might have been made if the error had not been committed, that error is prejudicial.” *Clement v. State Reclamation Board*, 35 Cal.2d 628, 644, 220 P.2d 897, 906.

[5] There was no evidence that plaintiff was contributively negligent. The negligence of Dietrich is not imputed to plaintiff. *Cary v. Wentzel*, 39 Cal.2d 491, 495, 247 P.2d 341. If Coe was negligent and his negligence was a proximate cause of plaintiff’s injuries, it matters not how negligent Dietrich may have been.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



163 Cal.App.2d 554

The PEOPLE of the State of California,  
Plaintiff and Respondent,  
v.

Victor E. LAISNE, Defendant and Appellant.  
Cr. 2851.

District Court of Appeal, Third District,  
California.

Sept. 16, 1958.

Rehearing Denied Oct. 9, 1958.

Hearing Denied Nov. 12, 1958.

Prosecution for contributing to the delinquency of minor by selling him intoxicating liquor. The Superior Court, Mariposa County, Thomas Coakley and R. R. Sischo, JJ., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peek, J., held that trial court did not err in sustaining objections to admission of evidence of names of persons who attended a party at which minor received money used to purchase liquor, on theory such evidence might have shown minor would have purchased liquor from persons other than defendant, since such evidence was wholly irrelevant on

issue of whether or not defendant sold liquor to minor.

Judgment affirmed.

**1. Criminal Law** ⇨260(11)

Where in prosecution for contributing to the delinquency of a minor by selling him intoxicating liquor it was stipulated that case would be submitted for decision upon a transcript of evidence taken at the preliminary hearing and written argument of counsel, District Court of Appeal would not reweigh the evidence on appeal even though final decision was made by a judge who did not see or hear the witnesses. West's Ann.Welfare & Inst.Code, § 702.

**2. Infants** ⇨20

Evidence sustained conviction for contributing to the delinquency of a minor by selling him intoxicating liquor. West's Ann.Welfare & Inst.Code, § 702.

**3. Criminal Law** ⇨1163(3)

In criminal prosecution, where court denied a request for admission of certain evidence, but court indicated it would consider the matter if it later appeared that such evidence should be admitted in order to do justice to defendant, but no further request was made, in the absence of a showing of prejudice, no prejudice would be presumed to have occurred from such refusal even if it constituted error.

**4. Criminal Law** ⇨338(1)

In prosecution for contributing to the delinquency of a minor by selling him intoxicating liquor trial court did not err in excluding evidence of names of persons who attended a party at which minor received money used to purchase liquor on theory such evidence might have shown minor would have purchased liquor from persons other than defendant, since such evidence was wholly irrelevant on issue of whether or not defendant sold liquor to minor. West's Ann.Welfare & Inst.Code, § 702.

**5. Criminal Law** ⇨338(1)

In prosecution for contributing to the delinquency of a minor by selling him liq-

uor, court did not err in denying admission of affidavits apparently offered for purpose of showing reason why district attorney filed suit, and did not err in denying admission of an affidavit of counsel for defendant relating a conversation with the district attorney for purpose of showing possible prejudice in the county against defendant, since district attorney's reasons for initiating the proceeding were wholly irrelevant, and only possible relevancy of affidavit of defendant's counsel would have been on a motion for change of venue, which motion was not made. West's Ann. Welfare & Inst.Code, § 702.

**6. Criminal Law** ⇨1139

In prosecution for contributing to the delinquency of a minor by selling him intoxicating liquor, motion to the District Court of Appeal, for leave to produce additional evidence, would be denied where such additional evidence would be merely cumulative and could in no respect be conclusive of the fact that defendant had not made the sale to a minor as alleged. West's Ann.Welfare & Inst.Code, § 702.

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T. N. Petersen, Merced, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and William O. Minor, Deputies Atty. Gen., for respondent.

PEEK, Justice.

By information defendant was charged with a violation of section 702 of the Welfare and Institutions Code in that he sold intoxicating liquor to a minor, thereby tending to cause the minor to lead an idle, dissolute, lewd and immoral life. The case was submitted on the record of the preliminary hearing supplemented by written argument of counsel. From the judgment of conviction which was thereafter entered, defendant appeals contending (1) that the evidence was insufficient to support the judgment, and (2) that the court erred in excluding certain testimony and exhibits.

The record shows that on the evening of December 24, 1956, James, the minor, at-



tended a party at a friend's home at which several persons between the ages of 16 and 20 were present. It was decided that some liquor should be obtained, and a collection was taken up for that purpose. James, with two other minors, drove to the Chateau Laisne, a bar and restaurant near Mariposa, which was owned and operated by the defendant. James purchased a fifth of vodka, two pints of bourbon and some beer. No request was made by the defendant for any identification, nor did James make any statement relative to his age. After the sale the boys returned to the party where the liquor was consumed. At the conclusion of the preliminary hearing, which was before Judge Thomas Coakley of the Superior Court of Mariposa County, it was stipulated that the case would be submitted for decision upon the transcript of the evidence taken at the preliminary hearing and the written argument of counsel. Subsequently Judge Coakley disqualified himself, and the cause was submitted to Judge R. R. Sischo of Merced County.

It is defendant's first contention that since the final decision in the case was made by a judge who did not see or hear the witnesses but had only the written record before him, this court should therefore reweigh the evidence on appeal.

[1,2] Here it should be noted that defendant was not compelled to submit the case for determination upon the evidence produced at the preliminary examination. Had he desired the judge to see the witnesses personally and hear the testimony he had every right to a court trial. To allow him now to attack the conclusion of the court on the very basis upon which he allowed it to be submitted would be to go far afield from the established rules of appellate practice. The rule so frequently quoted from *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778, is equally as applicable to this proceeding as it would be to one after a conventional hearing before a court or jury. In other words, the limited scope of review has been consistently followed in cases such as the present. See

*People v. Miller*, 145 Cal.App.2d 473, 302 P.2d 603; *People v. Smallfield*, 131 Cal. App.2d 324, 280 P.2d 497; *People v. Silva*, 119 Cal.2d 421, 259 P.2d 74. Whether or not the act of defendant in selling James liquor tended to cause him to become an idle, dissolute, lewd or immoral person was essentially a question for the trier of fact. *People v. Deibert*, 117 Cal.App.2d 410, 416, 256 P.2d 355. Applying the rule set forth in the *Deibert* case to the facts presented herein, the finding that such acts on the part of the defendant did so affect the minor was reasonable and fully justified under the evidence presented.

It is further contended by defendant that a cash register tape which was introduced by him into evidence was an uncontradicted and unimpeached original business entry and hence as such must be accepted as true. This particular bit of evidence showed that on the day in question a total of only \$10.95 in off-sale liquor was sold. Therefore defendant argues no liquor was sold to the minor in question, since the total price of the liquors bought by him was \$12.35. Th record was admitted into evidence solely as proof of the facts shown thereon; that is that it showed \$10.95 in sales, not that which it did not show. The trier of fact could reasonably infer that the sale to James did not appear on the tape by reason of mistake, accident or design. See *Egan v. Bishop*, 8 Cal.App.2d 119, 123, 47 P.2d 500. Furthermore this evidence was directly contradicted by the testimony of James that he purchased the liquor from the defendant.

[3] Finally defendant assigns as error three rulings of the trial court sustaining objections to the admission of certain evidence offered by him. The first relates to his request that certain prosecution witnesses be required to show their wallets and the contents thereof to the court. In denying the request the court indicated that he would consider the matter if it later appeared that such examination should be had in justice to the defendant. However no further request was made, and in

the absence of a showing of prejudice no prejudice will be presumed. See *People v. Carmen*, 43 Cal.2d 342, 347, 273 P.2d 521.

[4] It is next contended that the court erred in refusing the admission into evidence of the names of all of the other persons who attended the party on the evening in question, and that the court further erred in refusing to allow testimony as to whether James had ever purchased liquor from any other person. Defendant, by such evidence, apparently desired to show that other persons at the party had relatives in the liquor business, and hence it was more likely that James would have purchased the liquor from them than from himself. Certainly such evidence was wholly irrelevant in this proceeding since the sole question was whether or not defendant had sold liquor to James on this particular occasion.

[5] It is further contended that the court also erred in denying admission into evidence of an affidavit by the secretary of defendant's counsel which was apparently offered for the purpose of showing the reason why the district attorney filed suit in the present proceeding. The second was an affidavit of counsel himself concerning a conversation with the district attorney for the purpose of showing possible prejudice in the county against the defendant. What may have been the district attorney's reason for initiating the proceeding was wholly irrelevant; and secondly, the only possible relevancy of the affidavit of counsel would have been on a motion for change of venue, but no such motion was made and obviously no error may be predicated thereon.

[6] Subsequent to the filing of briefs, defendant petitioned this court for an order to take additional evidence upon the grounds that the evidence sought to be adduced would tend to prove that two witnesses were lying; that Chateau Laisne was closed at the time of the alleged sale to James; and that defendant did not make the purported sale.

Even assuming the propriety of such action by this court (see *People v. Cowan*, 38 Cal.App.2d 144, 153, 100 P.2d 1079), the evidence sought to be introduced would be merely cumulative and could in no respect be conclusive of the fact that the defendant had not made the sale to James as alleged.

The motion for leave to produce additional evidence is denied. The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



163 Cal.App.2d 518

**Rudolph S. VICTOR, Plaintiff and Appellant,**  
v.

**John C. SPERRY, John M. Sperry, and  
Edward Thornton, Defendants and  
Respondent.**  
Civ. 5859.

District Court of Appeal, Fourth District,  
California.  
Sept. 12, 1958.

Hearing Denied Nov. 5, 1958.

Action by automobile guest against automobile drivers for injuries sustained in automobile collision in Mexico. From a judgment of the Superior Court, San Diego County, Clarence Harden, J., for damages in amount permissible under Mexican law, the guest appealed. The District Court of Appeal, Mussell, J., held that where automobile guest was injured in accident which occurred in Mexico, his cause of action arose there and character and measure of his damages were governed by laws of Mexico, but Mexican statute providing for liability without fault was contrary to public policy of State of California and court properly refused to enforce such statute in

an action by automobile guest against automobile owners.

Judgment affirmed.

### 1. Damages ⇨2

Generally, measure and elements of damage are, in actions of tort, regarded as controlled by law of place in which act occasioning injury is committed, but in actions of contract, law of place of contract is resorted to.

### 2. Damages ⇨2

Where automobile guest was injured in accident which occurred in Mexico, his cause of action arose there and character and measure of his damages were governed by laws of Mexico. West's Ann. Code Civ.Proc. § 1875, subd. 4.

### 3. Courts ⇨9

Limitation upon amount of damages imposed by laws of Mexico for personal injuries sustained is not contrary to public policy of state of California or injurious to welfare of people thereof.

### 4. Courts ⇨9

Mexican statute providing for liability without fault was contrary to public policy of state of California and court properly refused to enforce such statute in an action by automobile guest against automobile owners for injuries sustained in a collision in Mexico. West's Ann.Code Civ.Proc. § 1875, subd. 4.

Martin & Martin, San Diego, for appellant.

Gray, Cary, Ames & Frye, San Diego, for respondents Sperry.

MUSSELL, Justice.

This is an action for personal injuries sustained by plaintiff in an automobile accident which occurred on the San Quintin highway, approximately 44 kilometers south of Tiajuana, Baja California, Republic of Mexico.

At the time of the collision on July 3, 1955, defendant John C. Sperry, with the permission and consent of defendant John

M. Sperry, was driving a Mercury automobile northerly on said highway when the Mercury collided with a Chevrolet automobile being driven in a southerly direction on said highway by defendant Edward Thornton. Plaintiff Rudolph Victor was an occupant of the Thornton vehicle and was severely injured in the collision. Plaintiff and the drivers of both cars were and now are residents and citizens of the State of California. The accident was the result of the negligence (and of the equivalent of negligence under Mexican law) of the drivers of both cars involved in the accident.

Article 1910 of the Civil Code of 1928 for the Federal District and Territories of Mexico, as amended, which had been adopted by the State of Baja California del Norte and which was in effect at the time of the accident, provided as follows: "A person who, acting illicitly or contrary to good customs, causes damages to another, is obligated to repair it, unless it is shown that the damage was produced as a consequence of the guilt or inexcusable negligence of the victim." Neither said code nor the general law of said state or of said Republic distinguished between guests and passengers in motor vehicles nor did they impose any restrictions upon the right of a guest to recover damages from the negligent operator of a motor vehicle in which he was riding.

Prior to the accident plaintiff had been employed as a house mover and his weekly wage was \$99. He had not returned to work at the time of the trial and will not be able to engage in the same occupation or any occupation requiring a substantial amount of physical activity.

The trial court found (and it is not disputed) that as a result of the accident plaintiff's spinal cord was damaged. He suffered a paralysis of the left upper and lower extremities and the disability in his left upper extremity is permanent and total. The disability in his lower extremity is permanent and partial. He is and will continue to be unable to walk without a limp or for protracted periods. The court



further found that plaintiff suffered the following actual damages as a result of the accident:

|                                    |              |
|------------------------------------|--------------|
| Medical and hospital expenses      | \$2,962.05   |
| Loss of earnings                   | 7,500.00     |
| Impairment of earning capacity     | 15,000.00    |
| Pain, suffering and mental anguish | 15,000       |
|                                    | <hr/>        |
|                                    | \$40,462.05. |

At the time of the accident the Mexican law in effect imposed restrictions on the recovery of damages for personal injuries regardless of their nature or extent. Under the Mexican law in effect at the time a victim of the negligent conduct of another could recover his medical and hospital expenses. For a temporary total disability he could recover only 75 per cent of his lost wages for a period not to exceed one year. Wages in excess of 25 pesos, or \$2 per day, could not be taken into account in computing the amount allowed. If he suffered a permanent and total disability, he could recover lost earnings for only 918 days and, even though he earned more than 25 pesos per day, only that amount could be taken into account in computing the amount of the recovery. Where the disability was permanent but not total, the recovery was scaled down. For a permanent disability of an upper extremity the victim could recover only from 50 to 70 per cent of \$2 per day for 918 days, the exact percentage depending upon age, the importance of the disability, and the extent to which the disability prevented the victim from engaging in his occupation. If the injured extremity was the "least useful", the indemnity was reduced by 15 per cent. In addition, "moral damages" up to a maximum of one-third of the other recoverable damages might, in the discretion of the court, be awarded. "Moral damages" are defined as "damages suffered by a person in his honor, reputation, personal tranquility or spiritual integrity of his life, and as damages which are not of a physical nature and not capable of exact monetary evaluation." The trial court concluded that enforcement of these restrictions on the recovery of damages is

not contrary to the public policy of this State or to abstract justice or injurious to the welfare of the people of this State and that plaintiff was not entitled to recover his actual damages in the amount of \$40,462.05. Judgment was thereupon rendered against defendants John C. Sperry and Edward Thornton in the amount of \$6,135.96. The recovery was computed as follows:

|                                                                       |             |
|-----------------------------------------------------------------------|-------------|
| Medical and hospital expenses                                         | \$2,962.05  |
| Temporary total disability<br>(75% of \$2.00 for 365 days)            | 547.50      |
| Permanent partial disability<br>(70% of \$2.00 for 918 days less 15%) | 1,092.42    |
|                                                                       | <hr/>       |
| Sub-Total                                                             | \$4,601.97  |
| Moral damages                                                         | 1,533.99    |
|                                                                       | <hr/>       |
| Total                                                                 | \$6,135.96. |

Under Article 1913 of the Civil Code of 1928 for the Mexican Federal District and Territories, if a person has the use of mechanisms or instruments which are dangerous per se, by the speed they develop, or otherwise, he is obligated to answer for the damages he causes, even though he does not act illicitly, unless the damage is caused by the guilt or inexcusable negligence of the victim. The Mexican courts hold that an automobile is a dangerous mechanism or instrument within the meaning of this section and that a person injured by a motor vehicle is entitled to recover damages without regard to fault or negligence from both the owner and driver of the automobile. However, if liability exists only under Article 1913 "moral damages" are not recoverable. Since liability under Article 1910 was found to exist on the part of the drivers of both automobiles, it became immaterial whether liability under Article 1913 was found to exist as to them. Plaintiff, however, sought a judgment against John M. Sperry, owner of the Chevrolet automobile, for \$4,601.97, under Article 1913. The trial court concluded that this article is contrary to the public policy of this State, is in substantial conflict with the law of this State, and should not be enforced. Judgment was entered in favor of defendant John M. Sperry.

Rudolph Victor appeals from the judgment (a) Insofar as it fails to award damages in excess of \$6,135.96 as against defendants John C. Sperry and Edward Thornton; and (b) Insofar as it fails to award any damages against defendant John M. Sperry. The appeal is taken on the judgment roll and appellant does not dispute the correctness of the court's factual findings. He is in disagreement only with its conclusions as to the enforceability of the Mexican law. The court's knowledge of the Mexican law was acquired under section 1875, subdivision 4, of the Code of Civil Procedure, as amended, effective September 11, 1957. Letters from Dr. William B. Stern, Los Angeles County Foreign Law Librarian, and a Mexican law firm, were received in evidence and were made a part of the clerk's transcript on appeal.

The questions to be determined on this appeal are (1) Whether the limitations imposed by the Mexican law on the recovery of damages by plaintiff are enforceable by the courts of California; and (2) Whether the limited liability without fault created by Article 1913 of the Civil Code of 1928 for the Mexican Federal District and Territories, as amended, is contrary to the public policy of this State or to abstract justice or injurious to the welfare of the people of this State.

[1] In 11 American Jurisprudence, Conflict of Laws, section 185, page 497, it is said that generally the character and measure of damages recoverable in an action for tort are governed by the law of the state in which the cause of action arises, and not by the law of the forum. And in 25 C.J.S. Damages § 4, page 462, it is said that the measure and elements of damage are, according to the general rule, regarded as controlled, in actions of tort, by the law of the place in which the act occasioning the injury is committed, while in actions of contract, the law of the place of the contract is to be resorted to, since such matters pertain to the substance of the right and not to the remedy. In Restatement, Conflict of Laws, section 412,

pages 493 and 494, it is stated that the right to damages in compensation or punishment for tort is to be distinguished from the right of access to the courts and from the procedure to obtain the damages; that the creation of the right to have damages necessarily involves the measurement of that right insofar as the law can measure it; that while the actual finding of the amount of damages is a function of the jury or other fact finding body at the forum, the law that creates the right determines what items of loss are to be included in the damages; and that since the right is created by the law of the place of wrong, it is measured by that law. In 11 California Jurisprudence 2d, Conflict of Laws, section 99, page 205, it is said that the California cases are in substantial accord with the general rules declared by the Restatement that the measure of damages for a tort is determined by the place of the wrong, and for a breach of contract, by the law of the place of performance. In 13 California Law Review 318 it is said that a rule permitting the law of the forum to govern the measure of damages would afford the plaintiff an opportunity to increase substantive rights by choosing the jurisdiction allowing a maximum recovery.

In *Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63, 65, 84 A.L.R. 1264, it was held that:

"It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found. It is the general rule in tort actions that the court will, if it has jurisdiction of the necessary parties, and can do substantial justice between them in accordance with its own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice, or pure morals, or injurious to the welfare of the people of the state of the forum."

In *Grant v. McAuliffe*, 41 Cal.2d 859, 862, 264 P.2d 944, 946, 42 A.L.R.2d 1162, the court said:

"In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. [Citation.] '[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.'"

In *Zinn v. Ex-Cell-O Corp.*, 148 Cal.App. 2d 56, 78, 306 P.2d 1017, the court held that on the question of damages generally in a tort action California has followed the Restatement, Conflict of Laws, section 412: "The measure of damages for a tort is determined by the law of the place of wrong." Citing *Klaffki v. Kaufman*, 52 Cal.App. 48, 198 P. 36.

In *Slater v. Mexican National R. Co.*, 194 U.S. 120, 24 S.Ct. 581, 583, 48 L.Ed. 1000, Mr. Justice Holmes, in delivering the opinion of the court, said:

"It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern P. R. Co. v. Babcock*, 154 U.S. 190, 199, 14 S.Ct. 978, 38 L.Ed. 958, 961, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far

as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

[2, 3] In the instant case, since the accident occurred in Mexico, plaintiff's cause of action arose there and the character and measure of his damages are governed by the laws of Mexico. The measure of damages is inseparably connected to the cause of action and cannot be severed therefrom. The limitation upon the amount of damages imposed by the laws of Mexico is not contrary to the public policy of the State of California or injurious to the welfare of the people thereof.

[4] The trial court herein held that the application of Article 1913 of the Civil Code of 1928 for the Federal District and Territories of Mexico, which provides for liability without fault, was in opposition to the public policy of the State of California and refused to enforce that article against John M. Sperry, owner of one of the automobiles involved in the collision. We find no reversible error in this refusal.

In *Hudson v. Von Hamm*, 85 Cal.App. 323, 329, 331, 259 P. 374, 377, plaintiff, a resident of California, was employed as a governess by the defendant, who was a resident of the Territory of Hawaii. Plaintiff was taken to Hawaii, where she was injured by one of defendant's children. The action was filed in California under the Hawaiian statute which permitted recovery against a parent for a tort committed by his child. There is no such right of action in California. The court there said:

"It is the rule in a majority of the states that, when the cause of action depends upon a foreign statute, as it does in the instant case, there must be a statute in the forum similar to the one relied upon, in order to confer jurisdiction upon the courts of the forum. 5 R.C.L. 1040, sec. 131. In 12



C.J. 438, § 14, the author says: 'The doctrine of comity must yield to the positive law of the land. Hence the foreign law must give way when in conflict with the statutes of the forum, or the settled current of its judicial decisions.' \* \* \*

"While there may appear to be some confusion of authorities due to a natural difficulty in construing laws or statutes, and in applying the doctrine of the law of comity, the decisions of the courts of America seem to be in harmony to the effect that, when the positive law of the forum, represented by its Constitution, statutes, or current decisions is in substantial conflict with the law of the foreign state, country, or territory, upon the subject-matter in controversy, the courts of the forum will decline to accept jurisdiction without violation of the doctrine of the comity of nations."

In *McManus v. Red Salmon Canning Co.*, 37 Cal.App. 133, 136-137, 173 P. 1112, 1114, a California corporation hired one John McManus as a seaman and also to do shore work for it on a voyage to Alaska. McManus was killed in Alaska due to negligence of the corporation and an action was brought in California by the administrator of his estate pursuant to Alaska law which allowed the administrator to recover for the estate for a wrongful death. The court held that the Alaska law was contrary to the policy of the laws of the State of California and that:

"It is settled law that an action for wrongful death, like other actions on tort, is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant is found (*Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 P. 862), unless the court where the suit is brought, in enforcing the remedy, would be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction."

In *Thome v. Macken*, 58 Cal.App.2d 76, 136 P.2d 116, plaintiff brought suit in California for an alienation of affection which occurred in Oregon, where such an action is allowed. A demurrer was sustained without leave to amend and this ruling was affirmed on appeal. The court held that the Oregon law was contrary to the public policy of California as established by section 43.5 of the Civil Code, which provides that alienation of affection is not actionable in this state.

Since no right of action exists in California for damages for liability without fault under the circumstances set forth herein and in Article 1913 of the Civil Code of 1928 for the Mexican Federal District and Territories, the trial court herein properly concluded that this article should not be enforced as against John M. Sperry as owner of one of the automobiles involved.

Judgment affirmed.

GRIFFIN, P. J., and COUGHLIN, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



163 Cal.App.2d 625

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Herbert A. BARRAGAN and Frank Galindo,  
Defendants and Appellants.

Cr. 1346.

District Court of Appeal, Fourth District,  
California.

Sept. 18, 1958.

Prosecutions for selling, furnishing and giving away marijuana and conspiracy to commit such offenses. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment and denied motion

for new trial and defendants appealed. The District Court of Appeal, Mussell, J., held that where undercover agent testified as to how his meeting with unindicted co-conspirator was arranged and what transpired at that meeting, refusal to allow defendants to cross-examine undercover agent as to how he got his contacts was not prejudicial to defendants and there was no abuse of discretion.

Judgments and order affirmed.

#### 1. Witnesses Ⓒ268(1)

It is duty of the trial judge in criminal prosecutions to restrict cross-examination of witnesses to reasonable limitations.

#### 2. Criminal Law Ⓒ1153(4)

##### Witnesses Ⓒ267

The scope of cross-examination is within sound discretion of trial court, and its rulings in such matters will not be disturbed on appeal in absence of clear abuse of discretion.

#### 3. Criminal Law Ⓒ1170½(5)

In prosecution for selling, furnishing and giving away marijuana and conspiracy to commit such offenses, where undercover agent testified as to how his meeting with unindicted coconspirator was arranged and what transpired at that meeting, refusal to allow defendants to cross-examine undercover agent as to how he got his contacts or as to who else was involved as undercover agents was not prejudicial to defendants and there was no abuse of discretion. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 182.

#### 4. Criminal Law Ⓒ481, 1153(2)

In prosecutions for selling, furnishing and giving away marijuana and conspiracy to commit such offenses, where on direct examination undercover agent was only allowed to state what substance appeared to be and another qualified as expert and gave his opinion as to substance involved, and was cross-examined as to contents of exhibits, refusal to permit cross-examination of undercover agent as to characteristics of marijuana on ground that he was not

qualified to testify as to characteristics of marijuana was not abuse of discretion and ruling could not be disturbed on appeal. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 182.

#### 5. Criminal Law Ⓒ481

Question whether witness was qualified to testify as to characteristics of marijuana was matter resting in discretion of trial court.

#### 6. Witnesses Ⓒ268(1)

Question whether trial court erred in restricting cross-examination must be determined on facts shown by evidence and not by what occurred in another action.

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Thomas Whelan, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants, with one Robert L. Martinez, were charged in count one of an information with criminal conspiracy to violate section 11500 of the Health and Safety Code, in violation of section 182 of the Penal Code. Joseph Sanchez, Vest Barragan and John Doe were named in said count as unindicted co-conspirators. Appellant Barragan was charged in counts two, three, four and five of violation of section 11500 of the Health and Safety Code, to wit, individual and separate acts of selling, furnishing and giving away of a narcotic, to wit, marijuana, each act a felony. A jury found appellant Barragan guilty as charged in counts one through five and appellant Galindo guilty as charged in count one. The jury failed to reach a verdict as to Martinez and a new trial date was set as to him. Appellants' motions for a new trial were denied. Galindo was given probation for five years under certain conditions and Barragan was sentenced to imprisonment in the State's prison. Barragan and Galindo appeal from the "judgments" and from the order denying their motion

for a new trial, contending that the trial court erred in the decision of questions of law arising during the trial, and in restricting the cross-examination of appellants.

On May 2, 1957, Ernest Halcon, a special deputy sheriff working as an undercover agent, met one Joseph Sanchez in San Diego and purchased 16 hand-rolled marijuana cigarettes from one Henderson, in the presence of Sanchez. On May 26th Sanchez took Halcon to appellant Barragan's home but Barragan was not there. However, on June 11th Halcon found Barragan at home and introduced himself as Ron Rico. Barragan told Halcon he had heard about him from Sanchez and asked if Halcon was in San Diego for the same purpose as before. When Halcon stated that he was, Barragan said that he "wasn't holding at this time." Barragan then took Halcon to another area in San Diego where Barragan said "he knew of another connection living there." Barragan did not obtain any narcotics at this place and told Halcon to contact him later.

On June 15th Halcon went to Barragan's home and asked him if he was "holding" and Barragan replied "that a fellow just picked up what he had ordered from him and he was clean." However, Barragan told Halcon that he could let him have a "roach" and handed it to Halcon, saying, "It is only good for two or three tokes." Barragan told Halcon he was clean (out of possession) because he did not have any money and asked Halcon for a loan of \$2. Halcon gave Barragan the money and it was agreed that Barragan would deduct it from the price of a "tin" that he would get for Halcon later.

On June 24th Halcon and Barragan went to a body shop in San Diego operated by defendant Martinez. Martinez and Barragan went to a Cadillac belonging to Martinez and parked near the shop. Barragan returned with a hand-rolled cigarette which he handed to Halcon, saying, "I scored a joint from the fellow in the Cad." Halcon asked appellant if he was

the connection for his friend in the "Cad." and Barragan said, "Yes. I pick up for him and his business partner."

On July 4th Barragan told Halcon he had two tins that Halcon could buy but that they would have to go to his partner's home in San Diego; that his partner had just gotten out of the paratroopers and that "they (appellants Barragan and Galindo) were back in business." Halcon and Barragan then went to an address in San Diego where they met appellant Galindo and in his presence Barragan produced two brown paper packages and said to Halcon, "Here's the stuff. It is real good. I have just got rid of fifteen of them before I saw you." Halcon gave Barragan \$20. for the two packages, which were later proven to contain marijuana. On July 20th Halcon went to Galindo's residence and in a conversation with him, Galindo said, "I have just got out of the service and it will take me two or three weeks to get back in the swing of things and really make some money." On July 10th Barragan and Halcon went to 803 Beardsley Street in San Diego where Barragan obtained 10 marijuana cigarettes which he sold to Halcon for \$3.

On July 24th a deputy sheriff arrested Galindo and, upon searching his home, found a marijuana cigarette in a coat hanging in his closet. On July 24th appellant Barragan was interviewed in the county jail by a deputy sheriff and stated to the deputy that he was in jail because of narcotics, and said, "I sold marijuana to some people." When the officer asked which people, Barragan replied, "People that were the wrong people, I guess."

Appellants do not urge insufficiency of the evidence as a ground of appeal and concede that if the evidence was believed by the jury, it will as a matter of law support the verdicts. They claim, however, that the trial court committed error in restricting the cross-examination of Halcon, the undercover agent. Halcon was asked on cross-examination by counsel for appellants if he had a conversation with San-



chez on the morning of May 2 in the presence of Henderson. An objection was made by the prosecution and sustained by the court on the ground that it was beyond the scope of direct examination and was immaterial. The court then remarked that he did not think it was material as to how Halcon got his contacts. The following then took place:

"Mr. Whelan: I know, your Honor, but if this evidence was material at all then if it is admissible against the two chaps who weren't even there I think we are entitled to inquire into what did happen and who Sanchez is and what this is all about.

"The Court: What you want to find out is who else is involved as undercover agents, and I am not going to permit that.

"Mr. Whelan: I am not concerned with that at all except as it has any bearing on this case.

"The Court: I don't think it has any bearing on it.

"Mr. Whelan: Very well."

[1-3] Appellants argue that the court's rulings sustaining the objection to the question was error and cite *People v. Alvarez*, 154 Cal.App.2d 694, 316 P.2d 1006, in support of their contention. That case is authority for the proposition that in a prosecution for the sale of heroin it is prejudicial error to sustain the prosecution's objection to the disclosure of the identity of its informer who actively participated in the sale charged by delivering the purchase price to a defendant. However, in the instant case Joseph Sanchez was named in the information as one of the unindicted co-conspirators and his identity was well known by appellants. The trial court evidently concluded that the substance of his conversation between Halcon and Sanchez would be immaterial since Halcon testified as to what took place and appellants were permitted to find out how Halcon's meeting with Sanchez was arranged and what transpired at that meeting. It is the duty of the trial judge to restrict the cross-examina-

tion of witnesses to reasonable limitations. *People v. Spreckels*, 125 Cal.App.2d 507, 514, 270 P.2d 513. The scope of the cross-examination is within the sound discretion of the trial judge and his rulings will not be disturbed on appeal in the absence of a clear abuse of discretion. *People v. Apodaca*, 132 Cal.App.2d 340, 341, 282 P.2d 182. It does not appear that appellants herein were prejudiced by the criticized ruling and no clear abuse of discretion was shown.

[4, 5] Appellants contend that the court erred in restricting the cross-examination of Halcon as to the characteristics of marijuana. In this connection the trial court stated he did not think that Halcon was qualified to identify the substance and assumed that the prosecution would call a qualified chemist to testify as to the characteristics of marijuana and to testify as to the presence or absence of marijuana in the exhibits in evidence. In his direct testimony Halcon was only allowed to state what the substance appeared to be. Wayne A. Burgess, a criminalist, was, in fact, called as a witness, qualified, and stated his opinion as to the substances involved. Appellants were given ample opportunity to cross-examine him as to the contents of the various exhibits. The question of whether Halcon was qualified to testify as to the characteristics of marijuana was a matter resting largely in the discretion of the trial court and since no clear abuse of discretion was shown, his ruling cannot be disturbed on appeal. *People v. Ravenscroft*, 90 Cal.App.2d 543, 203 P.2d 109. Furthermore, appellant Barragan readily admitted that the various items which he procured and delivered to Halcon were marijuana.

[6] Counsel for appellants states in his brief that "the venture of the trial court towards halting a proper cross-examination of a prosecution witness is not just occasional" and refers to a colloquy between the court and counsel which took place in another unrelated criminal case. The question of whether the court erred in re-

stricting the cross-examination of Halcon in the instant case must be determined on the facts shown by the evidence and cannot be determined by what occurred in another action.

Judgments and order affirmed.

GRIFFIN, P. J., concurs.



**The PEOPLE of the State of California,  
Plaintiff and Appellant,**

**v.**

**William G. BERNSTEIN, Defendant and  
Respondent.\***

**Cr. 1248.**

**District Court of Appeal, Fourth District,  
California.**

**Sept. 19, 1958.**

**Hearing Granted Nov. 13, 1958.**

Prosecution for contributing to the delinquency of minors. From an order of the Superior Court, Fresno County, Arthur C. Shepard, J., setting aside the information, the state appealed. The District Court of Appeal, Mussell, J., held that testimony adduced at preliminary examination that defendant visited home occupied by divorcee and her two children and that sometimes he came in the daytime and sometimes in the night and morning and that on more than one occasion he was seen by eight year old child to take a shower in the home and that he was seen coming from mother's bedroom to shower in his underclothes and that he had seen defendant and mother in bedroom quite a few times, established reasonable and probable cause to hold defendant to answer to information charging him with contributing to delinquency of minors.

Order reversed.

#### **1. Criminal Law ☞238**

Testimony adduced at preliminary examination that defendant visited home oc-

cupied by divorcee and her two children and that sometimes he came in the daytime and sometimes in the night and morning and that on more than one occasion he was seen by eight year old child to take a shower in the home and that he was seen coming from mother's bedroom to shower in his underclothes and that he had seen defendant and mother in bedroom quite a few times, established reasonable and probable cause to hold defendant to answer to information charging him with contributing to delinquency of minors. West's Ann.Welfare & Inst.Code, §§ 700 and subd. (k), 702; West's Ann.Pen.Code, §§ 995, 1009.

#### **2. Indictment and Information ☞144**

On a motion to dismiss an information on ground that defendant has been committed without reasonable or probable cause, neither trial court nor court of appeal is authorized to weigh the evidence and determine the conflicts, and sole duty of court of appeal is to determine whether there was sufficient evidence presented to committing magistrate which would establish defendant's guilt. West's Ann.Pen.Code, § 995.

#### **3. Indictment and Information ☞144**

On motion to dismiss information on ground that defendant has been committed without reasonable or probable cause, court may not substitute its judgment as to weight of evidence for that of magistrate conducting preliminary examination and it will not inquire into sufficiency of evidence if there is some evidence in support of the information. West's Ann.Pen.Code, § 995.

#### **4. Infants ☞13**

Purpose of statute making it a misdemeanor to commit any act or omit the performance of any duties which may tend to cause a person under 21 years of age to become delinquent is to make criminal commission of any act tending to cause minors to become dependent or delinquent. West's Ann.Welfare & Inst.Code, § 700 and subd. (k).

#### **5. Indictment and Information ☞45, 161(3)**

Amendment of an information is permissible without leave of court at any time

before defendant pleads or a demurrer to original pleading is sustained, and court may order or permit amendment of information for any defect or insufficiency, at any stage of proceeding, or if defect in information be one that cannot be remedied by amendment, court may order a new information to be filed. West's Ann.Pen. Code, § 1009.

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Edmund G. Brown, Atty. Gen., E. Clarke Savoy, Dist. Atty., George Roth, Deputy Dist. Atty., Fresno, for appellant.

Leo R. Friedman, San Francisco, for respondent.

MUSSELL, Justice.

[1] Defendant William G. Bernstein was charged with contributing to the delinquency of minors in an information filed in the Superior Court of Fresno County. Thereafter, he filed a motion in said court to set aside the information on the ground that he had been held to answer without reasonable or probable cause. The People have appealed from the order granting this motion.

The testimony adduced at the preliminary examination is set forth in the reporter's transcript and is in substance as follows: Michael Enns, aged eight years, and his sister, Sandra, aged six years, lived with their mother, Beverly Enns, in a two bedroom house in Fresno. One bedroom was occupied by the children and the other by the mother, who had obtained a divorce from her husband, the father of the children. Michael testified that the defendant, Dr. Bernstein, came to the home "pretty often"; that "sometimes he comes in the day and sometimes he comes in the night and morning"; that once the doctor came at night and he saw him there the next morning; that on more than one occasion the doctor took a shower in the home and that on one occasion he saw the doctor go to the shower in his underclothes, coming from his mother's bedroom to the shower room; that his mother was in the bedroom

or kitchen at that time, dressed in a robe and pajamas; that he has seen the doctor and his mother in her bedroom quite a few times; that one afternoon, when he was returning from play, his mother's bedroom door was partly open and he saw his mother and the doctor lying on the bed, and that his mother "had a headache".

Cameron Enns, the divorced husband of Mrs. Enns and father of the children, testified that he saw a Porsche car, which he believed to be the defendant's, parked in front of Mrs. Enns' home at 1:30 a. m. on February 21, 1958, and again on March 4, 1958, at 10 p. m.; that he saw the same car there six or eight times in the past year.

Officer Perry Foster testified that he saw defendant Bernstein's car close to the front of the house on March 4, 1958, and checked the registration out through the police department.

The principal question here involved is whether there was reasonable or probable cause to hold the defendant to answer upon a charge of contributing to the delinquency of Michael Enns.

Section 702 of the Welfare and Institutions Code provides, in part, that

"Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands or persuasion, induces or endeavors to induce any person or ward of the juvenile court under the age of 21 years to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of any of the subdivisions of



Section 700, is guilty of a misdemeanor

\* \* \*

Among the persons under 21 years of age enumerated in section 700 of the Welfare and Institutions Code, subsection (k) as being within the jurisdiction of the juvenile court is any person who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life.

[2-4] On a motion to dismiss the information under Penal Code, section 995, neither the trial court nor this court is authorized to weigh the evidence and determine the conflicts, and our sole duty is to determine whether there was sufficient evidence presented to the committing magistrate which would establish defendant's guilt. *People v. Cornette*, 158 Cal.App.2d 724, 322 P.2d 1001, and cases cited. The court may not substitute its judgment as to the weight of the evidence for that of the magistrate conducting the preliminary examination and will not inquire into the sufficiency of the evidence if there is some evidence in support of the information. *People v. Flanders*, 140 Cal.App.2d 765, 768, 296 P.2d 13; *People v. Bradley*, 152 Cal.App.2d 527, 535, 314 P.2d 108. The purpose of the statute involved is to make criminal the commission of any act tending to cause minors to become dependent or delinquent. *People v. Williams*, 152 Cal. App.2d 641, 644, 313 P.2d 878; *People v. Miller*, 145 Cal.App.2d 473, 477, 302 P.2d 603, 607. In the latter case it is said that:

"It is not required that the effect of the act complained of must have an absolutely certain and unmistakable tendency to cause the minor to lead an idle, dissolute, lewd or immoral life, and in determining whether the act in question would reasonably so affect the minor, the jury may apply the teachings of human experience."

In *People v. Deibert*, 117 Cal.App.2d 410, 419, 256 P.2d 355, 360, the court said:

"\* \* \* the relatively comprehensive word 'immoral' is one which conveys concrete impressions to the ordinary person. It is in constant use in

popular parlance and is found in every dictionary. When used in a legal sense in relation to statutes involving an exercise of the police power to promote the general welfare, it has an accepted definition of something that is inimical to good order and *contra bonos mores*."

and 117 Cal.App.2d at pages 415-416, 256 P.2d at page 358:

"By the provisions of section 702, Welfare and Institutions Code, any act or omission which 'tends to cause or encourage' a minor to become a delinquent is made criminal. A case is therefore established when the evidence proves acts or omissions on the part of the defendants which tend or cause or encourage the minors to lead an idle, dissolute, lewd or immoral life."

In *Bompensiero v. Superior Court*, 44 Cal.2d 178, 183-184, 281 P.2d 250, 254, the court said:

"Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344. An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. *Lorenson v. Superior Court*, 35 Cal.2d 49, 56, 59, 216 P.2d 859; cf. *Greenberg v. Superior Court*, 19 Cal. 2d 319, 322, 121 P.2d 713."

The evidence herein, considered in the light of the rules and principles herein set forth, impels us to conclude that there was reasonable and probable cause to hold the defendant to answer, and that the trial court erred in setting aside the information.

[5] Respondent argues that there is no evidence establishing that Mrs. Enns and the doctor lived together as husband and wife, as charged in the information. However, the evidence, in our opinion, was

sufficient to hold the defendant to answer to the offense of contributing to the delinquency of a minor and violation of section 702 of the Welfare and Institutions Code. Under the provisions of Penal Code, section 1009, the amendment of an information is permitted without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. Under said section the court in which an action is pending may order or permit an amendment of an information for any defect or insufficiency, at any stage of the proceeding, or if the defect in the information be one that cannot be remedied by amendment, the court may order a new information to be filed.

The order setting aside the information herein is reversed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem., concur.



163 Cal.App.2d 379

**PEOPLE of the State of California,**  
Respondent,

v.

**Herman HOLLANDER, Appellant.**  
Cr. 3508.

District Court of Appeal, First District,  
Division 1, California.  
Sept. 10, 1958.

Defendant was convicted of issuing fictitious checks. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., rendered judgment and defendant appealed. The District Court of Appeal, Peters, P. J., held that notices of protest authenticated by signature and seal of out-of-state notary were admissible in evidence.

Affirmed.

### 1. Criminal Law Ⓒ304(1)

The courts of California take judicial notice of the seals of all notaries public without limitation. West's Ann.Code Civ.Proc. § 1875, subd. 7.

### 2. Criminal Law Ⓒ304(1)

In prosecution for issuing fictitious checks, where protests were authenticated by signature and seal of Arizona notary, trial court was required to take judicial notice of the notarial seal. West's Ann.Code Civ.Proc. § 1875, subd. 7.

### 3. Criminal Law Ⓒ444

In prosecution for issuing fictitious checks, notices of protest authenticated by signature and seal of out-of-state notary were properly authenticated and were admissible in evidence. West's Ann.Pen.Code, § 476a(c); West's Ann.Gov.Code, § 8208(a-d); West's Ann.Code Civ.Proc. §§ 1875 and subd. 7, 1940.

E. R. William, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Philip Hanley, Deputy Dist. Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

The appellant, Herman Hollander, was convicted by a jury of three violations of section 476a of the Penal Code, that is, of issuing fictitious checks. He appeals from the judgment of conviction.

The evidence shows that on October 2, 1957, the appellant purchased various articles from a department store in San Francisco. He offered, in payment for these articles, three checks drawn on the Valley National Bank of Phoenix, Arizona. At various times that day the department store cashier cashed three checks for appellant, one for \$27, one for \$84 and one for \$73. The department store employees became suspicious and the matter was referred to the police. Upon being questioned, appellant admitted to the officers that he had drawn the checks and that

he had no account in the bank on which the checks were drawn. His explanation was that, several years prior to 1957, he had an account in the Phoenix bank and had some of its checks in his possession, and that he needed some articles of clothing and passed the checks to secure them. His only defense was that at some indefinite time in the future he intended to make the checks good.

At the trial defendant did not testify. The prosecution, after producing the evidence above summarized, introduced protests and notices of protest on all three checks. These documents show that a notary public in the State of Arizona presented the checks to the Valley National Bank in Phoenix for payment, and that payment was refused on the ground that the maker of the checks had no account in the bank. Appellant objected to the introduction of these notices of protest on the ground that they were not properly authenticated. The objections were overruled.

On this evidence the jury found appellant guilty on all three counts. The sole contention made on appeal is that the protests were erroneously admitted into evidence because not properly authenticated. Each notice of protest bears the notary's seal, but appellant urges that this was not sufficient authentication.

The point is without merit. Section 476a (c) of the Penal Code provides that a notice of protest "shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds" in the bank on which the protested check is drawn. Section 8208 of the Government Code provides that:

"The protest of a notary public, under his hand and official seal, of a bill of exchange or promissory note for nonacceptance or nonpayment, specifying:

"(a) The time and place of presentment.

"(b) The fact that presentment was made and the manner thereof.

"(c) The cause or reason for protesting the bill.

"(d) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found, is prima facie evidence of the facts recited therein."

Appellant urges, however, that the notices of protest here admitted into evidence over his objections were not admissible because not properly authenticated as required by section 1940 of the Code of Civil Procedure, the section relating to the method of proving a private writing. Appellant also urges that this deficiency of proof cannot be supplied by the judicial notice provisions of section 1875 of the Code of Civil Procedure. He points out that under that section California courts take judicial notice of the seals of all courts of this state and of the United States, and of the official signatures and seals of the principal officers of the government, legislative, executive and judicial, of this state and of the United States. Thus, by failing to so provide, the courts of this state may not take judicial notice of the seals of out-of-state courts or of the seals of office of the legislative, executive or judicial officers of states other than California. It is, therefore, argued that the courts of this state cannot, logically, take judicial notice of the authenticity of the seal of an out-of-state notary.

[1] The difficulty with this argument is that the Legislature has provided to the contrary. Subdivision 7 of section 1875 of the Code of Civil Procedure provides that the courts of this state take judicial notice of "The seals of courts of admiralty and maritime jurisdiction, and of notaries public." Unlike the subdivisions of the section relating to seals of courts and of the actions of principal legislative, executive, and judicial officers, subdivision 7 is not limited to this state and to the United States. Subdivision 7 is a general provision relating to all notaries public without limitation. Appellant urges that it is high-



ly illogical to so interpret the section, because, under such an interpretation, the seal of an out-of-state notary is given greater dignity than the seal or acts of out-of-state legislatures, governors or courts. At first blush this does appear to be illogical. But subdivision 7 has been in our Code since 1872. It is a codification of a basic common law concept. In VII Wigmore on Evidence (3rd ed.), § 2165, the rule, and the reason for it, is stated as follows: "Other than a foreign seal of State \* \* \*, the only foreign official seal presumed at common law to be genuine, by universal concession, was that of a *notary*. The notary's hearsay certificate was at common law not admissible except for the single purpose of evidencing the fact of demand and non-payment (protest) of a foreign bill of exchange \* \* \*; but, so far as it was thus receivable, the purporting notary's seal sufficiently evidenced its genuineness. The reason for the exceptional recognition of this officer's seal was undoubtedly the necessity for prompt action in fixing the liabilities accruing on commercial paper, and the consequent impossibility of securing further certification of the document under the seal of State; this consideration sufficing to override the risk of forgery: This rule seems never to have been disputed, and its universal concession has caused the precedents to be few in number. The only question seems to have been as to the *form* of the seal; and this was properly held to depend upon the law of the place of purporting execution." See, also, cases collected 20 Am.Jur. p. 100, § 80; 31 C.J.S. Evidence § 25, p. 539.

[2, 3] As Wigmore points out, the rule is of long standing and has been so seldom disputed in either civil or criminal cases that there are few precedents. We have, however, at least one case where the court has held that out-of-state protests, similar to those here involved, are admissible in a criminal case. In *People v. Bullock*, 123 Cal.App. 299, 11 P.2d 441, on appeal it was contended that such out-of-state protests were not properly authenticated. The court

stated (123 Cal.App. at page 303, 11 P.2d at page 442): "The defendant objects that the notices of protest were not in proper form. This court has examined the notices of protest introduced at the trial and made exhibits therein. The protests are in all instances in a form that complies both with the law of the state wherein they were made and executed, and also with the law of this state. Civ.Code, § 3233 et seq. They were all properly authenticated by the signature of the notary public who executed them, and in all cases, the notary public has attached to them his seal of office. Our courts are required to take judicial notice of the seals of notaries public. Code Civ. Proc., § 1875, subd. 7. The instruments introduced in evidence were the original documents and not copies. No statute requiring any further authentication of these instruments other than the signature and seal of the notary has been cited to the court or found by this court. The proof of instruments in this manner is not new or novel. Civ.Code, § 1182."

Appellant contends that this quotation was a mere dictum, because the court also held that, since the question of authentication had not been raised in the trial court, it could not be raised for the first time on appeal. We do not find it necessary to determine whether the judicial notice point was a dictum or constituted an alternative ground of the decision. Assuming the holding to be dicta, it is dicta no longer. It is a sound dictum, and should be followed. It is in accord with a basic common law rule codified in this state in subdivision 7 of section 1875 of the Code of Civil Procedure.

Thus the protests and notices of protest were properly admitted. Their authenticity was established by the signature and seal of the Arizona notary public. The courts of California take judicial notice of that seal. No further authentication was required.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.

163 Cal.App.2d 619

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Charles B. WINTERS, Defendant and  
Appellant.

Cr. 1242.

District Court of Appeal, Fourth District,  
California.

Sept. 18, 1958.

Defendant was convicted of rape and second degree robbery. The Superior Court, Kings County, Meredith Wingrove, J., entered judgment and denied new trial, and defendant appealed. The District Court of Appeal, Griffin, P. J., held that testimony of prosecutrix as to circumstances under which rape was allegedly committed was not inherently improbable and that there was sufficient evidence that defendant accomplished acts of sexual intercourse and took money from prosecutrix by means of fear.

Affirmed.

#### 1. Rape ☞11

A threat may be expressed by acts or conduct as well as by words, and submission to sexual intercourse through fear is not consent. West's Ann.Pen.Code, § 261, subd. 4.

#### 2. Rape ☞51(4)

In prosecution for rape, jury's conclusion that prosecutrix offered sufficient reasonable resistance was final and was supported by evidence. West's Ann.Pen. Code, § 261, subd. 4.

#### 3. Rape ☞51(1)

Prosecutrix' testimony as to circumstances under which alleged rape was committed was not inherently improbable. West's Ann.Pen.Code, § 261, subd. 4.

#### 4. Robbery ☞1

It is not necessary that robbery be accomplished by means of both force and fear. West's Ann.Pen.Code, § 211.

#### 5. Rape ☞51(4)

#### Robbery ☞24(5)

In prosecution for rape and robbery, evidence established that defendant accomplished acts of sexual intercourse and took money from prosecutrix by means of fear. West's Ann.Pen.Code, §§ 211, 261, subd. 4.

#### 6. Robbery ☞11

Where robbery was committed by threat of gun as well as other threats which could well have placed victim in fear to extent that she parted with her money, defendant could be convicted of second degree robbery. West's Ann.Pen.Code, § 211.

#### 7. Criminal Law ☞1175

Defendant convicted of second degree robbery could not complain that he was prejudiced by the verdict on ground that threat by gun was inducing cause and that crime therefore would be first degree robbery. West's Ann.Pen.Code, § 211.

#### 8. Criminal Law ☞1171(2)

In prosecution for rape and robbery, prosecutor's statement, that he expected to prove defendant's consciousness of guilt by two named witnesses, was not prejudicial, although prosecutor did not later call such witnesses for that purpose, in view of fact that it did not affirmatively appear that there was any bad faith on part of prosecutor in making statement or that jury was not adequately instructed that statements of counsel were not to be considered as evidence. West's Ann.Pen. Code, §§ 211, 261, subd. 4.

Hugh Wesley Goodwin, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., John M. Huntington, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was charged with and convicted by a jury of the offense of rape, a violation of section 261, subdivision 4 of the Penal Code, and robbery, second

degree, violation of section 211 of the Penal Code, on October 19, 1957.

The prosecutrix, aged 22, about 5ft. 6 in. tall, weighing about 140 pounds, was living with her husband in Lemoore. On October 19, 1957, she left in her car with her four children, ranging in age from 2 to 5 years, to visit her mother near Riverdale. On her return home that evening about 8:45, her car ran out of gasoline. After waiting alongside the road for some time appellant and his 12-year-old brother-in-law drove up and offered to push her car to a service station. After some effort he said he could not negotiate it and he invited the prosecutrix and her children to ride with him to the station. They got in the back seat of his car. Appellant drove off the highway and up a more or less isolated dirt road, stopped, got out, opened the door to the back seat and invited the prosecutrix to see a rear tire which he said was flat. He then put his hands on her shoulders and told her to put the baby down from her arms or in the front seat. She testified she became "scared" and said "No" over and over, and refused; that he said the boy in the front seat had a gun and she turned and saw the boy standing on the other side of the car facing toward the children in the back seat; that she could not see his hands to determine whether he had a gun; that because of what appellant said she opened the front door and placed the baby down on the front seat; that appellant steered her around in front of the car with his arm around her and she did not resist; that appellant then started talking about "gangs \* \* \* Duke's Gang of Los Angeles", and said he was a member of it; that there were "guys all around there" and he told her to be quiet and not cry so loud and that she would be lucky if the "gang don't get you"; that appellant walked her down the road and in back of some trees; that she was crying all this time and had her hands over her face; that appellant told her to remove her clothing which she did, partially; that appellant brought a blanket, put it on the ground, and accomplished an act of sexual intercourse;

and that all of that time he kept telling her about "gangs throwing people in the river" and if she didn't do as he said they would never go home. She said she thought she heard twigs crackling near-by and she believed appellant when he said not to cry aloud or protest and she believed the 12-year-old boy had a gun; that she consented to two such acts on this occasion because she was afraid; that appellant had warned her not to tell because someone had her automobile license number and would follow her home and that if she turned appellant in, someone would "get them" while appellant was in jail. She said she walked back to the car "sniffing"; that appellant told her to sit in the front seat with him and that she saw a gun on the floor of the car when she got in and appellant made reference to it; that appellant then drove to Hanford and his car ran out of gasoline; that appellant made her walk with him for a distance but a car came by and he told her to run back to his car; that he also returned shortly and obtained the gun from the front seat and handed it to the boy who put it in the back by the window; that appellant then left again and she made no effort to get away because she was "scared"; that she felt she could not leave her children there alone; that appellant came back and stopped a passing car; that the operator offered to take him to town for gasoline but after noticing a woman and children in the car he asked who they were and appellant said it was his wife; that the operator refused to leave them there, pushed their car into town, and appellant left and went to the oil station. This driver testified at the trial and described appellant. The prosecutrix further testified that all the time appellant was gone the boy had the gun in the back seat up by the rear window; that appellant's threats had "scared her" sufficiently that she made no effort to get away to report him; that after obtaining a can of gasoline for her car appellant proceeded back to it, placed some gasoline in it and directed her to drive his car and follow him while he was driving her car; that he showed her



a gun in his possession from the glove compartment of his car and said the "gang" had issued it to him; that she followed him with the children to a dead-end road and appellant told her she was never going home and ordered her to leave the children with the boy in her car and then ordered her to undress in his car and again accomplished an act of sexual intercourse; that one of the children came over to his car crying and she asked to be left alone so she could go home in her car; that she got in it; that her wallet was on the front seat and appellant asked her to hand it to him; that he went through it and took the \$7.00 contained therein; that she did not protest because he had already made so many threats toward her; that she wanted her driver's license back so he threw the wallet to her without the money, and that she then left for home, arriving at about 1:30 a. m.; that she put the children to bed and took a shower and then she went to bed and started crying because of her fear of telling her sleeping husband of the occurrences; that he awakened and inquired the cause of her crying and she revealed the above-mentioned facts to him; that she feared appellant had the license number of her car and if put in jail his "gangs" would call on them.

The law-enforcement officers were called and on October 24th appellant was apprehended and questioned. He stated that on October 19 he was home all afternoon and evening and had not taken his car out. Later, he stated he was home until dark and had been drinking wine; that he then left in his car with the boy, Christopher; that the gun was already in the car; that "Chris" had it for a while and later put it over the back seat; that he was going to kill pigeons; that en route he saw the prosecutrix stalled in her car and out of gasoline; that he put her and the children in his car and stopped near a bridge and told her he had a flat tire; that he did not have sexual intercourse with her because she refused; that no threats were made to her about "gangs" and he never mentioned anything about a gun; that they drove to a

gasoline station, bought some gasoline for each car and she gave him \$2.00 for this purpose; that they drove back to her car, placed the gasoline in it; that she gave him \$5.00 and left for home; and that he did not have sexual intercourse with her at all.

On another occasion, with a shorthand reporter present, he changed his story and said he did have sexual intercourse with her twice there and once later, as described by the prosecutrix, but claimed she consented to these acts; that he told her he probably would not have money enough to get home so she handed him her wallet and told him to take the \$7 contained in it, said he could have it, and that he gave the bill-fold back to her and left.

On this appeal appellant claims: (1) that the testimony of the prosecutrix was inherently improbable and advances his reasons why the evidence falls short of that required to show that since the prosecutrix did not resist, she must have been prevented by threats of great and immediate bodily harm, accompanied by apparent power of execution, citing Penal Code, section 261, subdivision 4; and *People v. Patterman*, 103 Cal.App.2d 322, 229 P.2d 444.

[1-3] A threat may be expressed by acts or conduct as well as by words. *People v. Harris*, 108 Cal.App.2d 84, 89, 238 P.2d 158. Submission through fear is not consent. *People v. Cassandras*, 83 Cal. App.2d 272, 279, 188 P.2d 546. A mere recitation of the testimony of the prosecutrix meets the requirements prescribed by Penal Code section 261, subdivision 4. While the testimony of the prosecutrix, when considered in connection with appellant's story, may well have been argued to the jury in support of his contention that there was not sufficient reasonable resistance offered by the prosecutrix, the jury's conclusion on this subject is final and is supported by the evidence. It cannot be said that her testimony was inherently improbable. *People v. Simpson*, 43 Cal.2d 553, 563, 275 P.2d 31; *People v. Showers*, 90 Cal.App.2d 248, 253, 202 P.2d 814; *People v. Ogden*, 41 Cal.App.2d 447, 455, 107 P.2d 50; *People v. Harris*, supra.

[4, 5] Appellant next argues that the prosecutrix merely handed her money to him without force or fear on his part, and accordingly the robbery charge cannot be supported. It is not necessary that the robbery be accomplished by means of both force and fear. *People v. Borra*, 123 Cal. App. 482, 484, 11 P.2d 403; *People v. Calliham*, 81 Cal.App.2d 928, 185 P.2d 342; Penal Code, Section 211. There was sufficient evidence that the appellant accomplished the acts of sexual intercourse and took the money from the prosecutrix by means of fear. *People v. Enochs*, 113 Cal. App.2d 231, 233, 247 P.2d 929.

[6, 7] The argument that appellant could not be convicted of second degree robbery where the threat by the gun was the inducing cause, because it would be robbery of the first degree, is untenable. The threats made were not only by the use of a gun but there were other threats which could well have placed her in fear to the extent that she parted with her money. At any rate, appellant could not complain that he was prejudiced by the verdict. *People v. Hudson*, 92 Cal.App. 593, 595, 268 P. 687; *People v. James*, 20 Cal.App.2d 88, 90, 66 P.2d 461.

[8] Lastly, appellant claims the prosecutor committed prejudicial misconduct in stating he expected to prove defendant's consciousness of guilt by two named witnesses, i. e., that appellant attempted to escape from jail during his incarceration prior to trial, and made several statements during the day of his intention so to do, particularly when he did not later call such witnesses for this purpose. Appellant objected to the statement at the time. At the outset, counsel for the people announced he was merely stating what he thought his evidence would be and that he fairly believed it was admissible to show consciousness of guilt under *People v. Arnold*, 199 Cal. 471, 497, 250 P. 168. The court, during the arguments, remarked that it thought the jury understood "by this time" that statements of counsel are not to be taken as evidence and that the evidence will come

from the witnesses when admitted by the court. The reason for not calling the witnesses is not indicated. It does not affirmatively appear that there was any bad faith on the part of the prosecutor in making the statement or that the jury was not adequately instructed in respect to the statement of counsel not being considered as evidence in the case. We are convinced that no prejudicial error resulted. *People v. Sing Yow*, 145 Cal. 1, 9, 78 P. 235; *People v. Gordon*, 71 Cal.App.2d 606, 631, 163 P.2d 110; *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243.

Judgment and order denying a new trial affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.



163 Cal.App.2d 568

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

John William CARR and Michael Triandofilos, Defendants and Appellants.

Cr. 6198.

District Court of Appeal, Second District,  
Division 1, California.

Sept. 17, 1958.

Rehearing Denied Oct. 14, 1958.

Hearing Denied Nov. 13, 1958.

Defendants were convicted of first degree robbery and from a judgment of the Superior Court of Los Angeles County and order denying motion for new trial, Joseph M. Maltby, J., the defendants appealed. The District Court of Appeal, Lillie, J., held that, where the case was close on the facts, remarks of the prosecutor in his opening statement coupled with his comments on the evidence in closing argument were so prejudicial as to deprive the defendants of a fair trial.

Judgment and order reversed and cause remanded for new trial.

Fourt, P. J., dissented.

**1. Robbery**  $\Rightarrow$ 24(1)

Mere possession of stolen property is not sufficient to sustain a robbery conviction, but is only a circumstance tending to prove guilt. West's Ann.Pen.Code, § 211.

**2. Robbery**  $\Rightarrow$ 26

In prosecution for robbery, evidence of identity of the defendant who had in his possession some of the stolen property as perpetrator of the offense was sufficient for the jury. West's Ann.Pen.Code, § 211.

**3. Criminal Law**  $\Rightarrow$ 317

In determining the sufficiency of evidence to sustain conviction for robbery, failure of both defendants to testify at the trial could be considered by the jury with other evidence. West's Ann.Pen.Code, § 211.

**4. Robbery**  $\Rightarrow$ 24(1)

In prosecution for first degree robbery, evidence sustained conviction as against defendant in whose automobile some of the stolen property was found in view of his purchase and possession of a pistol with which the victim was allegedly beaten, and in view of the defendant's close association with his codefendant who was identified as one of the victim's assailants. West's Ann.Pen.Code, § 211.

**5. Criminal Law**  $\Rightarrow$ 703

The opening statement of the prosecutor will furnish ground for an assignment of prejudicial misconduct only in exceptional cases, such as lack of good faith or a deliberate attempt to misstate the evidence.

**6. Criminal Law**  $\Rightarrow$ 703

Purpose of the opening statement of the prosecutor is to outline the state's evidence against one accused of crime and to inform the jury what the people intend to prove, and generally the failure to make such proof during trial does not indicate prejudice, particularly in the absence of a showing of bad faith.

**7. Criminal Law**  $\Rightarrow$ 703, 1171(2)

In robbery prosecution, prosecutor's opening statement as to what the evidence would show with respect to stolen property found in the car of the defendant was prejudicial.

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**8. Criminal Law**  $\Rightarrow$ 703, 1171(2)

In robbery prosecution, statement of prosecutor in opening statement that defendant had offered to plead guilty to something less than robbery was prejudicial where the defendant asked only that if defendants pleaded guilty would they get any lesser sentence, since such was not an offer to plead.

**9. Criminal Law**  $\Rightarrow$ 720(6)

The prosecutor may place any fair interpretation upon the facts and may make any reasonable inferences drawn from the evidence.

**10. Criminal Law**  $\Rightarrow$ 719(1)

In robbery prosecution, where there was a lack of evidence to support prior arrests and suspected participation in other robberies and defendants denied to the police that they were involved in the instant robbery, statements of the prosecutor that the defendants when apprehended while driving an automobile were out working at their trade, looking for somebody to rob, was error.

**11. Criminal Law**  $\Rightarrow$ 719(1)

A statement of facts not in evidence by the prosecutor in his argument to the jury constitutes misconduct.

**12. Criminal Law**  $\Rightarrow$ 700

The district attorney as representative of the people must refrain from making inflammatory statements and is bound by somewhat higher degree of fairness than is the ordinary practitioner in a court of law.

**13. Criminal Law**  $\Rightarrow$ 1171(1)

Determination of whether misconduct of the prosecutor has prejudiced substantial rights of defendant rests largely upon the circumstances and appellate court may reverse a conviction when it is apparent from all the facts that there has been a miscarriage of justice, and strength of proof of guilt is an important factor in determining whether the misconduct has prejudiced a defendant.

**14. Criminal Law**  $\Rightarrow$ 1171(1)

Where the case is so closely balanced and guilt has not been so strongly establish-



ed as to render it improbable that the harmful effect of the prosecutor's misconduct may have turned the scales against the accused, such misconduct warrants a reversal.

#### 15. Criminal Law §720(1)

A prosecutor is limited to a fair comment in his argument to the jury and where such a limitation is exceeded in a close case, the comments may be prejudicial.

#### 16. Criminal Law §1171(2, 3)

In robbery prosecution, where the case was close on the facts, remarks of the prosecutor in his opening statement coupled with his comments on the evidence in closing argument were so prejudicial as to deprive the defendants of a fair trial.

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Ellery E. Cuff, public defender, Los Angeles, J. Raymond Cullum, deputy, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondents.

#### LILLIE, Justice.

Defendants were charged by information with a violation of section 211 of the Penal Code and convicted by a jury of first degree robbery. Their motions for new trial were denied and both were sentenced to the state prison. From the judgment of conviction and order denying motion for new trial both defendants appeal.

The defendants offered no evidence at the trial. The following facts are taken from the People's case. On October 8, 1957, at approximately 2 a. m. Robert W. McKenzie, while walking alone on the beach, was accosted and robbed by two men. Neither spoke to him. Although he saw no weapon on either man as he fell in the sand he was struck repeatedly about the head with a heavy object. He was rendered unconscious. When he came to he discovered 80 cents in change, his keys and his wallet containing a campfire permit, badge, identification card, credit cards, insurance card and driver's license were

missing. He called police who searched the area and found nothing. McKenzie suffered two lacerations on the side of the head, multiple bruises and abrasions on the face, a cut lip, two broken teeth and a fractured rib.

On the same morning, one and one-half hours later, police stopped a slow-moving car owned by defendant Triandofilos in which he was riding and which defendant Carr was driving. The rear license plate was partially obscured by mud and dirt. Upon being asked to produce his driver's license Carr walked back to the trunk compartment, opened it with a key, and searched in a small bag wherein officers later found McKenzie's campfire permit (Exhibit 2) and his keys (Exhibit 3). Both defendants were arrested and when the car was searched police found two loaded guns, a p.38 and a .45 automatic pistol, only one of which was offered into evidence. Defendants claimed they had been burglary victims and that for their protection Triandofilos had purchased the guns in another state.

A week later in the Culver City police station McKenzie identified Carr from a 15-prisoner lineup as one of his assailants. He could not identify the second man and at no time has claimed defendant Triandofilos was the other involved.

Both defendants told police they had left New York together several weeks before and had been together since. Carr explained they had been driving around waiting for morning so they could see a man about getting work. He claimed he had found McKenzie's campfire permit and keys in a service station restroom shortly before his arrest, had tossed them into his bag in the trunk of the car and told Triandofilos, who had been asleep in the car, nothing about them. Triandofilos, who told police he had never been in trouble before, denied knowing anything about the two items. Both defendants denied to the police they had robbed and beaten McKenzie.

At the trial McKenzie identified Carr as one of the men whom he "believed" had at-

tacked him and upon further query by the prosecuting attorney as to whether it was his best recollection that defendant Carr was one of the two McKenzie responded, "Yes, it is." Asked on cross-examination what led him to believe Carr was the man he answered, "I saw him with the light behind him and he was silhouetted against the light. He was a man of stocky build and at the time he had light blond or light brown hair \* \* \*" McKenzie admitted he was unable to see their features and could give no further description of either man. Dr. Rayola who examined the victim's wounds testified that they were caused by an instrument similar to the .45 automatic pistol. Martin Klein, forensic chemist, examined the .45 automatic and found traces of blood on the rear portion of the "sleeve" of the weapon but because the quantity was so small could not determine its age or even whether it was human blood. No traces of hair were found on the weapon.

Defendants did not testify at the trial and no evidence was offered on their behalf.

Appellants contend first that the evidence was insufficient to sustain the conviction and, second, that the deputy district attorney was guilty of prejudicial misconduct.

The rule relating to an appeal court's review of the evidence is well stated in the case of *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397, and *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911. Unquestionably the evidence against defendants is largely circumstantial but it is with this principle of appellate review in mind that we examine the main circumstances relied upon by the prosecution to connect defendants with the perpetration of the robbery.

[1,2] When arrested Carr had in his possession two items belonging to McKenzie, a campfire permit and some keys. This fact, appellants claim, without other suspicious or incriminatory circumstances is insufficient to sustain the conviction. Such evidence of course is admissible, tending to show the identity of the perpetrator of an offense, but mere possession of stolen

property alone is not sufficient to sustain a conviction. It is only a circumstance tending to prove guilt. However we find in this record the "slight corroborative evidence of other inculpatory circumstances" necessary to sustain the conviction. *People v. Wisenfeld*, 36 Cal.2d 758, 763, 227 P.2d 833, 836; *People v. Holland*, 82 Cal.App.2d 310, 312, 186 P.2d 58; *People v. Leary*, 28 Cal. 2d 727, 735, 172 P.2d 34. We refer to the identification of Carr as one of the assailants and defendants' possession of the .45 automatic. The jury was not bound to, and did not, accept Carr's explanation about finding the stolen items even though it could have reasonably inferred that had he robbed McKenzie he probably would have kept the more valuable part of the loot—the driver's license and identification cards.

As to the identity of those who beat and robbed him McKenzie's description was vague. He described only one, as of stocky build with light hair. However a week later in a police lineup he identified Carr and again at the trial pointed to him as one whom "I believe attacked me." On further examination he affirmed that to his best recollection Carr was one of the men.

It is true that McKenzie's opportunity to observe the two men was not only limited but under most difficult conditions and that other evidence in the record might well have convinced the jury that McKenzie's identification of Carr, under the circumstances, was not worthy of belief. However we might feel about the weakness of Carr's identification, the jury in evaluating and weighing the evidence had a right to, and did, accept McKenzie's testimony. The evidence that it was dark at the time of the robbery; that the victim had been drinking, was nearsighted and wore glasses which had been knocked off his face; that when he fell to the ground he put his hands over his head and at no time saw the features of the two men or heard their voices; and that McKenzie was under great fear and stress and received head blows severe enough to render him unconscious, only served to create a question of fact for the jury. The resolution of the conflicting evi-

dence is for the trier of fact. *People v. Huizenga*, 34 Cal.2d 669, 213 P.2d 710; *People v. Ross*, 120 Cal.App.2d 882, 262 P.2d 343; *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397; *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911.

Much the same may be said concerning the inference that the .45 automatic could have been the assault weapon. Appellants contend such an inference was unreasonable.

Possession of the gun by defendants, one of whom was identified by the victim and who had in his possession some of the victim's property, reasonably supports the inference that it was utilized in causing the injuries described by the victim as having been inflicted "with some heavy object," and by Dr. Rayola as possibly having been caused "by a very hardy instrument" and "by such kind of instrument." (.45 automatic.)

[3,4] As for defendant Triandofilos no one identified him or described him as being involved in the robbery. Although two items of stolen property were found in his automobile they were in the immediate possession of Carr who claimed he found them. Triandofilos not only denied any knowledge of the stolen items but denied to police any participation in the crime. Any inference that Triandofilos participated in the robbery must rest on the presence of some of the stolen property in his automobile, his purchase and possession of the .45 automatic and upon his close association with Carr who was identified as one of the assailants. Of some importance in considering the sufficiency of the evidence is the failure of both defendants to testify at the trial, which the jury could consider with the other evidence. *People v. Ashley*, 42 Cal.2d 246, 267 P.2d 271; *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3; *People v. Chapman*, 156 Cal.App.2d 151, 319 P.2d 8.

Circumstantial as the People's case may be, in assuming the existence of every fact which the jury could have reasonably deduced from the evidence we conclude that it was legally sufficient to support the ver-

dict against both defendants and appellate interference with the determination of the jury is not justified.

Of greater significance however is appellants' claim that the misconduct of the deputy district attorney was so prejudicial as to have precluded them from having a fair trial. It is because of this contention we have set out in detail the close questions of fact presented to the jury relating particularly to the identity of Carr and the participation of Triandofilos who was convicted mainly "by association." The following specifications of misconduct of the prosecuting attorney present a substantial basis for attacking the verdict.

In his opening statement the deputy district attorney, referring to the arrest of defendants, told the jury "Upon further search of the car, the officers found Mr. McKenzie's personal effects that had been in his wallet, photograph identification, a camp fire permit issued to him; *all* of his identification as to where he worked, and *all* that had been in his wallet were in the trunk of the car; his keys \* \* \*" (Emphasis added.) The record discloses that out of the change, keys, wallet, campfire permit, badge, employment identification card, credit cards, insurance card and driver's license taken from the victim, only the keys and the campfire permit were found in defendants' car. Although apparently most of the victim's property was recovered, the record is silent as to when, where and by whom. That such overstatement of what the evidence would show was prejudicial to defendants is clear from the reasonable inferences the jury might well have taken from it. Considering the state of the evidence and particularly the fact that although two loaded guns were found in defendants' car only one was produced and offered in evidence by the prosecuting attorney, the jury could have fairly concluded that all of the victim's property was found in the car; but only two items were produced and placed in evidence. Those not offered in evidence, the credit cards, identification cards, badge and driver's license are all items of par-



ticular value to one bent on larceny. It was an entirely reasonable inference that defendants actually had these items and intended to use them in what the deputy district attorney later told the jury they were doing that night—"working at their trade and looking for somebody to rob." Taking into consideration defendants' outright denials to police that they were in any way involved in the robbery, Carr's not unreasonable explanation as to how he came by the two stolen items, the circumstances surrounding the identification of Carr, and that the campfire permit and keys were the only part of the stolen items found in the car, the jury otherwise could well have believed that the defendants did not rob McKenzie because had they done so they most likely would have kept the most valuable portion of the loot which could no more incriminate them than the permit bearing the victim's name and would have better served for false identification.

[5-7] It is well settled that the opening statement of the deputy district attorney will furnish ground for an assignment of prejudicial misconduct only in exceptional cases—some involve lack of good faith or a deliberate attempt to misstate the evidence (*People v. Lucas*, 160 Cal.App.2d 305, 324 P.2d 933; *People v. Alexander*, 41 Cal. App.2d 275, 106 P.2d 450, 916; *People v. Berryman*, 6 Cal.2d 331, 57 P.2d 136; *People v. Emme*, 120 Cal.App. 9, 7 P.2d 183), and some disclose such flagrantly improper conduct as to work a legal prejudice to the defendant. *People v. Arnold*, 199 Cal. 471, 250 P. 168. The purpose of the opening statement of the prosecuting attorney is to outline the state's evidence against the one accused of crime and to inform the jury what the people intend to prove. Generally the failure to make such proof during the trial does not indicate prejudice, particularly in the absence of showing of bad faith. However it is the substance and implication of a statement or the effect of an act which really define what the law recognizes as prejudicial misconduct. *People v. Planagan*, 65 Cal.App.2d 371, 150 P.2d 927. Whereas in the case at bar the

unwarranted statement might not alone have prejudiced the defendants, the cumulative effect on the jury of this and other unjustified comments of the deputy district attorney justifies a contrary conclusion particularly in view of the state of the evidence.

As to the prosecuting attorney's good faith in including *all* of the stolen property, in view of the importance of the circumstance of possession of some of it, and that without it he in all probability could not have made a case against defendants, the deputy district attorney must have known in advance that his witnesses, Officers Bennett, Good and Perkins, would testify that only the two items were found in defendants' car. Of interest in this connection is the case of *People v. Bentley*, 131 Cal.App. 2d 687, at page 690, 281 P.2d 1, at page 3, in which the court stated: "The district attorney knew, or should have known, the testimony the officer was going to give \* \* \* Every prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand." Although appellant does not contend that the deputy district attorney was guilty of a deliberate misrepresentation of the evidence it is obvious in view of the weaknesses of the People's case that the prosecutor was willing to, and did, take advantage of every opportunity to influence the jury against defendants whether it was created by carelessness or deliberation on his part. To say that the deputy district attorney's comment to the jury at the outset of his opening statement that what he was about to tell them was not evidence but only what he intended to prove; and the court's instruction to the jury that any statement of counsel concerning the facts must not be regarded as evidence, cured the effect of overstatements and misstatements of the evidence by the prosecuting attorney, is to completely ignore their practical and lasting effect on a jury, and the inability of laymen to completely reject and erase from their minds damaging statements they have heard.

[8] This is not the only comment made by the deputy district attorney in his opening statement and later unsupported by the evidence. He continued, "In the course of this conversation, Mr. Triandofilos asked the police officers in Long Beach if there was any chance to reduce this charge and permit them to plead to something less than robbery upon which they were booked." Defendants' motions for mistrial were denied. At the close of the People's case the prosecuting attorney, out of the hearing of the jury, offered to prove that "The two defendants were together at the jail elevator, Mr. Triandofilos said to Mr. Lambert and Mr. Ragsdale, 'If we plead guilty can we get any lesser sentence?'" The trial court's ruling is not clear, but it did not permit the statement to be received in evidence.

It is true that an offer on the part of a defendant to plead guilty to the offense charged, or to a lesser offense, is admissible against him as constituting an implied admission of guilt. However there is here only the query, "If we plead guilty can we get any lesser sentence?" We fail to see wherein there is an offer to plead. It is at most an inquiry about what defendants could expect if they decided to enter a plea. The prosecuting attorney's offer of proof fails to come up to the "offer to plead" admissible against a defendant and the trial court's refusal to permit the evidence to go before the jury was undoubtedly proper. The deputy district attorney exceeded permissible bounds in informing the jury that Mr. Triandofilos had asked police officers if they would permit them to plead guilty to a lesser offense. His assertion to the jury finds no support either in the evidence or his offer of proof.

During his closing argument the deputy district attorney told the jury " \* \* \* these men were driving very slowly down Washington Boulevard in a westerly direction with a gun on the floor under each one of them, and I say they were out working at their trade and looking for somebody to rob," to which objection was made and overruled.

[9-11] The prosecuting attorney may place any fair interpretation upon the facts and may make any reasonable inference fairly drawn from the evidence. *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1. However, in view of the lack of any evidence to support prior arrests, suspected participation in other robberies or any kind of trouble with the law and their denials to police that they were in any way involved in the McKenzie robbery, the deputy district attorney's use of the phrase "working at their trade" was entirely unwarranted. The word "trade" connotes an occupation or regular means of livelihood and is defined in *Websters New International Dictionary*, second edition (unabridged) at page 2683: "The business one practices or the work in which one engages regularly; one's calling; occupation; gainful employment; means of livelihood." Likewise the prosecuting attorney's use of the phrase, "I say" might well have led the jury to conclude he personally had information that defendants had previously engaged in robbery, made their living robbing people and were professionals. It is almost too well settled for citation of authority that "statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." *People v. Kirkes*, 39 Cal.2d 719, 724, 249 P.2d 1, 4. Several cases of interest here are *People v. Shaffer*, 150 Cal.App.2d 287, 309 P.2d 475, in which the court held the deputy district attorney's implication that defendant was in the business of selling narcotics was prejudicial misconduct because there was no evidence to justify it; and *People v. Vienne*, 142 Cal.App.2d 172, 297 P.2d 1027, 1028, in which the prosecuting attorney told the jury, "Now if you want to put these professional gunmen away, you and other juries like you are going to have to do it." Said the court at page 174 of 142 Cal.App. 2d, at page 1028 of 297 P.2d: "There was no evidence which would indicate that the defendant in this case was a professional gunman, and the remark of the deputy was unwarranted."

[12] While it is easy to understand counsel becoming excited in the course of the trial and while it is natural and necessary that counsel for the people as well as counsel for the defendant shall have the mind of an advocate, still the district attorney as a representative of the people is bound to refrain from making inflammatory statements and is bound by a somewhat higher duty of fairness than is the ordinary practitioner in a court of law. *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481.

[13-16] The determination of whether misconduct of the prosecuting attorney has prejudiced substantial rights of a defendant rests largely upon the circumstances of each case and an appellate court may, and indeed it is its duty, to reverse a conviction when it is apparent from all the facts that there has been a miscarriage of justice. *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1. Strength of the proof of guilt is an important factor to consider in determining whether misconduct has prejudiced a defendant (*People v. Byrnes*, 84 Cal.App.2d 64, 190 P.2d 286; *People v. Lucas*, 160 Cal. App.2d 305, 324 P.2d 933), and where the case is so closely balanced and guilt has not been so strongly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against the accused, such misconduct has consistently been deemed ground for reversal. *People v. Shaffer*, 150 Cal.App.2d 287, at page 296, 309 P.2d 475, at page 480; *People v. Ford*, 89 Cal.App.2d 467, 200 P.2d 867; *People v. Beal*, 116 Cal.App.2d 475, 254 P.2d 100. A prosecutor is limited to fair comment in his argument to a jury and when such limitation is exceeded in a close case, the comments may be prejudicial. *People v. Johnson*, 153 Cal.App.2d 564, 314 P.2d 751. The evidence at bar is not so strong in its support of the verdict that it does not appear reasonable to believe that the misconduct of the deputy district attorney contributed materially to the jury's determination of guilt. This was a close case on facts. The remarks of the prosecuting attorney in his opening statement, coupled with his comment on the evidence

in his closing argument, viewed in their entirety and cumulative effect in relation to the state of the evidence, convince us that the misconduct of the deputy district attorney was so prejudicial as to result in depriving defendants of a fair trial.

Judgment and order denying motion for a new trial are and each is reversed as to each defendant and the cause remanded for a new trial.

WHITE, P. J., concurs.

FOURT, Justice.

I dissent:

The appellants have made two main contentions: first, that the evidence was insufficient to sustain the convictions, and secondly, that the district attorney was guilty of misconduct.

The statement of facts as set forth in the majority opinion, while sufficient, does not include many matters which are important. However, I will not extend the factual statement further for the reason that the majority has correctly ruled and come to the conclusion that there was, in any event, sufficient evidence to find the appellants guilty.

Considering the claimed misconduct of the district attorney in his opening statement. There seemingly is no claim or contention that there was any bad faith upon the part of the deputy district attorney in this connection. In fact, at the time of the argument on the motion for a new trial, which was made upon the grounds of the misconduct of the district attorney, counsel for the defendants said: "In making this remark, I refer in no way or mean to suggest that the District Attorney was acting in any way in bad faith," and again in the same argument counsel stated, "Again, I want to make it perfectly clear to the Court, the District Attorney, and the record, that I am not attempting to imply that he was acting in bad faith."

The deputy district attorney told the jury, at the very start of his opening statement, the following:



"\* \* \* Ladies and Gentlemen of the jury: Most of you have had experience in criminal cases, so it may be redundant to say this to you. What I may say by way of an opening statement is not evidence in the case. The evidence must come from the lips of the witnesses or physical objects which are introduced in evidence, and not from the statements of either one of the lawyers.

"If you will keep that in mind, I will attempt to trace briefly and *Cronologically* the events as we expect and intend to prove them."

Likewise, the court instructed the jury to the following effect: "As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; \* \* \*."

The first statement made by the deputy district attorney which is questioned is as follows:

"Upon further search of the car, the officers found Mr. McKenzie's personal effects that had been in his wallet, photograph identification, a camp fire permit issued to him; all of his identification as to where he worked, and all that had been in his wallet were in the trunk of the car; his keys, and then the officers communicated with the various other authorities, including the Long Beach Police Department, and later the two defendants were taken from the Culver City custody and brought to Long Beach."

The testimony disclosed that the keys, the nail clip and the camp fire permit were found with the defendants. The camp fire permit cited upon its face the name of the victim and his home address. The Long Beach police had, after the original investigation, picked up some other items which had been in the possession of the victim, some of which, namely, an "I.D. card and driver's license," had been seen by the victim in the possession of the inspector of the police department, but the victim did not "know what is all in there."

There is no showing whatsoever in this case, nor can there be any, that the statement that "all" of the property of McKenzie was found in the possession of the defendants was made in bad faith, or with the view of distorting the People's case. In *People v. Lucas*, 160 Cal.App.2d 305, at page 308, 324 P.2d 933, at page 934, it was said: "The opening statement did say that 'the pictures will show' that the final shot was fired into decedent's head while he lay on the floor. In fact this was not established, but was disproved by evidence produced by defendant. However, there is no showing that the erroneous statement by the prosecutor was made in bad faith. In the absence of a positive showing of a deliberate attempt to misstate the case, such a remark cannot constitute prejudicial misconduct. *People v. Alexander*, 41 Cal.App. 2d 275, 282, 106 P.2d 450, 916. Appellate courts recognize that such an overstatement reacts against the party making it, and thus often is not prejudicial to the opposing party. *People v. Berryman*, 6 Cal.2d 331, 336, 57 P.2d 136, and cases there cited. In the case at bar, defense counsel made effective use of the overstatement in his argument, quoting the opening statement and pointing out to the jury the respects in which the proof fell short of sustaining its assertions." Also, see *People v. Alexander*, 41 Cal.App.2d 275, at pages 282-283, 106 P.2d 450, 916, at page 454, where it is said:

"In the absence of a positive showing of a deliberate attempt to misstate the case, such remark cannot constitute prejudicial misconduct. (Citing cases.) Also no objection was made to this remark nor was the alleged misconduct called to the attention of the court or jury at the close of the prosecution's case. We cannot assume that a public official deliberately injected false accusations in his opening statement. In the absence of any showing we must assume it was that officer's honest belief that he would introduce such evidence. It may have been that the witnesses were not available or that owing to the development of the trial such evidence might by him have been deemed unnecessary and immaterial."

In my opinion the statement complained of had no effect whatsoever upon the final outcome of the case.

The next statement made by the deputy district attorney and complained of by the appellants is as follows:

"In the course of this conversation, Mr. Triandofilos asked the police officers in Long Beach if there was any chance to reduce this charge and permit them to plead to something less than robbery upon which they were booked. Mr. McKenzie will identify, not completely, Mr. Carr, and will not be able to identify Mr. Triandofilos."

At the conclusion of the testimony of a police inspector (cross-examination by appellants' counsel), the following occurred:

"Mr. Cullum (Deputy Public Defender): Nothing further. Might we have our recess at this time and we will discuss a legal matter with the Court?

“(The following proceedings had at the bench out of the hearing of the jury:)

"The Court: My inclination would be not to admit testimony of the defendant offering to plead guilty to a lesser offense. I can think of many reasons why a defendant would.

"Mr. Cochran (Deputy District Attorney): Let me refresh the recollection of the Court to the proposed testimony: The two defendants were together at the jail elevator. Mr. Triandofilos said to Mr. Lambert and Ragsdale, 'If we plead guilty can we get any lesser sentence?' That is a little different than the Court's contention. If there is any question about the importance of it I am sure there are cases in Fricke which the Court may have read, but are not in your mind.

"The Court: They are not in my mind. If you will obtain them and we will discuss them after the recess outside of the presence of the jury.

“(In open court.)

"Mr. Cullum: Before we commence, may counsel approach the bench?

"The Court: Yes.

“(Discussion at the bench.)

"Mr. Cochran: People rest.

"Mr. Collum: The defense rests.

"The Court: Proceed with the argument."

It is obvious to me that the judge indicated to the deputy district attorney that he would not permit the receipt of evidence of any conversation to the effect that defendant Triandofilos had asked the officers if there was any chance to reduce the charge and permit them to plead to some lesser offense.

In my opinion, if there was evidence which could have been presented to demonstrate that the defendant Triandofilos did ask the officers, in effect, if they could plead guilty to a lesser charge, such was admissible. It was appropriately stated in *People v. Cooper*, 81 Cal.App.2d 110, at pages 117-118, 183 P.2d 67, at page 71:

"Other material evidence was the implied admission of guilt of the charges herein when he offered to plead guilty to petty theft. In *People v. Carroll*, 92 Cal. 568, 28 P. 600, an officer testified that the defendants, who were arrested upon a charge of robbery, asked him if he would allow them to plead guilty to petty theft. On appeal therein it was contended that the conversation with the officer was not admissible, upon the ground that the defendants were not acting voluntarily. The court held therein that the conversation was voluntary and was properly admitted. In *People v. Boyd*, 67 Cal.App. 292, 227 P. 783, the defendant was charged with grand theft and obtaining money under false pretenses. When that case was called for trial, after several continuances had been had, defendant therein offered to plead guilty to obtaining money under false pretenses if the case would be continued to another date. That case was tried, and evidence therein as to the offer to so plead was received over the objection of the defendant, and defendant was convicted of obtaining money under false pretenses. On appeal therein the District Court of Appeal held that such objection should have been sustained, but the Supreme Court in denying a petition for a

hearing disapproved that part of the opinion and held that the trial court was right in overruling the objection and receiving the evidence as to the offer to plead guilty to one of the offenses charged. The Supreme Court said therein at pages 302 and 303 of 67 Cal.App., at page 786 of 227 P.: "The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. \* \* \* Such admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely, its weight and sufficiency being proper subjects for consideration by the jury. \* \* \* The defendant's own admission, voluntarily made, was clearly competent evidence against him."

From the colloquy at the bench and out of the presence and hearing of the jury, it may be gathered that apparently Triandofilos did not, in fact, ask if a lesser charge could be filed, but rather asked in effect, "if we plead guilty can we get any lesser sentence?" Depending upon the circumstances under which the statement was made, it may or may not have been an admission. In any event, we are not concerned about that particular matter here because the testimony was never presented to the jury, and from the record before us, such presentation was not because of any bad faith upon the part of the prosecutor, but rather because of an indication of the court that the testimony would not be admitted in any event. There is not the slightest showing by the appellants that the statement made by the deputy district attorney had any adverse effect whatsoever as to their status.

Now turning to the statements made by the deputy district attorney in the final argument. The statement in question is as follows:

"Another thing that Mr. Cullum did not mention was the fact that these men were driving very slowly down Washington Boulevard in a westerly direction with a gun on the floor under each one of them, and I say

they were out working at their trade and looking for somebody to rob.

"Mr. Cullum: I feel there is no evidence to support this statement of Mr. Cochran's. Objected to as an improper statement.

"The Court: I took it as an inference that the District Attorney was drawing. There is no evidence except what we have heard in the courtroom except that there was their trade. It is up to the jury to draw whatever inference they wish.

"Mr. Cochran: I am presenting an inference they may draw. They were not very affluent. Here was a piece of hose, an old coffee can, a rough funnel, what were those there for: The rubber hose smelled of gasoline.

"Mr. Cullum: I apologize to Mr. Cochran for the purpose of interrupting his argument: The purpose of closing argument is to answer points in the argument raised by me and he is going into points not gone into by me or in his opening argument.

"Mr. Cochran: I am answering Mr. Cullum on the reasonableness.

"The Court: The objection is overruled.

"The Cochran: Those are things you have a right to take into consideration. They have not been of any assistance to this jury by taking the stand and explaining any of the circumstances placed against them if they did not have some very compelling reason that kept them off of the witness stand, you are deprived of having an opportunity to see either of them under oath on the witness stand or to see them cross-examined."

The majority opinion indicates that "\* \* \*" in view of the lack of any evidence to support prior arrests, suspected participation in other robberies or any kind of trouble with the law and their denials to police that they were in any way involved in the McKenzie robbery," the statement was unwarranted. I am not aware of any rule to the effect that the prosecution must show prior arrests or suspected participation and other robberies, or some other conflict with the law, before the district attorney can draw a proper



inference in an argument before a jury. I am at a further loss to understand how the prosecution could have introduced evidence of prior arrests under the circumstances of this case, unless the defendants took the witness stand and testified in their own behalf, and that they refused to do.

In this particular case there is nothing in the record which would indicate that the defendants were timid and shy and therefore thought that they might not be good witnesses in their own behalf. In my view, if they were wholly innocent they had every good reason to take the witness stand and to tell the jury just what the facts of the matter were and what they had been doing. From what was said by their own counsel, I am inclined to the belief that each of them had some previous record and they did not care to testify, and then be impeached by a showing which could have been made. In this connection, their own attorney apparently advised them not to testify, and apparently so stated to the jury. He said at the conclusion of the trial, "There may be some doubt as to the eligibility of one of these defendants, some doubt of his eligibility for probation." Both defendants, in fact, asked the court to impose sentence at once, without any application for probation or pre-sentence report. At the time of sentence counsel for the defendants said: "In my opinion, the defendant Triandofilos is not eligible for probation," and "In review of the facts in this case, and my knowledge of the previous record of the defendant Carr, would lead me to believe that the Court probably would not grant probation in the case \* \* \*." Later on, in the same proceeding the court questioned the defendants as to their desire to be sentenced forthwith, and Triandofilos himself stated that he was ineligible for probation, and Carr stated in effect that because of his background he wanted to be sentenced then and there. As I view it, the defendants preferred not to explain to the judge how and why they happened to be along the streets, driving an automobile in the early morning hours with a license number substantially

covered to the end that it could not be read, and with two fully loaded automatic pistols immediately at hand; nor did they care to explain how the blood got onto the slide of the .45 automatic which was in their immediate possession; nor did they care to explain to the jury how they happened into the possession of certain items which had been forcibly taken from the possession of the victim.

The prosecution has a wide field of discretion in a closing argument. As stated in *People v. Eggers*, 30 Cal.2d 676, at page 693, 185 P.2d 1, at page 10: "It is the province of a district attorney to state to a jury the various conclusions that he draws from the evidence, and to make it clear to the jury what conclusions in his opinion should be drawn from the evidence introduced, so long as he keeps within the scope of conclusions which may properly be drawn." *People v. McKenzie*, 12 Cal.App.2d 614, 615, 616, 55 P.2d 1200. "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." *People v. Sieber*, 201 Cal. 341, 355-356, 257 P. 64, 70. In the argument before the jury, any reasonable inference may be drawn from the evidence, and it is a matter within the discretion of the trial court to determine whether counsel stays within the permissible range of discussion. *People v. Hoyt*, 20 Cal.2d 306, 318, 125 P.2d 29. Assuming that, giving effect to these rules, counsel 'illogically deduced' that a finding of torture could be inferred from the evidence, at least in the absence of objection, it does not amount to misconduct which has prejudiced defendant's rights."

I have read the entire opening statement, the opening argument and the closing argument, and in my view there was nothing said which was prejudicial error,

nor which brought about a miscarriage of justice. There was evidence from which the judge and jury believed that the defendants had robbed McKenzie, and that they were later found roaming the streets in an automobile, the rear license number of which was obscured, and that the defendants were armed with loaded guns in their immediate possession (one of which had blood upon it); that the defendants were unemployed and had no stationary place of abode, and had very little money in their immediate possession. I am of the opinion that for the district attorney to state what he did state, and to infer that the defendants were plying their trade, was not prejudicial error. The defendants never explained to the jury what their business or occupation was, and by their course of conduct any proper inference could be drawn and argued to the jury. Robbery, in my opinion, was not an unreasonable inference under the circumstances.

Lastly, the appellants complain of the prosecutor referring to their poverty, or that they had a small amount of money. The appellants themselves have answered that contention by admitting that they made no objection to the introduction of such evidence as to what property they had in their possession, and further that they made no objection to the comment upon their financial standing by the deputy district attorney. Such an objection cannot be made for the first time upon appeal. *People v. Lindsey*, 90 Cal.App.2d 558, 567, 203 P.2d 572; *People v. Sellas*, 114 Cal.App. 367, 378, 300 P. 150; *People v. Agajanian*, 97 Cal.App.2d 399, 405, 218 P.2d 114. However, in my opinion, if there had been an objection, it would not have been well taken and should have been overruled.

As I view it, the appellants in this case were properly convicted of robbery. The evidence was ample and sufficient. There was no error. However, assuming that there was error, it was not prejudicial nor sufficient to warrant a reversal. I would affirm the judgment.

Hearing denied; SHENK, SCHAUER and McCOMB, JJ., dissenting.

**Russell S. MUNRO**, Director of the Department of Alcoholic Beverage Control, State of California, Petitioner and Respondent,  
v.

**The ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD** of the State of California and **Helen M. Richards**, Respondent,  
**Helen M. Richards**, Appellant. \*

Civ. 9335.

District Court of Appeal, Third District,  
California.

Sept. 23, 1958.

Hearing Granted Nov. 19, 1958.

Proceeding for writ of mandate to compel the Alcoholic Beverage Control Appeals Board to reverse its decision and to reinstate the decision of the Department of Alcoholic Beverage Control which had denied an application for an on-sale beer license for a small restaurant. From a judgment of the Superior Court, Sacramento County, Gordon A. Fleury, J., the applicant for the license appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that evidence sustained the department's findings that premises were in a residential area, that there were inadequate off-the-highway parking facilities and that issuance of license would be contrary to public welfare and morals and justified the denial of the application.

Judgment affirmed.

Opinion, 325 P.2d 533, vacated.

## 1. Intoxicating Liquors ⇐72

The Department of Alcoholic Beverage Control is agency upon which constitution has conferred limited judicial powers, and its decisions on factual matters must be affirmed if there is substantial evidence to support them. West's Ann.Const. art. 20, § 22.

## 2. Mandamus ⇐172

In mandamus proceeding to compel Alcoholic Beverage Control Appeals Board to reverse its decision and reinstate decision of Department of Alcoholic Beverage Control.

\* Opinion vacated 340 P.2d 1.

trol which had denied application for an on-sale beer license for a small restaurant, the trial court properly looked to the department's decision to determine if it was supported by substantial evidence, notwithstanding claim that it was the decision of the appeals board that was under attack. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

### 3. Intoxicating Liquors ⇨75(7)

On appeal from decision of Department of Alcoholic Beverage Control that application for on-sale beer license for small restaurant should be denied, appeals board was simply called upon to determine whether findings of department were supported by substantial evidence in light of whole record, and board was not permitted to exercise independent judgment on facts. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

### 4. Intoxicating Liquors ⇨75(7)

The decisions of Department of Alcoholic Beverage Control are final, except that they are subject to review for excess of jurisdiction, error of law, abuse of discretion and insufficiency of evidence. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

### 5. Intoxicating Liquors ⇨75(7)

When jurisdiction of Department of Alcoholic Beverage Control to grant on-sale beer license for small restaurant depends upon establishment of public welfare and morals by reason of applicant's premises being in residential district and inadequacy of off-the-highway parking facilities, reviewing court may examine evidence upon which findings of department to that effect are based, and if findings are contrary to evidence, read as a whole, or are without meritorious support in evidence, findings of department, and decision based thereon, may be set aside. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

### 6. Intoxicating Liquors ⇨75(7)

Findings of Department of Alcoholic Beverage Control, in proceeding on application for an on-sale beer license for small

restaurant, that the premises were in a residential area, that there were inadequate off-the-highway parking facilities and that issuance of license would be contrary to public welfare and morals, were supported by substantial evidence. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

### 7. Intoxicating Liquors ⇨69

Although neither Constitution nor Alcoholic Beverage Control Act, nor rules adopted by Department of Alcoholic Beverage Control prohibit granting of on-sale license in residential area, when applicant's premises are not proper place to have license by reason of circumstances such as noises incident to even ordinary operation of business, annoyances to occupants of homes within area, insufficiency of parking area in creation of traffic hazard in case automobiles are parked along road contiguous to applicant's premises, department has power to deny application for license. West's Ann.Bus. & Prof.Code, § 23000 et seq.; West's Ann.Const. art. 20, § 22.

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Richard tum Suden, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., by William T. Chidlaw, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment affirming the decision of the Department of Alcoholic Beverage Control and reversing the decision of the Alcoholic Beverage Control Appeals Board.

Appellant applied for an on-sale beer license for a small restaurant which she owned and operated. Approval of the application was recommended by an investigating officer of the department. However, protests were filed by residents in the vicinity and, after a hearing thereon, an officer of the department found that the premises were in a residential area; that there were inadequate off-the-highway parking facilities and that issuance of the license would be contrary to the public



welfare and morals. His recommendation that the protest be sustained and the application denied was adopted by the department. Upon appeal from the decision, the Alcoholic Beverage Control Appeals Board, hereinafter referred to as the Appeals Board, found that the findings of fact were not supported by substantial evidence in the light of the whole record, and the decision of the department was reversed. The department petitioned for a writ of mandate to compel the Appeals Board to reverse its decision and reinstate that of the department. As the interested party, appellant appeared and answered in the mandamus proceedings, wherein the trial court found that the reversal of the decision of the department by the Appeals Board on the ground that it was not supported by substantial evidence was erroneous, arbitrary and capricious and constituted a prejudicial abuse of discretion, and judgment was entered accordingly. This appeal followed.

[1,2] Appellant first contends that the trial court erred in looking to the department's decision to determine if it was supported by substantial evidence, since it was the decision of the Appeals Board that was under attack. There is no merit in this contention. The rule of law applicable to the review of the decisions of the Department of Alcoholic Beverage Control is stated in *Brice v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 315, 320, 314 P.2d 807, 810, as follows:

"\* \* \* That agency is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in alcoholic beverage control matters. Being an agency upon which the Constitution has conferred limited judicial powers, its decisions on factual matters must be affirmed if there is substantial evidence to support them. Cal.Const., art. 20, sec. 22; *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545; *Kirchhubel v. Munro*, 149 Cal.App.2d 243, 308 P.2d 432; *Molina v. Munro*, 145 Cal.App.2d 601, 302 P.2d

818; *Dethlefsen v. State Board of Equalization*, 145 Cal.App.2d 561, 303 P.2d 7; *Griswold v. Department of Alcoholic Beverage Control*, 141 Cal. App.2d 807, 297 P.2d 762. In other words, on the mandamus proceeding, the trial court was not permitted to exercise an independent judgment on the facts, as it may do in reviewing the findings of legislatively created state-wide administrative agencies, but was required to give to the factual determinations of the appellant the same deference that an appellate court must give to the findings of a trial court. Thus, the trial court was simply called upon to determine whether the findings of the Board were supported by substantial evidence."

[3] There is nothing in Section 23084 of the Business and Professions Code or in Article XX, Section 22, of the California Constitution which warrants departure from that rule, nor is there any reason why the rule should not control the Appeals Board on appeal to that body. Thus, the Appeals Board was simply called upon to determine whether the findings of the department were supported by substantial evidence in the light of the whole record. It was not permitted to exercise an independent judgment on the facts as contended for by appellant.

More serious questions are presented upon the issues as to (a) whether there is substantial evidence in the record to support the findings that the area is residential in nature and does not afford adequate off-the-road parking facilities, and (b) if so, whether the denial of an on-sale beer license constituted an arbitrary abuse of the discretion vested by the California Constitution in the department.

Before discussing the facts, a brief reference should be made to the rules of law which we feel are applicable to a determination of the question.

[4, 5] It is well established that the decisions of the department are final, except that they are subject to review for excess

of jurisdiction, error of law, abuse of discretion and insufficiency of evidence. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545. It was held in *Schaub's, Inc., v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 858, 864, 315 P.2d 459, that when the jurisdiction of the department to grant or refuse a transfer of a license (in this case the granting of a license) depends upon the establishment of an ultimate fact (in the instant case that it would be contrary to the public welfare and morals by reason of appellant's premises being in a residential district, and that off-the-highway parking facilities would be inadequate) the reviewing court may examine the evidence upon which the findings of the department to that effect are based, and if the findings of the department are contrary to the evidence, read as a whole, or are without meritorious support in the evidence, they, like those of a trial court, may be set aside and the decision based thereon may be set aside.

[6] Tested by these rules, we feel that the findings are supported by substantial evidence in the light of the whole record and that the decision of the department must be upheld.

The record discloses the following facts: Appellant's premises and restaurant are located on the westerly side of a 1200-foot segment of the old Auburn highway about  $\frac{3}{4}$  mile south of the city limits of Grass Valley. The distance between the two roads varies up to 150 feet and the old road joins the new highway at each end. There are nine residences within the immediate area and there are children of school age living in some of the homes. Seven of the homes are situated east of the old road, ranging in distance from about 100 to 300 feet from the appellant's restaurant. The other two are immediately to the north of appellant's premises. One resident conducts a sand and gravel business from his home, using 7 or 8 trucks in such business, which trucks he parks on his premises. Apparently, however, he does not store sand and gravel on the

premises. Another operates a chimney sweep and septic tank service from his home, using a "pick-up truck". The property 50 feet to the north of appellant's restaurant is occupied by auto wreckers and is maintained as a junk yard, where cars are dismantled as late as 9 or 10 o'clock at night during the summer months. Another junk yard is maintained some 400 feet northwesterly of appellant's premises. In the immediate area is what one witness described as a sheet-iron garage which is used as a welding and maintenance shop by the occupant for the maintenance of trucks which he uses in logging or lumber operations. Chickens and rabbits have been raised for sale by one of the occupants within the immediate vicinity and although the premises were not being used for that purpose at the time of the hearing before the hearing officer the two barns which were used in the business are still on the premises. There is also testimony that 12 to 15 cars may "conservatively" be parked on appellant's property between the road and the restaurant. The above facts are taken from the "Report on Application for License" and the transcript of the testimony taken before the hearing officer for the department.

At the conclusion of the hearing the parties entered into the following stipulation:

"The Hearing Officer: I take it there is no objection to the hearing officer viewing the neighborhood and making observations.

"Mr. tum Suden: No.

"Mr. Todd: We would appreciate [it] if you would.

"The Hearing Officer: It will be submitted then."

After viewing the neighborhood and observing the existing conditions, the hearing officer made the following findings of fact, presumably based upon his observations: "The applicant's premises are in a residential neighborhood." "The circumstances show that ordinary noises incidental to even orderly operation of the applicant's

premises will result in substantial annoyance to the occupants of the homes on the easterly side of the road \* \* \*. Parking space for automobiles is provided between the front of applicant's building and the road. The applicant estimates that 15 cars could be parked in the area, but inspection \* \* \* made pursuant to stipulation revealed that it would not be practicable to park that many cars. The parking area would be inadequate to accommodate sufficient cars for any substantial amount of patronage. The parking of cars along the road would create a traffic hazard."

Under the findings in this matter we cannot say that the department's conclusion and determination that the granting of the license would be "contrary to the public welfare and morals" are not amply supported. Especially is this so when we consider the finding made by the hearing officer based upon his observations. While what he saw and observed is not carried into the transcript except as reflected in the findings, his inspection was made pursuant to the stipulation of the parties and we must assume that he saw what he reported. The record supports the finding that the area is residential, at least primarily so. The fact that there are two junk yards within the area, a garage building used as a private welding and maintenance shop by one of the residents and that the occupants of two of the homes have used their respective homes to carry on their businesses does not negative the finding that the area is residential.

[7] While there is no inhibition in the Constitution, or in the Alcoholic Beverage Control Act, or in the rules adopted by the department against the granting of an on-sale beer license in a residential area, nevertheless when the facts, as in the instant case, show that the applicant's premises are not a proper place to have a license by reason of circumstances such as noises incident to even the ordinary operation of the business, annoyance to occupants of the homes within the area, the insufficiency of parking area and the creation of a traffic hazard in case cars

are parked along the road contiguous to applicant's premises, the department unquestionably has the inherent power under the statute to deny an application for a license.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



163 Cal.App.2d 669

**PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Frank VELARDE, Defendant and Appellant.**  
Crim. 1182.

District Court of Appeal, Fourth District,  
California.

Sept. 19, 1958.

Prosecution for furnishing marijuana to minors. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment and order denying new trial and accused appealed. The District Court of Appeal, Griffin, P. J., held that instruction that if jury finds that crime charged was committed by accused proof need not show that it was committed at time so alleged did not prejudice accused.

Affirmed.

**Criminal Law** ¶1172(1)

In prosecution for furnishing marijuana to minors, where information alleged that offense was committed on or about certain date and proof was in accordance with allegation as to time, place and parties present, accused's claim of alibi was impeached by his contradictory statements and his admission of felony convictions, corroborating witnesses were his close relations, and jury was fully instructed



on law relating to alibi defense, instruction that, if jury finds that crime charged was committed by accused, proof need not show that it was committed at time so alleged did not prejudice accused.

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Theo. G. Krumm, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and N. B. Peek, Deputy Attys. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was charged in two counts of an information with furnishing a narcotic (marijuana) to a minor, Joy Quarles (aged 19) on or about December 26, 1955, and on or about the same day with furnishing such a narcotic to one Davida Finley (aged 16). He was also charged with two prior convictions of a felony (murder and possession of narcotics) which he admitted. He pleaded not guilty to the charges. The jury found him guilty as alleged.

On his appeal from the judgment and order denying a new trial he claims that since his basic defense was an alibi as to his association with these minors on December 26, 1955, and the time fixed by their testimony as to the commission of said defenses, it was prejudicial error to give an instruction to the effect that:

"When, as in each count alleged in the Information, it is charged that a crime was committed on or about a certain date, if the jury finds that the particular crime charged was committed by the defendant, the proof need not show that they were committed at the time so alleged." Citing *People v. Morris*, 3 Cal.App. 1, 84 P. 463; and *People v. Waits*, 18 Cal.App.2d 20, 62 P.2d 1054.

No claim is made that the evidence is not sufficient to support the convictions. A brief résumé of the girls' testimony is that on December 26, 1955, at about 6:30 p. m. (Davida's birthday) they went

around to several homes with one Bob Long and engaged in conversation generally about Christmas festivities. At the Alwardt home they had an alcoholic drink and appellant Frank Velarde came there and was introduced to the girls by Bob. After a brief conversation appellant and Bob went to the kitchen and Bob then invited Davida there and asked her if she wanted to "go smoke some marijuana" and she agreed; that Joy then joined them and at about 8:30 p. m. the four of them drove to appellant's home in a 1949 or 1950 maroon-colored convertible white top Ford, which appellant said belonged to his brother; that when they arrived there appellant left and talked to a man (Velarde's father) and then returned and said he "got two joints (marijuana cigarettes) \* \* \* from the old man. I have my one stashed"; that they then rolled up the windows in the car to keep the smoke in and then drove away; that appellant handed one cigarette to Bob, who was driving, which he and Joy smoked and appellant and Davida, riding in the back seat, shared the other. The girls said the cigarettes were greenish-brown, about  $2\frac{3}{4}$  inches in length, and when lighted had a sweet odor which they had smelled before on prior occasions when they had smoked marijuana cigarettes. They related in detail how they smoked them with appellant on this occasion and said both Bob and appellant had made a "cocktail" out of their respective cigarettes. Davida said after smoking the cigarette she felt a "numbness around my head \* \* \* and uncontrolled laughter". Joy said her "head was light and maybe felt a little larger than it is" and she was laughing at things that made no sense. Based on these sensations they testified from their previous sensations and knowledge of the content of these other cigarettes, that they were of the opinion they were marijuana cigarettes. They testified that after smoking them they went to the mountains and after their return appellant stated he could make another buy in Colton; that they drove there and appellant left and returned, bringing what looked like marijuana cigarettes wrapped

in wax paper; that Bob was offered one but he refused and they drove the girls to their home. Both girls were positive that the foregoing took place on December 26, 1955, at the time indicated.

On February 4, 1956, officers arrested appellant on this charge at his home. He there admitted that at times he did drive his brother's maroon Ford convertible car but denied knowing Davida and Joy. While there, Joy called appellant on the telephone and he then admitted he did know her and Davida and that he and Bob did take the girls driving at night, but claimed they never gave them marijuana.

Appellant testified that on December 26, at about 7:30 p. m. he and his brother visited the Longs and that he then went home; that shortly before 10 p. m. he went to the depot and boarded a bus for Los Angeles. He denied having his brother's car on December 26, denied seeing Bob on that day, obtaining marijuana from his father, or making any statements to the officer that he had known Davida or Joy or that he had ever taken them anywhere. Appellant's relatives claim that he and the girls did not visit their homes on December 26, as indicated by the girls. Bob, who was in the courtroom while the girls testified, did not take the witness stand to refute their stories.

It should be here noted that the prosecution's witnesses testified that the only offense occurred on December 26, 1955, at the time indicated, and no other such offense by appellant was indicated connecting appellant with it. Accordingly, appellant was completely informed by them of the time and place, and the information so alleged.

In the Waits case, *supra*, relied upon by appellant, the instruction was to the effect that it was wholly immaterial on what day or night *the offense was committed* \* \* \* provided it was committed within *three years*. (Italics ours). People v. Morris, *supra*, was to the same effect except it re-

lated to the entire day. The instant instruction is to the effect that where the information charges the *commission of the crime* on or about a certain date, it is not necessary that the proof show that it occurred on the date alleged. It must be conceded that if the information charged that this occurrence took place on December 26, and all of the testimony and evidence showed it took place on December 27, this would not preclude a conviction under the information, and it would be a proper instruction under the statute of limitations. These cases were under consideration in People v. Notz, 73 Cal.App.2d 439, 166 P.2d 607, under an instruction given in about the same form as the one here under consideration. It was there held not to be prejudicial error where the court elsewhere instructed the jury that the burden of proving defendant's presence at the time and place of the alleged offense devolved upon the prosecution, and that it was sufficient to justify an acquittal if the evidence raised a reasonable doubt of defendant's presence at the time and place of such offense. Substantially the same instructions were here given and the jury was fully and completely instructed on the law relating to the alibi defense. The record unerringly points to appellant's guilt and his claim of alibi was impeached not only by his contradictory statements but by his admission of felony convictions. The corroborating witnesses were his close relatives. The exact date was alleged in the information and the proof was in accordance with the allegation as to time, place and parties present.

We conclude that appellant was not prejudiced by the giving of the instruction under consideration and no miscarriage of justice resulted. People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243; People v. Meacham, 84 Cal.App.2d 193, 204, 190 P.2d 262.

Judgment and order denying a new trial affirmed.

MUSSELL, J., concurs.

163 Cal.App.2d 440

**BOARD OF TRUSTEES OF The WOODLAND UNION HIGH SCHOOL DISTRICT OF YOLO COUNTY, State of California, Petitioner and Respondent,**

**v.**

**Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California, the Department of Alcoholic Beverage Control of the State of California, and the Alcoholic Beverage Control Appeals Board of the State of California, Respondents and Appellants,**

**Thomas P. Raley, Intervenor and Appellant.**  
**Civ. 9372.**

District Court of Appeal, Third District,  
California.

Sept. 11, 1958.

Hearing Denied Nov. 5, 1958.

Mandamus proceeding by board of trustees of high school to review order of Department of Alcoholic Beverage Control granting off-sale liquor license. The Superior Court, Yolo County, Ben R. Ragain, J., decreed that writ of mandate should issue against Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board, directing them to reverse determination that off-sale liquor license should issue and department, board and intervenor appealed. The District Court of Appeal, Van Dyke, P. J., held that question whether granting of off-sale liquor license to neighborhood supermarket which would establish separate department in charge of clerk, would adversely affect public welfare and morals by allowing juveniles to obtain liquor and by increasing use of intoxicants by adults was for departmental resolution, and it could not be said the department abused its discretion in granting license.

Reversed.

**1. Intoxicating Liquors ⇐72**

In reviewing decision of Department of Alcoholic Beverage Control, reviewing court is limited to determination whether decision is supported by substantial evidence and court may not substitute its view for that of administrative body, nor reweigh

conflicting evidence. West's Ann.Const. art. 20, § 22.

**2. Intoxicating Liquors ⇐72**

Reviewing court, in its consideration of evidence in support of decision of Department of Alcoholic Beverage Control, must resolve conflicts and indulge legitimate and reasonable inferences in favor of that decision, and there can be nothing in nature of trial de novo in reviewing court. West's Ann.Const. art. 20, § 22.

**3. Mandamus ⇐168(4)**

In mandamus proceeding by board of trustees of high school to review order of Department of Alcoholic Beverage Control granting off-sale liquor license to supermarket located in neighborhood shopping center, evidence sustained decision of department that issuance of license would not be contrary to public welfare and morals. West's Ann.Const. art. 20, § 22.

**4. Mandamus ⇐168(4)**

In mandamus proceeding by board of trustees of high school to review order of Department of Alcoholic Beverage Control granting off-sale liquor license to supermarket located in a neighborhood shopping center, testimony that granting of license would allow juveniles to obtain liquor, and increase use of intoxicants by adults, did not, as matter of law, prove that granting of license would be contrary to public welfare or morals. West's Ann. Const. art. 20, § 22.

**5. Mandamus ⇐172**

Question whether granting of off-sale liquor license to neighborhood supermarket, which would sell liquor in separate department of store, would adversely affect public welfare and morals by allowing juveniles to obtain liquor and by increasing use of intoxicants by adults was for Department of Alcoholic Beverage Control. West's Ann.Const. art. 20, § 22.

**6. Intoxicating Liquors ⇐59(1)**

Even though valid covenant against sale of intoxicating liquors appeared in deed to land on which applicant proposed to operate off-sale general alcoholic beverage business, Department of Alcoholic Bev-



crage Control could issue off-sale liquor license. West's Ann.Bus. & Prof.Code, § 23790; West's Ann.Const. art. 20, § 22.

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Anthony B. Avilla, Dist. Atty., and Harry A. Ackley, Deputy Dist. Atty., Woodland, for petitioners-respondents.

Edmund G. Brown, Atty. Gen., by E. G. Funke, Asst. Atty. Gen., and William T. Chidlaw and Robert W. Baker, Deputies Atty. Gen., for respondent Munro and others.

Downey, Brand, Seymour & Rohwer, Sacramento, for appellant Raley.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of the Superior Court for Yolo County, decreeing that a writ of mandate should issue against the appellant department and the appellant board, directing them to reverse their determination that a general off-sale liquor license should issue to Thomas P. Raley, the real party in interest. The basic question presented on this appeal is whether or not the Department of Alcoholic Beverage Control prejudicially abused its administrative discretion in granting the license.

The department made the following findings of fact: The proposed premises consist of a supermarket located in a neighborhood shopping center at the southeast corner of College Street and Granada Drive in the South Land Park area near the southerly outskirts of Woodland. The premises in question constitute one of a chain of eight Raley food markets, seven of which are located in Sacramento County, and all, or most of them, are licensed for off-sale general alcoholic beverages. There are presently no alcoholic beverage licenses in force in the vicinity of the premises. The applicant's store building is situated in the southerly part of the shopping center, and there is an adjacent main parking area immediately to the north of the applicant's building which is shared with patrons of a drive-in restaurant located at the corner of College Street and Granada Drive and with patrons of other retail stores in the shop-

ping center. Immediately to the south of, and adjacent to, the proposed premises is another parking area reserved for the exclusive use of the applicant's customers. The main entrance to the applicant's store faces College Street, while a secondary entrance faces the general parking area to the north of the building. The nearest school to the proposed premises is the Woodland Union High School, located to the north of the premises and occupying land on both sides of College Street. The distance from the nearest point of the premises and the nearest point of the school property is approximately 365 feet. The evidence shows that the school board has under consideration the enlargement of the high school campus, which, although it occupies large areas of land on both sides of College Street lying to the north of the proposed premises, appears to be too small for present or proposed enlarged school activities. The distance from the proposed premises to the nearest point on school property could, by the additional school facilities proposed, be reduced to approximately 300 feet. Present enrollment of Woodland Union High School is approximately 1,000 students, which include age groups ranging from 13 to 19. The 19-year-old group would constitute but a small fraction of the enrollment. A considerable number of students frequent the area near the proposed premises by reason of their patronage of the drive-in restaurant and their purchases of ice cream and candy bars at applicant's store. Complaints of the neighboring residents have been directed toward the practice of these students discarding papers such as candy wrappers and other debris around the shopping center during the noon lunch period, after school hours and during evening when sports events are held at the school. There is insufficient evidence to show that the package sale of alcoholic beverages by applicant would aggravate this litter problem or that consumption in public of alcoholic beverages in the vicinity is, or would be of such proportions as to add appreciably to the litter. The evidence shows that by far

the greatest number of sales of alcoholic beverages sold at other markets of similar type, operated by applicant, are made in conjunction with purchase of grocery items for consumption at the purchasers' homes. The applicant does not propose to sell alcoholic beverages from open shelves or refrigerators accessible to patrons on a self-service basis as is usual in his other and in most food stores of this kind, but he has submitted a revised floor plan whereby refrigerated beer, wines and so-called hard liquors will be sold only at a separate department located at the front of the store in the southwest corner and outside the check stands. Persons desiring to purchase alcoholic beverages will only be able to procure them at this portion of the store, which will be in charge of a clerk at all times that the liquor department is open for business. The proposed arrangement should effectively minimize the possibility of theft of alcoholic beverages by high school students or others, and will safeguard against inadvertent sale of alcoholic beverages to minors by clerks at the food-checking stands at times when they are busy with customers purchasing large lots of groceries. A children's public playground will, at some time in the future, occupy a park area proposed to be constructed across College Street and opposite the proposed premises. The evidence does not show what portion of this proposed public park will be used for playground purposes such as swings and other play equipment. The width of College Street intervening between the proposed premises and the proposed park area is approximately 60 feet from curb to curb. A municipal swimming pool, which is patronized by increasing numbers of adults, students and other children to the extent of a total of 43,548 persons in 1955, is located to the northwest and across College Street from the premises in question, at a distance of about 400 feet airline measured from the nearest portion of the applicant's store building to the nearest point of the swimming pool enclosure. This pool is surrounded by a high wall and, with the

exception of the upper portions of bleacher seats located against the south wall of the pool enclosure, the view of the proposed premises from the pool area is effectively blocked. The American Lutheran Church, with a total membership of about 530 persons, and holding the usual services on Sundays and meetings on most week nights is located on the west side of College Street and across the street from the proposed premises at a distance of about 171 feet from the nearest point of the applicant's building to the nearest corner of the church property. An additional distance of about 25 feet to the nearest church entrance makes the distance about 196 feet. It is proposed to construct a Y.M.C.A. building in about two to three years on the lot adjacent to and south of the church across the street from the proposed premises, at a distance of about 150 feet from the premises, measured by direct line between the respective buildings. There is no substantial evidence to show that the granting of a license for the off-sale of packaged alcoholic beverages would, under the method of operation proposed, constitute an undue moral hazard to the students of the high school, the church activities of the persons attending the church, or juveniles using the facilities of the proposed playground or the proposed Y.M.C.A. The premises in question are located on Lot 16 of Block 4 in the tract known as South Land Park. By a "Declaration of Restrictions" signed by Anton Paulsen, his wife, and others, the then owners of the South Land Park Tract executed August 31, 1946, and which was recorded on September 7, 1946, certain restrictions were imposed on this tract, providing that all lots, with the exception of Lot 16 of Block 4 on which the shopping center and the proposed premises are located shall be restricted to residential use. As to Lot 16 of Block 4 it is provided that said lot is "restricted to retail commercial purposes provided that no liquor or beverages shall be sold on said premises containing more than one-half of one per cent alcohol by volume." There is no evidence

to show that issuance of the license in question would violate any valid zoning ordinance. It is stipulated, and it is found to be true, that the proposed premises are located in a shopping center, which, in turn, is located in a general residential area. A search of the record discloses substantial support for the findings of fact.

The conclusions of the department from the foregoing findings were as follows: Issuance of the license would not be contrary to public welfare and morals for the reason that although the proposed premises are located within the immediate vicinity of (1) a portion of the high school grounds, (2) a proposed children's public playground, (3) a church and (4) a proposed Y.M.C.A., an off-sale license would not expose the persons or juveniles involved to any undue moral hazard. Issuance of the license would violate a deed restriction, which appears to be valid and enforceable as to all parties in privity therewith, but public welfare and morals would not, in view of the findings on all other issues herein, be adversely affected by the issuance of an off-sale general license to this applicant and premises. The proposed premises are located in a residential area, but issuance of the license would not be contrary to public welfare and morals.

[1,2] The scope of review of a decision of the Department of Alcoholic Beverage Control, like that of the review of a decision of any administrative body given quasi-judicial powers by the Constitution, is well established. The Constitution declares that the department "shall have the exclusive power to license the manufacture, importation and sale of alcoholic beverages in this State, \* \* \*. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals \* \* \*." Const. art. 20, § 22. In reviewing the decision of such an administrative body, the reviewing court is limited to the determination of whether or

not the decision is supported by substantial evidence and the court may not substitute its view for that of the administrative body, nor reweigh conflicting evidence. *Dethlefsen v. State Board of Equalization*, 145 Cal.App.2d 561, 563, 303 P.2d 7; *Molina v. Munro*, 145 Cal.App.2d 601, 302 P.2d 818. The reviewing court, in its consideration of the evidence in support of the decision, must resolve conflicts, and indulge legitimate and reasonable inferences, in favor of that decision. *Thompson v. City of Long Beach*, 41 Cal.2d 235, 241, 259 P.2d 649; *Oxman v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 740, 744, 315 P.2d 484; *Marcucci v. Board of Equalization*, 138 Cal.App.2d 605, 292 P.2d 264. There can be nothing in the nature of a trial de novo in the reviewing court.

[3] Tested by the foregoing rules, there is substantial evidence in the record which supports the decision of the department and, therefore, its decision must be upheld and the judgment appealed from must be reversed.

Witnesses for the protestants testified that if liquors were sold in Raley's market, minors would find a way of getting it, either by pilfering it from the store or inducing adults to purchase it, take it out of the store and give it to the minors; that this would happen generally when students were attending various athletic games and contests during evenings such as football and basketball games; that the pilfering and illegal obtaining through intervention of adults would be increased by the propinquity of the market to the school grounds; that handy access to the liquor supply would increase use of intoxicants by adult attendants at the games; that minors would obtain liquor more readily at that market than they would at other markets through misrepresentation of their ages and having obtained it would permit its use by themselves and other students. Representatives of the nearby church testified that they opposed granting the license on the same grounds urged by the school authorities, but admitted that so far as the



church congregation was concerned they did not expect any bad effects upon their membership. Representatives of the Y.M.C.A., which proposed to build in the future a building in the general vicinity of the market, testified that their membership would be more apt to indulge in the use of alcoholic beverages than if the same were not so handy to their headquarters. Many of these witnesses claiming to be well versed with juvenile problems, particularly those encouraged by the use of alcoholic beverages, gave it as their opinion that transfer of the license would adversely affect public welfare and morals, thus testifying directly to the very issue to be passed on by the board.

[4] Assuming the admissibility of such opinion evidence, we think it apparent that the evidence given by protestants' witnesses did not, as a matter of law, prove that the granting of the transfer of the license by the board would be contrary to public welfare or morals.

[5] The ultimate question whether or not under all the circumstances the granting of the off-sale license would adversely affect public welfare and morals was on this record peculiarly an issue for departmental resolution. It is lawful to sell, possess and use intoxicating liquor in this state. Surely the board, which passes on the issuance of thousands of licenses under all conceivable conditions, can better determine the effect upon public welfare and morals of the granting of a license than can those who are not constantly so engaged. Undoubtedly, the protestants were completely and conscientiously serious in their objections and their witnesses were honestly apprehensive, as they said they were, that public welfare and morals would be adversely affected if Raley's application were granted, but the question was for resolution by the board and it cannot be said from this record that the board in anywise abused its discretion in granting the license.

[6] With respect to the contentions of respondent that the license could not be

validly issued during the existence of a valid covenant against the sale of intoxicating liquors, the research of counsel and of the court has disclosed little authority, and apparently the question is novel in California. The Constitution, which vests in the department the exclusive power to license the sale of intoxicating liquor, makes the power subordinate to laws enacted by the legislature. The legislature, by Section 23790 of the Alcoholic Beverage Control Act, Business and Professions Code, has provided that retail licenses shall not be issued for any premises located in territory where the exercise of the rights conferred would be contrary to a valid zoning ordinance of any county or city unless the premises had been used in the exercise of such rights at a time prior to the effective date of the zoning ordinance. We find no other legislative enactment restricting the licensing power of the board. Restrictive covenants are private contracts as opposed to public zoning ordinances. In *Barnegat City Beach Ass'n v. Busby*, 44 N. J.L. 627, the court said:

"\* \* \* The question of jurisdiction is not affected by the existence of covenants and conditions against open bars for the sale of intoxicating drinks, contained in the deeds for lands in this locality. However binding this may be upon the parties to such instruments, they are in no wise obligatory upon the court in the exercise of its statutory discretion to grant licenses for the public convenience, nor can such provisions render licenses granted invalid."

Apparently a contrary position has been taken by the courts in Pennsylvania. See *Appeal of Cheris*, Liquor License, 127 Pa. Super. 355, 193 A. 162.

In this case the board received in evidence a certified copy of a deed imposing the restriction. From the record it appears that the board considered the covenant to be valid and, further considering the covenant as one of the facts before it, specifically determined that its existence did not justify the board in a holding that

its violation would be a matter affecting public welfare and morals. We think this conclusion of the board to have been warranted by the record before it. Apparently the board concluded that the covenant presented no insurmountable barrier to the granting of the license and left the parties to the covenant to resort to the courts if so advised. On this record this was a justifiable and proper disposition of the issue.

For the reasons given, the judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.



163 Cal.App.2d 651

**John RIEGER and Fern Rieger, as Co-Executors of the Estate of Marla Lamp, Deceased, Plaintiffs and Respondents,**  
v.

**Frank E. RICH and Viola P. Rich, husband and wife, Defendants and Appellants.**

Civ. 22731.

District Court of Appeal, Second District,  
Division 1, California.

Sept. 19, 1958.

Hearing Denied Nov. 12, 1958.

Action to set aside deed. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, White, P. J., held that evidence would sustain finding that deceased grantor had lacked mental capacity to make valid deed.

Affirmed.

#### 1. Mortgages ⇨38(2)

To sustain claim that deed absolute on its face was in reality a mortgage or trust deed, testimony would have to be clear, convincing and conclusive.

#### 2. Mortgages ⇨39

It was for trial court to determine what weight was to be accorded to oral

declarations of deceased grantee relied upon to support claim that deed absolute on its face was in reality a mortgage or trust deed.

#### 3. Mortgages ⇨38(1)

Evidence sustained finding that deed absolute on its face was an unconditional deed and not a mortgage or trust deed, as contended.

#### 4. Deeds ⇨78

Presence or absence of mental capacity to make deed is matter which must necessarily depend upon peculiar circumstances of particular case.

#### 5. Appeal and Error ⇨989, 1010(2)

Power of an appellate tribunal begins and ends with determination of whether there is in record substantial evidence, contradicted or uncontradicted, which supports judgment rendered; and unless it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below, that conclusion may not be set aside on ground of insufficiency of evidence.

#### 6. Appeal and Error ⇨931(3)

Reviewing court must assume in favor of judgment existence of every fact which trier of facts could have reasonably deduced from evidence.

#### 7. Appeal and Error ⇨996

In suit to set aside deed, if circumstances reasonably justified judgment of duly constituted arbiter of facts, opinion of reviewing court that those circumstances might also reasonably be reconciled with contrary conclusion would not warrant interference with determination of trial court.

#### 8. Deeds ⇨211(1)

In suit to set aside deed, evidence would sustain finding that deceased grantor had lacked mental capacity to make valid deed.

#### 9. Deeds ⇨211(3, 4)

In suit to set aside deed on grounds of fraud, undue influence, lack of capacity, and lack of consideration, evidence would

sustain finding that confidential relationship had existed between deceased grantor and the grantees.

**10. Contracts** Ⓒ94(1)

Trust and confidence reposed by one in the integrity and fidelity of another are elements of "confidential" or "fiduciary" relationships which, in law, are synonymous.

See publication Words and Phrases, for other judicial constructions and definitions of "Confidential Relationship" and "Fiduciary Relationship".

**11. Contracts** Ⓒ94(1), 99(1)

No one who is in confidential relationship toward another may take advantage of that relationship in favor of himself, or deal with other person upon terms of his own making, and in every such transaction between persons standing in that relationship, law will presume that he who held influence over other exercised it unduly to his own advantage.

**12. Deeds** Ⓒ196(2, 3)

Grantees who stood in relation of trust and confidence to grantor would have burden of proving that they had exhibited that degree of good faith sufficient to remove all doubt respecting fairness of transaction.

**13. Deeds** Ⓒ196(3)

A deed may not be set aside because of absence of independent advice alone; but where grantee stood in confidential relation to grantor he will be presumed to have taken undue advantage of grantor unless it appears that grantor had independent advice and acted not only of his own volition but with full comprehension of results of his action.

**14. Deeds** Ⓒ211(4)

In suit to set aside deed, evidence would support finding that defendants had exercised undue influence in procuring execution of deed without payment of any consideration therefor.

**15. Pleading** Ⓒ236(5)

Granting or denial of permission to file amendment to pleading to conform to

proof rests largely in discretion of trial court.

**16. Pleading** Ⓒ236(5)

On record presented, in suit to set aside deed, it was not an abuse of discretion for trial court to permit plaintiffs to file amended complaint, to conform to proof, after trial had been concluded.

**17. Pleading** Ⓒ253, 254

Issues tendered by amended pleading, having already been tried, were deemed denied without pleading, and, in suit to set aside deed, trial court would not be put in error for failing to give defendants an opportunity to plead or demur to amended complaint, to conform to proof, which trial court had permitted to be filed after trial had been concluded.

**18. Trial** Ⓒ367

In cause tried before court, sitting without a jury, no absolute right to argument exists; and, on record presented in suit to set aside deed, trial court, which had granted counsel privilege of filing briefs, could not be charged with an abuse of discretion in declining to hear oral arguments.

**19. Trial** Ⓒ390

On record presented, in suit to set aside deed, trial judge would not be put in error for not rendering decision until almost a month after filing of briefs, notwithstanding defendants' contention that trial judge could not have recalled all of evidence since more than two months had elapsed after it was adduced.

**20. New Trial** Ⓒ100

In suit to set aside deed executed by plaintiffs' decedent, wherein defendants contended that earlier deed from them to decedent had in fact been a mortgage or trust deed, it was not error to refuse to grant defendants' motion for new trial on ground of newly discovered evidence, consisting of original promissory note, a copy of which had been admitted into evidence on trial, notwithstanding defendants' claim that it would show that their deed to decedent had in fact been given as security.



James C. Webb, Long Beach, for appellants.

Walker, Johnstone & Walker and Ball, Hunt & Hart, George A. Hart, Jr., Long Beach, for respondents.

WHITE, Presiding Justice.

Plaintiffs, in their capacity as co-executors of the estate of Maria Lamp, Deceased, instituted this action to set aside a certain deed executed July 11, 1955, by said decedent, as grantor, to defendants, the day preceding the grantor's death.

By their complaint plaintiffs alleged fraud, undue influence, lack of capacity, and that the deed was procured by defendants without the payment of any consideration.

By their answer, defendants denied generally the allegations of the complaint, and as a third affirmative defense alleged ownership in the property in question by reason of an administratrix' deed from the Estate of Herman Lamp (husband of decedent), dated October 27, 1949.

At the conclusion of the trial and following submission of the cause on written briefs, the court made the following findings:

#### I.

That on May 1, 1950, Maria Lamp received an unconditional grant deed to real property located at 4422-4424 Vista Avenue, Long Beach, California, and that from May 1, 1950, to date of her death, July 12, 1955, she was the sole owner in fee of said real property.

#### II.

That on July 11, 1955, Maria Lamp was without mental capacity to attend to her business affairs, to know the extent or value of the property owned by her, or to know the relationship of persons appearing before her, or to execute the deed of July 11, 1955.

#### III.

That a confidential relationship existed between defendants and Maria Lamp.

#### IV.

That defendants did exercise undue influence upon said Maria Lamp, and defendants did, in the exercise of said undue influence, procure said Maria Lamp to execute said grant deed without the payment of any consideration therefor.

#### V.

That Maria Lamp had no independent advice from any person in reference to the execution of said deed of July 11, 1955.

Judgment was accordingly entered that the deed of July 11, 1955, from Maria Lamp to defendants be cancelled, vacated and set aside as null and void, and of no force or effect. Defendants' motion for a new trial was denied. From the judgment and the order thereafter made, denying their motion for a new trial, defendants prosecute this appeal.

Concerning the factual background surrounding this litigation, the record reflects that the subject property consists of a duplex dwelling situated in the city of Long Beach. In September of 1941 defendants became resident tenants in one unit of the property, at that time owned by decedent Maria Lamp and her husband Herman Lamp, who occupied the other unit. The owners continued to reside on the property until their respective deaths, Herman Lamp until 1949 and decedent herein, Maria Lamp until July 12, 1955. Defendants also continuously lived on the property up to the time of trial of this action.

Following the death of Herman Lamp, his estate was probated in the Superior Court of Los Angeles County. In November, 1949, defendants received an Administratrix' Deed dated October 27, 1949, for the duplex property. The deed was executed by decedent Maria Lamp as Administratrix of the estate of her husband Herman Lamp. The deed reserved in the widow, Maria Lamp, a life estate. Defendants paid a consideration of \$5,800 for the property, but the money therefor was received from the administratrix Maria

Lamp, and defendants gave Maria Lamp no note, trust deed or any other evidence of said loan or advance, and had no agreement—oral or written—as to time of repayment of principal or any provision for payment of interest.

Subsequently, in April, 1950, defendants borrowed \$4,800 for which, according to the testimony of defendant Frank E. Rich, he gave Maria Lamp an unsecured note for \$6,000. That, in September, 1953, Maria Lamp, "marked it paid and handed it back to me". The note was not produced. Mr. Rich testified that the last time he saw it was in the office of the attorneys for Maria Lamp. An additional \$800 was borrowed by defendants from Maria Lamp shortly after May 1, 1950, and subsequently, a further sum of \$1,200 was borrowed, making the total loans from decedent Maria Lamp to defendants the sum of \$11,400.

On May 1, 1950, defendants executed and delivered to Maria Lamp a grant deed to the duplex property here involved, which document remained in her safety deposit box until removed by defendant Frank E. Rich, about July 8, 1955.

With regard to the payment of taxes on the subject property after execution of the deed of May 1, 1950, defendant Frank E. Rich testified that while Maria Lamp sent in the check for the taxes he paid "my half of it". That such payments were made in cash, and no receipts were obtained therefor. In 1955, defendant Frank E. Rich was placed upon Maria Lamp's commercial checking account, with the right to withdraw money upon his signature only, and was also placed on the safety deposit box of Maria Lamp, with the right to enter said safety deposit box at the Farmers and Merchants Bank, 3rd and Pine Avenue, Long Beach, California, unaccompanied.

With regard to the foregoing transactions defendant Viola Rich testified she and her husband had known decedent Maria Lamp for approximately twelve years. That she and her husband acquired the foregoing Administratrix' Deed by way of purchase of the duplex property for \$5,800

in October, 1949. Admitted that her husband had borrowed approximately \$4,800 from deceased to make said purchase. That during the month of April, 1950, her husband received approximately \$5,800 as an additional loan from deceased. That the grant deed dated May 1, 1950, was executed and delivered by her and her husband to deceased, at the Farmers & Merchants Bank, 302 Pine Avenue, Long Beach, California, at which time no money or other consideration was received by the Riches in exchange for said grant deed, but was given by way of security to deceased for said sums totaling \$5,800, previously borrowed by Mr. Rich from said deceased, and that shortly thereafter said deceased did lend an additional \$800 to Mr. Rich. That arrangements for the execution and delivery of said note was made by conversations with deceased at her home a few days prior thereto. That the Riches made regular weekly payments thereafter to deceased on account of said loans. Said grant deed of May 1, 1950, was returned to Mr. Rich's possession about July 8, 1955, on which date decedent stated to this witness that she had instructed Mr. Rich to pick up this deed from her safety deposit box and that decedent wished the Riches to have it. That Mr. Rich had delivered his promissory note for \$6,000 to said decedent shortly prior to May 1, 1950. That this witness and her husband visited decedent almost daily during the time she was at home between January 1, 1955 and July 7, 1955, during which period of time she performed numerous tasks for decedent, including the making of her clothes, shampooing her hair, and other personal services, also including business trips, depositing monies, etc., and that upon returning from such business trips she did hand to deceased the bank book and other receipts, at which times said deceased would check the receipts and the bank book. That this witness had also performed similar numerous tasks and made various business trips for said decedent from time to time almost daily for the last five years of decedent's life.

Defendant Frank E. Rich corroborated generally the foregoing testimony of his wife and also stated that he also had performed numerous personal services and attended to business matters for decedent pursuant to her instructions, for approximately five years immediately preceding her death, all without compensation. That in April, 1955, some three months prior to her death, decedent authorized him to sign checks on her bank account and to enter, unaccompanied, her safety deposit box at the bank. He further testified that decedent had stated in December, 1954, that she intended to reconvey title to the duplex property to the Riches shortly after the holidays. That about January, 1955, decedent told this witness that her brother and his wife were coming to visit her; that she would like to have them live in the Riches' side of the duplex and look after her. That she intended to offer the duplex to her brother and his wife and she discussed arrangements with him regarding her selling one of her trust deeds to obtain monies necessary to buy out the Riches' equity in the said duplex. That deceased later requested a Mr. Prichard, her financial adviser, to sell one of her said trust deeds some time in February or March of 1955. That the expenses of the duplex property, including the taxes, were shared and paid jointly by the Riches and the deceased, and the use of said premises was also shared jointly by said parties. That he had repaid to decedent approximately \$7,500 for the monies he had received from her. That he kept a memo or record of monies he had paid to deceased and she had kept her own similar records.

Mr. Rich also testified that at and during all times hereinbefore mentioned the decedent discussed fully and in detail all business matters and all other transactions wherein she made demand upon him for his assistance therein and that she fully understood all phases thereof. That he made a full accounting and report to her in each of such instances. That decedent carried

on correspondence and other business matters and kept her own business records.

Decedent Maria Lamp had for some considerable time suffered from arteriosclerosis in both her lower extremities, frequently incapacitating her, during which times, according to defendants, they "took care of and looked after her" since decedent was living alone.

In January, 1955, decedent Maria Lamp, then 79 years of age, suffered an acute coronary occlusion for which she was hospitalized for four weeks. In March, 1955, she was again hospitalized for some three weeks following an attack of peripheral vascular disease, consisting of severe hardening of the arteries of the lower extremities.

On July 7, 1955, decedent Maria Lamp was hospitalized for the last time, and on July 8, was examined by Dr. G. D. Bock, an orthopedic surgeon, who diagnosed her ailment as arteriosclerotic gangrene, involving both lower extremities and most marked on the right leg. There is testimony that on July 8, 1955, decedent was in extreme pain. Dr. Bock recommended amputation of the right leg at mid-thigh level and that sympathetic blocks be carried out on the right side to cut down the progress of gangrene in the left limb. Dr. Bock testified that sympathetic block is quite similar to a spinal anaesthetic. A long needle, approximately four or five inches in length, is used, and is inserted in just one side of the spine and pushed down along the bodies of the vertebral column itself. The sympathetic ganglia or nerves lie just to the front of the bodies of the vertebrae. Once the needle engages the site of the body of the vertebrae it is pushed a little farther and the area is infiltrated with novocain or some such drug. That produces a block of the sympathetic system,—nervous system. Such sympathetic nerve blocking was performed on the 8th, 9th, 10th, 11th, and 12th of July.

Maria Lamp's right leg was amputated at mid-thigh level July 9, 1955, which said operation was considered a severe shock to the nervous system of a woman 79 years of age.



Dr. Bock testified: "I would say surgery of this magnitude would represent quite a shock to the system."

The doctor further testified as follows: "I would say there was great pain; I would even use the term 'agonizing pain' at times."

On July 11, 1955, defendants Frank E. Rich and Viola P. Rich procured from Maria Lamp a grant deed to the real property located at 4422-4424 Vista Avenue, Long Beach, California. No consideration was received by Maria Lamp for the execution of said grant deed. At the time the grant deed was executed, the attending surgeon, Dr. Bock, was not advised.

Maria Lamp passed away July 12, 1955, the day following execution by her of the grant deed to defendants, and the validity of which instrument is the subject of this litigation.

With regard to the events occurring on July 7th when decedent was last removed to the hospital, and the succeeding days prior to decedent's death, defendant Mrs. Viola P. Rich testified that she talked with decedent at the latter's home on July 7. That on the following day, her husband, defendant Frank E. Rich, transported her to the hospital, stating that decedent desired to see the witness. That she did visit with decedent at the hospital on July 8, in the presence of her husband, the attending nurse, and Shirley Mae Smith the notary public. Decedent was very glad to see her and engaged in conversation with her, in which decedent told this witness that she was deeding the duplex property back to her and her husband; that Mr. Rich had picked up the grant deed of May 1, 1950, from her safety deposit box at decedent's request because she wanted the Riches to have it also. That decedent discussed some minor changes to be made in her part of the duplex dwelling after she returned from the hospital, to facilitate her getting about in the wheelchair; that this witness and her husband signed an unrecorded grant deed dated July 8, 1955, as witnesses to decedent's signature thereto in the presence

of said notary, Shirley Mae Smith. That said decedent put on her glasses and read the grant deed before signing it and then placed it upon a suitcase across her lap and affixed her signature thereto. Decedent remarked that her signature did not look very good. That decedent did fully discuss with her all business matters and transactions in which this witness assisted or participated. In this testimony Mrs. Rich was corroborated by her husband, defendant Frank E. Rich.

As to the mental capacity of decedent to execute the deed of July 11, 1955, the day before her death, and the validity of which is here challenged, the evidence was in sharp conflict. We deem it unnecessary to here set forth the evidence in detail. Suffice it to say Dr. Bock who performed the surgery was asked, "Taking into consideration the age of Maria Lamp; your examination of the 8th; your surgery on the 9th, where you amputated her right leg above the knee; your personal observation of her during the time she was in the hospital; the administration of nerve blocks and drugs, as indicated by the hospital records and your own records; in your opinion was Maria Lamp, on July 11, 1955, mentally competent to execute a grant deed?" To which question he answered, "No". On cross-examination the witness stated that the novocain or the nerve blocks did not affect decedent mentally in any way as he observed her. He further testified that decedent recognized him as her doctor and responded to questions propounded to her except during and immediately following the surgery. That he discussed fully with her the proposed operation and that she consented to undergo the same.

John Rieger testified he had known decedent some six years prior to her demise and visited her approximately once a week during that period. In the opinion of this witness, decedent was mentally incompetent, and had been for some seven months prior to her death.

A niece of decedent testified that the latter had been incompetent since January,

1955. That the decedent was mentally incompetent was also the opinion of a friend Mrs. William Marxen.

On the contrary, the notary public who took decedent's acknowledgment on the questioned deed testified that while decedent appeared to have some emotional distress, nothing occurred to indicate that the decedent was not mentally competent at the time she affixed her signature to the deed. Margaret Orr, an employee of the hospital who witnessed decedent's signature to the deed on July 11, 1955, testified that nothing occurred at that time to cause her to suspect that Maria Lamp was not mentally competent to understand what she was signing.

Sworn as a witness for defendants, Dr. J. Knutson testified that he had attended decedent continuously from January, 1955, until her death on July 12, 1955. That during this time there was no change in the mental condition of decedent nor was there any mental deterioration during that period. Substantially the same testimony was given by Dr. J. Reed, an associate of Dr. Knutson, Minnie Lee Payne testified she was in constant attendance upon decedent from June 11th to July 7th, 1955. That during this interval it was her opinion that decedent was mentally competent. Similar testimony was given by Mrs. Nora N. Lindemberger and Effie Pauls, a neighbor of the decedent.

We are satisfied that Finding I that on May 1, 1950, decedent Maria Lamp received from appellants an unconditional grant deed to the subject property, and from the date thereof until her death was the sole owner in fee of said real property finds ample support in the evidence. First, the instrument was unconditional on its face, and remained in the safety deposit box of decedent from the time of delivery until removed therefrom early in July, 1955 by appellant Frank E. Rich. The absence of any trust deed, mortgage or other written memorandum to the contrary, supports a reasonable inference that the deed was what it purported to be on its face. Furthermore, the actions of decedent

Maria Lamp from May 1, 1950, to July 11, 1955, were at all times consistent with absolute fee ownership. It was her check that paid the taxes, although appellants testified that for a short period in 1949 and early in 1950, they paid a share of the taxes. There was testimony that on one occasion decedent had stated, "The Riches owe me over six months back rent". Also, on another occasion appellant Mrs. Rich stated to her husband, "You pay the rental on the wheelchair, as we have not paid the rent to Mrs. Lamp this month". Thereafter, in May, 1955, appellant Frank E. Rich delivered some money to decedent, saying: "Here is part of the rent money". This conduct is not at all consistent with a claim of ownership of the property. There is also in evidence an exhibit purporting to be a statement of accounts between appellants and the decedent. On this document appears a notation in the handwriting of decedent wherein she allows appellant Frank E. Rich a credit of \$300 "on a car loan" and that this allowance is made for a paint job done on the duplex. If appellants owned the duplex why would they be charging decedent for painting it? Appellant Frank E. Rich testified that decedent was going to give the property to her brother, if the brother would stay in California and take care of her, but because the brother could not stay, Maria Lamp would give it to appellants. Certainly, Maria Lamp must have considered that she owned the property in fee or she would not have considered giving it to her brother in consideration of his caring for her.

[1-3] On their claim that the deed of May 1, 1950, absolute on its face, was in reality something essentially different, viz., a mortgage or a trust deed, the testimony must be clear, convincing and conclusive (*Goodfellow v. Goodfellow*, 219 Cal. 548, 554, 27 P.2d 898; *Davis v. Stewart*, 31 Cal.App.2d 574, 577, 88 P.2d 734; *Stevens v. Fetterman*, 76 Cal.App. 741, 753, 246 P. 102). Appellants' proof consisted for the most part of the oral declarations of the decedent made to appellant Frank E. Rich. It was for the trial court to deter-

mine what weight was to be accorded them (*Herbert v. Lankershim*, 9 Cal.2d 409, 430, 71 P.2d 220). The conclusion of the trial court that the deed of May 1, 1950, from respondents to the decedent was an unconditional deed finds abundant support in the evidence and the inferences reasonably deducible therefrom.

Appellants next assail Finding II that on July 11, 1955, decedent Maria Lamp was without mental capacity to execute the deed bearing that date.

[4] Appellants direct our attention to many cases involving the issues of undue influence which are undoubtedly correct, and in a proper case would doubtless be decisive. However, we are here concerned with a case involving the mental capacity of decedent Maria Lamp to execute the deed in question. The presence or absence of mental capacity is a matter which must necessarily depend upon the peculiar circumstances of the particular case rather than upon bare and academic rules. Manifestly, the trial court was best able to appraise the weight of the testimony and the credibility of the witnesses, and came to the conclusion that on July 11, 1955, decedent was bereft of the mental capacity to know the extent or value of the property owned by her or to know and understand the nature of her act. In other words, that she was not fully cognizant of her actions with regard to her property at the time she affixed her signature to the deed.

[5, 6] It is axiomatic that on appeal, the power of an appellate tribunal begins and ends with a determination of whether there is in the record substantial evidence, contradicted or uncontradicted, which supports the judgment rendered. And unless it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below, that conclusion may not be set aside on the ground of insufficiency of the evidence. We must also assume in favor of the judgment the existence of every fact which the trier of

facts could have reasonably deduced from the evidence.

[7] In the case at bar, if the circumstances reasonably justify the judgment of the duly constituted arbiter of the facts, the opinion of the reviewing court that these circumstances might also reasonably be reconciled with a contrary conclusion will not warrant interference with the determination of the trial court. Viewed in the light of these rules, we are persuaded that the finding of the trial court as to mental incapacity must be sustained.

There was evidence that decedent was 79 years of age. During the year 1955 she suffered a severe heart attack which necessitated her hospitalization on two different occasions. She was afflicted with a generalized arteriosclerotic condition, aggravated by advanced gangrene in both legs. During the year 1955, here in question, decedent up to the time of her death suffered extreme pain which required her to take daily doses of pain-killing drugs to alleviate such pain. On July 7, 1955, when decedent was admitted to the hospital the last time, her signature upon hospital records was barely legible. Further evidence of lack of coordination and inability to place scribbles near the signature line is shown on the document consenting to the nerve blocks. At that time appellant Frank E. Rich signed the consent on behalf of decedent.

The hospital records indicate that the spinal blocks were performed on July 8, 9, 10, 11 (date of signing the deed), and 12. As heretofore noted, this is a procedure which involves the insertion of a needle four or five inches long into the lumbar spine of the patient.

On the hospital record designated "Laboratory Pathological Special Report", it is stated: "An extensive generalized arteriosclerosis involving all vessels examined, with marked reduction in visible lumens." Gould's Medical Dictionary defines "lumens" as "cavity of blood vessel".

Noteworthy also is the fact that the nurses' records contained in the hospital records revealed that the decedent Maria



Lamp, suffered excruciating pain throughout her entire stay in the hospital and that she received narcotics frequently to relieve pain and suffering. The hospital charts indicate that the patient cried out, moaned and complained of pain. The record of July 8, 1955, 12 a. m., shows the following: "Patient seems confused; at times pecks at covers; pain in legs severe".

[8] When the foregoing is added to the testimony of other witnesses for respondents, as narrated in the factual background hereinbefore set forth, we are satisfied that under applicable rules, the finding of the trial court as to mental incapacity cannot be strictured as being without substantial evidence in the record to support it, and as not sufficient to overcome any existing presumption of mental capacity.

[9, 10] Appellants next insist that "there is not one shred of evidence herein attesting to the existence of a confidential relationship between the decedent and appellants". They concede there was "friendship, affection and a close relationship", and that "it might be inferred that the deceased reposed confidence in the integrity of (appellant) Mrs. Rich", but that all this amounted to was "the behavior of a friend who serves another at his request \* \* \*" (Hausfelder v. Security-First Nat. Bank of Los Angeles, 77 Cal.App.2d 478, 483, 176 P.2d 84). It would unduly prolong this already lengthy opinion to here state the evidence as to the relationship existing between decedent and appellants. We have already done so. Suffice it to say that the evidence clearly establishes that decedent reposed trust and confidence in the integrity and fidelity of both appellants. These are the elements of a confidential or fiduciary relationship, which in law are synonymous (In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583).

[11-14] Appellants next challenge the sufficiency of the evidence to support the finding of undue influence on their part to procure decedent Maria Lamp to execute the deed of July 11, 1955, without the payment of any consideration therefor. There

can be no doubt that appellants actively participated in the transaction that resulted in the signing of the deed of July 11, 1955, by decedent and equally unassailable is the statement that by such transaction appellants obtained a gift or advantage which enriched them. Since appellants occupied a confidential relationship toward decedent, the principle applicable to the issues of undue influence is thus stated in *Khoury v. Barham*, 85 Cal.App.2d 202, 212, 192 P.2d 823, 828:

"The rule is inflexible that no one who holds a confidential relation toward another shall take advantage of that relation in favor of himself, or deal with the other person upon terms of his own making; that in every such transaction between persons standing in that relation, the law will presume that he who held the influence over the other exercised it unduly to his own advantage."

And in *Herbert v. Lankershim*, 9 Cal.2d 409, 426, 71 P.2d 220, 228, our Supreme Court stated:

"A concise statement of the rule where the relations between the parties were intimate and highly confidential, as here, and where the donor had no independent advice, and where the conveyance was without valuable consideration, or, it may be parenthetically added, in cases where the consideration is grossly inadequate, is announced as follows in *Mead v. Mead*, 41 Cal. App. 280, 182 P. 761, 763: 'Under such circumstances the decisions hold uniformly that the transaction resulting in benefit to the trustee should be viewed with "the most scrutinizing jealousy," and that the presumption of fraud attaches and must be overcome by evidence that the deed is what it purports to be.'"

Where, as here, appellants base their claim upon a deed obtained from one with whom they stood in a relation of trust and confidence, the usual rule that the burden of proof rests upon the person who asserts

fraud is relaxed to the extent that the beneficiary of a transaction under such circumstances must bear the burden of proving that he exhibited that degree of good faith sufficient to remove all doubt respecting the fairness of the transaction (Herbert v. Lankershim, supra, 9 Cal.2d at page 426, 71 P.2d at page 228).

As to the court's finding that decedent had no independent advice with regard to the execution of the deed of July 11, 1955, appellants urge that a deed may not be set aside because of the absence of independent advice alone. Undoubtedly this is true, but the lack of independent advice assumes considerable importance unless it clearly appears that the deed was made freely, voluntarily, and with full understanding of all the facts and the effect of the document (Wilbur v. Wilbur, 197 Cal. 1, 16, 239 P. 332; Mead v. Smith, 106 Cal.App. 2d 1, 5, 234 P.2d 705). In view of the evidentiary features of the case at bar, the rule would seem to be, as stated in Herbert v. Lankershim, supra, 9 Cal.2d at page 426, 71 P.2d at page 228: " \* \* \* one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, *unless it shall appear that such person had independent advice* and acted not only of his own volition but with full comprehension of the results of his action." (Emphasis added.) In the case now engaging our attention there is no evidence that decedent had the benefit of any independent advice, and under the facts and circumstances here present the court was justified in taking the absence of such advice into consideration in formulating its decision.

[15,16] Appellants rest a claim of prejudicial error upon the action of the trial court in permitting respondents over objection, to file an amended complaint to conform to proof after the trial had been concluded. Conceding that the amended complaint raised issues not framed by the original pleadings, it did plead issues raised by the evidence and which were treated as such during the trial. The granting or denial of permission to file

amendments to pleadings to conform to proof rests largely in the discretion of the trial court. The reason therefor is obvious and is intended to insure, as far as possible, that substantial justice is done by a liberal construction of the rule. When the amended complaint filed herein is compared with the evidence adduced at the trial, we are satisfied that there was no abuse of discretion on the part of the court in permitting it to be filed (39 Cal.Jur.2d, par. 258; Baker v. Van Dolzer, 142 Cal. App.2d 428, 437, 298 P.2d 86; Farnsworth v. Hunter, 11 Cal.2d 27, 31, 77 P.2d 840; Carman v. Athearn, 77 Cal.App.2d 585, 594, 175 P.2d 926).

[17] Appellants' claim that they were given no opportunity to plead or to demur is answered by the statement that since the issues tendered by the amended pleading to conform to the proof, have already been tried they are deemed denied without pleading (Valencia v. Shell Oil Co., 23 Cal.2d 840, 848, 147 P.2d 558).

[18] Appellants' contention that they were denied a fair and impartial trial, because they were denied an opportunity to orally argue the case at the conclusion of the trial is, in view of the record, unavailing. The reporter's transcript reveals that it was not appellants' counsel who sought to argue, but one of counsel for respondents who stated, "I want to argue just a little bit, if the court please", to which the trial judge replied, "No, we are not going to argue this. You are going to have to submit it. I have to submit this case gentlemen. I have a juvenile matter coming in at 1:30 and another case coming in at 1:45. You may object to the idea of submitting this on written briefs but it has taken some time to try this and it is a little bit complicated in some of its phases and I like that better. It gives me time to read the briefs in between conferences, and that is the only reason I wanted it." After further colloquy between court and counsel, the former said: "I want these briefs to cover your contentions with reference to what is shown and argue the evidence that applies to

those points in whatever you claim, or everything that you claim, in full, in other words." We entertain no doubt that when the court declined to hear oral argument but granted counsel the privilege of filing briefs, there was no abuse of discretion (*Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 118, 38 P. 635). See also *Dam v. Bond*, 80 Cal.App. 342, 347, 251 P. 818. In a cause tried before the court, sitting without a jury, no absolute right to argument exists was the holding in *Larson v. Blue & White Cab Co.*, 24 Cal.App.2d 576, 578, 75 P.2d 612.

[19] On their motion for a new trial, appellants filed an affidavit of their attorney wherein he reiterated the claim that appellants were denied a fair trial because the court refused to permit oral argument, a contention we have herein resolved against them. In the affidavit, complaint is also made that since appellants' closing brief in the trial court was filed February 28, 1957, and the court rendered its decision on March 25, 1957, appellants were denied a fair trial, "\* \* \*" in that said Trial Court could not do justice in determining a cause involving three and one-half days' testimony, and some sixteen witnesses having appeared and testified, without oral argument. It would be highly speculative to assume that the Trial Court could recall all of the evidence adduced during the trial, and numerous individual witnesses called and their manner of testifying, and to do complete justice in deciding the said within cause, more than two months after the conclusion of the adducement of said testimony." We find no merit in this contention. The trial judge had the benefit not only of the notes made by him during the trial but of the briefs filed by counsel, wherein it must be assumed, in view of the request of the trial court that the briefs, "cover your contentions with reference to what is shown and argue the evidence that applies to those points \* \* \*" in full, in other words", that the briefs contained an

epitome of the evidence and the law applicable thereto. Certainly, it cannot justly be said that having the case under submission for less than a month would indicate such a lapse of time as would render it probable that the particular case and the evidence and issues therein could not have remained within the memory of the court, aided as it was by trial notes and briefs.

[20] Counsel's affidavit on the motion for a new trial also sets forth that subsequent to the trial affiant discovered the original promissory note that was referred to in the trial and a copy of which we have herein held was properly admitted into evidence. It is contended that the original of said note tends "to strengthen the defendants' (appellants') cause herein, and to show as an instrument in writing, consideration for those certain monies advanced to defendants by the deceased, Maria Lamp, during the month of April, 1950, all to the further proof that the grant deed of the defendants herein to said deceased, bearing date of May 1, 1950, was in truth and fact given as security for the repayment of said monies." We fail to perceive wherein the original note can be regarded as of evidentiary value except insofar as it tends to corroborate the testimony given at the trial by appellant Frank E. Rich. Such testimony does not in any way affect the testimony concerning the ultimate issue involved in this litigation, viz., the mental competency of decedent Maria Lamp, when she signed the grant deed dated July 11, 1955.

We have concluded that there is substantial evidence in the record to support the findings, the latter support the judgment, and no prejudicial errors appear in the rulings of the court.

The attempted appeal from the order denying a new trial is dismissed. The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



50 Cal.2d 768

Pearl Anna KOLLERT et al., Plaintiffs  
and Appellants,

v.

Albert Franklin CUNDIFF et al.,  
Defendants and Respondents.

L. A. 24930.

Supreme Court of California,  
In Bank.

Sept. 19, 1958.

Action arising out of intersection automobile collision which occurred when defendant motorist attempted to make a left turn in front of automobile driven by one of plaintiffs. From a judgment of the Superior Court, Los Angeles County, Fred Miller, J., in favor of defendant, the plaintiffs appealed. The Supreme Court, Gibson, C. J., held that error in submitting issue of contributory negligence as to passenger in automobile operated by plaintiff motorist was prejudicial.

Judgment reversed as to such passenger and affirmed as to other plaintiffs.

Carter, J., dissented.

Opinions, 318 P.2d 502 and 319 P.2d 643, vacated.

#### 1. Automobiles ⇨244(11, 43)

In action arising out of intersection automobile collision which occurred when defendant motorist attempted to make a left turn at an intersection controlled by electrically operated signals and his automobile was struck by automobile driven by one of plaintiffs, who testified that light was on green when she entered intersection, evidence was sufficient to support implied finding that defendant motorist was not negligent or that plaintiff motorist was guilty of contributory negligence. West's Ann.Vehicle Code, § 551.

#### 2. Appeal and Error ⇨1062(1)

In action arising out of intersection automobile collision which occurred when defendant motorist attempted to make a left turn in front of automobile driven by one

of plaintiffs, error in submitting issue of contributory negligence as to passenger in automobile operated by plaintiff motorist was prejudicial.

#### 3. Trial ⇨344

Affidavits of jurors may not be used to impeach verdict except where jury has been induced to assent to any general or special verdict by a resort to a determination of chance or where bias or disqualification of a juror has been concealed by false answers on voir dire. West's Ann. Code Civ.Proc. § 657, subs. 1, 2.

#### 4. New Trial ⇨143(1)

Statute providing that a verdict may be vacated for irregularity in the proceedings has no reference to jurors' affidavits and statute may not be regarded as permitting use of such affidavits in situations where they would not otherwise be proper. West's Ann.Code Civ.Proc. § 657, subs. 1, 2.

#### 5. New Trial ⇨143(5)

Affidavits of jurors stating that foreman told them that they would have to abide by the verdicts completed by him or they would never again be allowed to act as jurors and that foreman investigated traffic lights at intersection at which collision under litigation occurred and that his report on the theory of signals was considered by the jury, could not be used to impeach verdict.

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Robert H. Lund and Floyd H. King,  
Long Beach, for appellants.

Parker, Stanbury, Reese & McGee and  
J. H. Peckham, Los Angeles, for respondents.

GIBSON, Chief Justice.

[1] Plaintiffs have appealed from a judgment for defendants, contending that the court erred in instructing the jury and in refusing to consider affidavits of jurors offered in support of a motion for new trial to prove misconduct of the jury.

The plaintiffs, Mrs. Kollert, Mrs. Abrahamson, and four children, were riding in a car which Mrs. Kollert was driving when it collided with one operated by defendant Cundiff who was then acting in the course of his employment by defendant the Termo Company. Mrs. Abrahamson, who is Mrs. Kollert's mother, was riding in the front seat with her. Four children, Steven and Michael Kollert and Mary and Marlene Cleveland, were riding in the back seat of the car.

The accident occurred in Long Beach at the intersection of Carson Avenue and Paramount Boulevard, where traffic is controlled by electrically operated signals. Mrs. Kollert was driving west on Carson in the lane nearest the center line, and, as she approached the intersection, there was no car in front of her in that lane. She testified that the signal light on Carson turned from red to green when she was half a block from the intersection, that she was driving about 20 miles an hour and that she did not see defendant's car until the collision occurred. A man who had been driving about 300 feet behind Mrs. Kollert in the lane to her right testified that the light was green when she entered the intersection and that it was still green when the accident happened.

Cundiff was driving east on Carson, intending to make a left turn north into Paramount. He testified that the light was green as he came to the intersection and that he stopped even with the curb. He signaled for a left turn, moved into the intersection and waited for several westbound cars to pass. As the light changed to amber, he drove across the double line and saw the car driven by Mrs. Kollert,

which was then approximately 50 feet east of the intersection, traveling at about 35 miles per hour. The cars came together in the westbound lane nearest the center line, the right front part of Mrs. Kollert's car colliding with the right front wheel of Cundiff's car.

A witness who was driving the third car behind Cundiff and in the same lane testified that traffic at the intersection had stopped and that as the cars in the lane to the right began to move, Cundiff, starting out very fast, turned left into the intersection. The witness said that he noticed Mrs. Kollert's car coming toward Cundiff "at a good rate of speed," as soon as Cundiff started to move.

There was substantial evidence to support the implied finding of the jury either that Cundiff was not negligent or that Mrs. Kollert was guilty of contributory negligence. However, in considering whether errors, if any, had a prejudicial effect, it should be noted that, on both of these issues, the evidence would also have warranted a finding against defendants.<sup>1</sup>

[2] The court gave instructions which submitted the issue of contributory negligence to the jury not only as to Mrs. Kollert but also as to Mrs. Abrahamson. Defendants did not plead that Mrs. Abrahamson was guilty of contributory negligence, and they concede that the instructions were erroneous as to her but take the position that the error was not prejudicial.

Defendants point out that the jury found against the four children in the car, although it was instructed that the defense of contributory negligence did not apply to them, and they argue that the jury must

1. At the time of the accident, July 1955, section 551 of the Vehicle Code provided:

"(a) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

have based its verdict for Cundiff on a conclusion that he was not negligent. The findings against the children could be explained upon the theory that they had not proved any substantial injuries caused by the accident. With respect to three of the children it is clear that the jury was not required to find under the evidence that they had been injured, and it may be noted that defendants moved for a directed verdict as to them on this ground. However, defendants assert that it was conclusively established that the other minor plaintiff had received a fractured finger as a result of the accident. We do not agree that this is so. Although a doctor testified that a week after the accident he found a slight fracture, defendants presented evidence that X-rays taken at a hospital immediately after the accident showed no fracture, and, on cross-examination by defendants, the doctor acknowledged that the fracture might have been sustained at some time after the accident. Thus the jury may have concluded that the minor plaintiffs received no substantial injuries and may have found against them on that ground.

As we have seen, the evidence would support a finding that both Cundiff and Mrs. Kollert were negligent. The jury may have believed that Mrs. Abrahamson was chargeable with Mrs. Kollert's negligence or that she in some degree failed to exercise due care for her own safety, and the erroneous instructions, when considered with the evidence, may have improperly caused the jury to go beyond the issues pleaded and return the verdict against Mrs. Abrahamson on the ground of contributory negligence. In these circumstances we are of the view that the erroneous instructions require that the judgment against Mrs. Abrahamson be reversed.

When the jurors were polled, they stood nine to three in favor of defendants. In support of the motion for a new trial, affidavits of the three dissenting jurors and of one majority juror were offered. The affidavits may be summarized as follows: The jury, taking four polls, considered the case of Mrs. Kollert only, and by a poll of

nine to three found that both drivers were negligent and that Mrs. Kollert should be denied recovery. The bailiff was summoned for the purpose of securing additional instructions as to the remaining plaintiffs. He asked how the deliberations stood, and the foreman answered that the vote was nine to three. The bailiff then left, returned, and advised that there would be no need for further instructions since a verdict had been reached. Over the protest of some jurors the foreman completed the verdicts as to the remaining five plaintiffs without any further deliberation. Two of the affidavits stated that the foreman told the jurors that they would have to abide by the verdicts completed by him or they would never again be allowed to act as jurors. According to three affidavits, the foreman, during a night recess, had investigated the traffic lights at the intersection where the accident occurred, and his report on the periods of the signals was considered by the jury.

It is the general rule in California that affidavits of jurors may not be used to impeach a verdict. See *People v. Sutic*, 41 Cal.2d 483, 495, 261 P.2d 241 [coercion of a juror by the others to subscribe to a verdict]; *People v. Evans*, 39 Cal.2d 242, 250, 246 P.2d 636 [evidence received out of court]; *People v. Gidney*, 10 Cal.2d 138, 146, 147, 73 P.2d 1186 [bailiff discussed case and probable sentence with jurors]; *People v. Azoff*, 105 Cal. 632, 39 P. 59 [evidence received out of court]; *People v. Zelter*, 135 Cal.App.2d 226, 235-236, 287 P.2d 183 [juror "coerced" and "intimidated" by other jurors]; *Maffeo v. Holmes*, 47 Cal.App.2d 292, 295, 117 P.2d 948 [independent investigation by some jurors]; *People v. Giminiani*, 45 Cal.App.2d 535, 539, 114 P.2d 392 [jury informed by bailiff that a defendant had a bad reputation with the police].

[3] An exception to the general rule is made by statute where "any one or more of the jurors have been induced to assent to any general or special verdict \* \* \* by a resort to the determination of chance.



\* \* \* Code Civ.Proc. § 657, subd. 2.<sup>2</sup> Another exception, recognized by judicial decision, is that affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire. E. g., *Williams v. Bridges*, 140 Cal.App. 537, 35 P.2d 407.

[4] Subdivision 1 of section 657, which provides that a verdict may be vacated for "irregularity in the proceedings," does not refer to jurors' affidavits and may not be regarded as permitting the use of such affidavits in situations where they would not otherwise be proper. Cf. *People v. Evans*, 39 Cal.2d 242, 250, 246 P.2d 636 [rejecting a similar argument made with respect to subdivision 2 of section 1181 of the Penal Code]. The statements to the contrary in *Shipley v. Permanente Hospital*, 127 Cal. App.2d 417, 424, 274 P.2d 53, 48 A.L.R.2d 964, are disapproved.

A few jurisdictions permit a wider use of a juror's affidavit to impeach a verdict than has been allowed in California (see *Wright v. The Illinois and Mississippi Telegraph Co.*, 20 Iowa 195, 210-212; *Mattox v. United States*, 146 U.S. 140, 148-150, 13 S.Ct. 50, 36 L.Ed. 917), and plaintiffs urge us to relax the rule in this state. The problem involves the balancing of two conflicting policies. It is, of course, necessary to prevent instability of verdicts, fraud, and harassment of jurors, and, on the other hand, it is desirable to give the losing party relief from wrongful conduct by the jury. The court in *McDonald v. Pless*, 238 U.S. 264, 267-269, 35 S.Ct. 783, 785, 59 L.Ed. 1300, after discussing these policies and

stating that the wrong to the individual was the lesser of two evils, concluded that as a general rule the affidavits should be excluded but that there might be instances where the rule could not be applied without "violating the plainest principles of justice."

[5] In California, as we have seen, only two exceptions have been recognized, one by statute and one by judicial decision. The present case does not come within either of them, and, whether or not additional exceptions may be justified under some circumstances, we are of the view that the allegations of the affidavits before us, even if taken as true, do not warrant a departure from the general rule. It is doubtful whether the conduct of the bailiff and the foreman's action at the time of completing the verdicts would have caused persons of ordinary intelligence to acquiesce in verdicts which did not represent their conclusions, and when the jurors were polled in open court all of them except the three affiants who voted for plaintiff affirmed each of the verdicts as written. With respect to the foreman's visit to the scene of the accident and his report to the jury it is difficult to see how, in the light of the evidence relating to the collision, the duration of the traffic signals could have had a significant bearing on the outcome of the case.

The judgment is reversed as to Mrs. Abrahamson and affirmed as to the other plaintiffs.

SHENK, TRAYNOR, SCHAUER,  
SPENCE and McCOMB, JJ., concur.

## 2. Section 657 of the Code of Civil Procedure provides in part:

"The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

"1. Irregularity in the proceedings of the court, jury or adverse party, or any

order of the court or abuse of discretion by which either party was prevented from having a fair trial;

"2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

\* \* \*

CARTER, Justice (concurring and dissenting).

I agree with the reasons given by the majority for reversing the judgment against Mrs. Abrahamson, but I can no longer assent to the dogma, so long parroted, that a juror's affidavit cannot be used to impeach his verdict.

The common formula that "a juror's testimony or affidavit is not receivable to impeach his own verdict is not correct as a statement of existing law, nor is it maintainable on any principle in this unqualified form." "It is a mere shibboleth and has no intrinsic signification whatever." 8 Wigmore on Evidence, Privileged Communications, § 2345, p. 663. Notwithstanding Wigmore's acute analysis disapproving the form in which the rule exists and the automatic application of it by the courts (8 Wigmore on Evidence, Privileged Communications, §§ 2345-2356), the practice in both aspects, unfortunately, remains unchanged. This persistence may, perhaps, be attributed to the one great difficulty with a rule that may be stated clearly and simply. When such a rule is completed and rounded, the corners smoothed and the content cohesive and coherent, it is likely to become a thing in itself, a work of art. It is then like a finely engineered bridge or a completed painting. One hates to disturb it. Even if knowledge and experience should demonstrate its obsolescence, one hates to tear it down because it has existed so long in its original design. I resist any such temptation and approach to the law.

The rule that a juror may not impeach his verdict is founded on three independent and general principles: (1) Privileged communications; (2) parol evidence rule; and (3) self-stultifying testimony. 8 Wigmore on Evidence, Privileged Communications, § 2345.

The application of the principle of privileged communications between jurors is to insure the attainment of the jurors' constitutional purposes. It prohibits the disclosure of communications with a fellow

juror upon the witness stand without the latter's consent. However, this principle is generally not significant primarily because what is said between jurors is seldom relevant at a new trial. 8 Wigmore on Evidence, Privileged Communications, § 2346. Moreover, what is disclosed in the affidavit herein is not in the nature of a communication.

As for the doctrine of self-stultifying testimony, this principle forbids a juror from showing that a juror's behavior was not in the prescribed form which is necessary before a juror's actions may be valid. 8 Wigmore on Evidence, Privileged Communications, § 2345. It is based on the principle "*nemo turpitudinem suam allegans audietur*" (a witness shall not be heard to allege his own turpitude). 8 Wigmore on Evidence, Privileged Communications, § 2345. Wigmore convincingly establishes that this principle no longer exists in our law and should not be resurrected for present purposes. 8 Wigmore on Evidence, Privileged Communications, §§ 2352-2353.

Therefore, the only principle on which we may validly reject the affidavits of the jurors herein is by the application of the parol evidence rule. This principle applies to the verdict of a jury like a will or a contract or a judgment.

Applying this principle it is evident that a juror's motives, beliefs, misunderstandings, intentions, and the like are immaterial. The verdict is the sole embodiment of the juror's acts. "The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in the deed, namely, the loss of all certainty in the verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow." 8 Wigmore on Evidence, Privileged Communications, § 2349, p. 668. This rule and policy is followed in California. *Amsby v.*

Dickhouse, 4 Cal. 102, 103; *People v. Wyman*, 15 Cal. 70, 75; *People v. Hughes*, 29 Cal. 257, 258, 263; see *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. Accordingly the statements by the jurors in their affidavits that the foreman told them that they would have to abide by the verdicts completed by him or they would never again be allowed to act as jurors are immaterial and may properly be excluded.

However, the policy of the parol evidence rule prohibiting the disclosure of a juror's motives, beliefs, misunderstandings, et cetera, does not compel a similar conclusion with respect to disclosure of irregularities and misconduct of jurors during their deliberations which constitute deviations from those certain formalities that are regarded as desirable policy-wise in the conduct of jury deliberations. The law of verdicts "must prescribe requisite formalities of conduct for the jurors, and define those informalities and irregularities which 'per se' invalidate the verdict. What those shall be is thus elsewhere in the law predetermined. The principle of the Parol Evidence rule then enters and declares that the lack of such formalities, for this as for every other legal act (whatever the respective required formality may be), is always proper to establish as a ground for declaring the act void. Whatever misconduct of the jury, therefore, is an irregularity fatal to the verdict may always be proved." 8 Wigmore on Evidence, Privileged Communications, § 2352, p. 683.

Admittedly the distinction between motive and irregularity may sometimes be shadowy and difficult to perceive, but this offers no excuse for not attempting to remove the cloud of uncertainty. Moreover, it is readily apparent that a court by merely pronouncing the "shibboleth that a juror cannot impeach his verdict can never appreciate the vital distinction between impeaching" it by motive and impeaching it by irregular conduct. 8 Wigmore on Evidence, Privileged Communications, § 2349.

If Wigmore is correct in his deductions that the prohibition against impeaching a jury verdict is founded on the policy behind privileged communications and the parol evidence rule, then this court should be ready to refer its rule to those ends, stating why those ends are desirable, what is given up to attain them, and whether they are worth the price. A reading of the majority opinion leaves one in doubt as to what end is being subserved. This doubt is permitted to grow because of the court's interpretation of the phrase "irregularity in the proceedings," which appears in subdivision 1 of section 657 of the Code of Civil Procedure. The majority opinion declares that this phrase "does not refer to jurors' affidavits and may not be regarded as permitting the use of such affidavits in situations where they would not otherwise be proper."

In view of the principles heretofore stated the holding of the majority avoids the very question the court should decide, i. e., do the affidavits allege irregularity and misconduct which constitute deviations from those formalities that are regarded as desirable in jury deliberations? This is a policy question that has been left to the courts to work out case by case. See, Code Civ.Proc. § 657(1). After due consideration this court might well conclude that the allegations in the affidavits do not state a deviation from the desired formalities, but such a conclusion should only be reached after careful thought.

The court should reconsider the matter clearly setting forth its reasons. This can only be accomplished by rejecting the automatic formula that a juror's testimony or affidavit is not receivable to impeach his own verdict.

I think the affidavits in the instant case are sufficient to establish misconduct of a character justifying the impeachment of the verdict and that a new trial should be granted as to all parties and all issues.



50 Cal.2d 794

Matter of the ESTATE of Elsie M.  
ALLIE, Deceased.

Myrtle MARQUARDT and Stella Kranz,  
Appellants,  
v.

Mitchell S. CASH, Respondent.  
S. F. 19782.

Supreme Court of California.  
Sept. 26, 1958.

Estate proceeding. The Superior Court, San Mateo County, Murray Draper, J., entered a decree of distribution adverse to surviving sisters of previously deceased husband of widow who died intestate, and they appealed. The Supreme Court, Schauer, J., held that where premiums on a National Service Life Insurance policy were paid during marriage of the insured and intestate, and there was no evidence that the premium payments were made from funds other than community property of the parties, insurance proceeds would be deemed to have had their origin or source in community property solely for the purpose of intestate succession under the laws of California, and therefore, under applicable section of the probate code, proceeds of such policy were sharable equally by the relatives of insured spouse and those of intestate into whose estate they were paid.

Decree reversed and cause remanded with directions.

Opinion, 322 P.2d 532, vacated.

#### 1. Husband and Wife ⇨274(1)

Underlying principle of statutes dealing with distribution of community and other property acquired from predeceased spouse where there is no surviving spouse or issue, and dealing with distribution of former separate property of a previously deceased spouse where there is no surviving spouse or issue, is that the origin or source of acquisition of the property should and does control its intestate distribution. West's Ann.Prob.Code, §§ 228, 229.

#### 2. Husband and Wife ⇨249, 274(1)

Where premiums on a life policy issued on the life of a spouse were paid with community funds, the policy was community property, and the policy proceeds retained their community character for purposes of intestate succession, notwithstanding the fact that such proceeds were paid only after dissolution of the community by death.

#### 3. Armed Services ⇨77(1)

Under a National Service Life Insurance policy, character of funds from which premiums are paid cannot affect the character of the rights of the insured with respect to the benefits of the policy.

#### 4. Husband and Wife ⇨274(1)

Where premiums on a National Service Life Insurance policy were paid during marriage of the insured and intestate, and there was no evidence that the premium payments were made from funds other than community property of the parties, insurance proceeds would be deemed to have had their origin or source in community property solely for the purpose of intestate succession under the laws of California, and therefore, under applicable section of the Probate Code, proceeds of such policy were sharable equally by the relatives of insured spouse, and those of intestate into whose estate they were paid. West's Ann. Prob.Code, § 228.

Emmet B. Hayes, San Francisco, for appellant.

Cooper, White & Cooper, Sheldon G. Cooper and John E. Schaeffer, San Francisco, for respondent.

SCHAUER, Justice.

From a decree establishing heirship with respect to certain property of the estate of an intestate deceased widow and determining that her surviving brother and sole heir at law is entitled to distribution of all of such property, the surviving sisters of the previously deceased husband of the widow appeal. The issue to be decided is whether the origin of such property, as between the widow and her husband, should

be deemed to be community or separate, if either, and, therefore, which of sections 225, 228 and 229 of the Probate Code controls the intestate succession thereto. For the reasons hereinafter articulated we conclude that the property should be treated as community for the purposes of intestate succession, that it should therefore go one-half to the relatives of the decedent and one-half to those of the predeceased husband, and that the decree must be reversed.

The appeal is presented on a settled statement in lieu of clerk's and reporter's transcripts. (Rule 7(b), Rules on Appeal.) From such statement it appears that in March, 1956, Joseph Allie died intestate and without issue. The beneficiary under his National Service Life Insurance policy was his widow Elsie, decedent herein. The following month Elsie died intestate and without issue. The proceeds of the policy were paid into her estate, and constitute the property here in controversy. Elsie's sole heir at law is her brother, respondent herein. The sole surviving heirs at law of Joseph are appellants, his sisters.

Section 225 of the Probate Code (see also section 220) provides that the separate property of a person who dies intestate, leaving neither issue nor spouse, goes to his parent or parents if living and if not to his brothers and sisters and to the descendants of deceased brothers and sisters.

Section 228 provides that "If the decedent leaves neither spouse nor issue, and the estate \* \* \* was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest \* \* \*, such property goes in equal shares to the children of the deceased spouse and their descendants \* \* \*, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or \* \* \* to the survivor, or if both are dead in equal shares to the brothers and

sisters of the decedent \* \* \*, and the other half goes to the parents of the deceased spouse in equal shares, or \* \* \* to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse \* \* \*."

Section 229 provides that "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest \* \* \* such property goes" to the heirs at law of the previously deceased spouse.

The settled statement declares that decedent and Joseph were married in 1926, and that "There is no evidence other than that the assets of the estate were acquired during the marriage by the earnings of the parties. The premiums on the insurance policies<sup>1</sup> were paid during the marriage. There is no evidence that the payments thereon were made from funds other than community property of the parties."

The trial court, in reliance upon *Wissner v. Wissner* (1950), 338 U.S. 655, 658-661, 70 S.Ct. 398, 94 L.Ed. 424, declared that "the community character" of a National Service Life Insurance policy on the life of the husband "cannot affect the distribution of its proceeds," and that therefore section 228, which treats of intestate succession to "community property of the decedent and a previously deceased spouse," cannot apply. The court further concluded that the policy proceeds should be distributed entirely to the widow's heir at law, respondent herein, seemingly upon the theory that they constituted separate property of the widow rather than originating in either community property or the predeceased husband's separate property. This appeal by the sisters of the predeceased husband followed.

[1] In resolving the issue it must be borne in mind that sections 228 and 229 of the Probate Code refer to the status of property as being either community or sep-

1. Only the National Service Life Insurance policy is involved on this appeal.

arate as of a time when both spouses were living; i. e., prior to the death of the "previously deceased spouse" mentioned in the two sections. (See *In re Estate of Reizian* (1951), 36 Cal.2d 746, 749-750 [1, 2], 227 P.2d 249; *In re Estate of Adams* (1955), 132 Cal.App.2d 190, 203 [8], 282 P.2d 190.) Further, the rule has been declared that the underlying principle of sections 228 and 229 is that the origin or source of acquisition of the property should and does control its distribution. (*In re Estate of Reizian* (1951), *supra*; *In re Estate of Abdale* (1946), 28 Cal.2d 587, 590-592, 170 P.2d 918; *In re Estate of Rattray* (1939), 13 Cal.2d 702, 713-714, 91 P.2d 1042.) Thus, in the *Abdale* case it was held that separate real property of the husband which he had transferred to himself and his wife as joint tenants, and of which he again became sole owner upon her death, should be distributed under section 225 of the Probate Code as being, and having originated wholly from, separate property of the husband, rather than one-half thereof being distributed under section 229 as the separate property of a predeceased spouse (i. e., the wife). (See also *Sears v. Rule* (1945), 27 Cal.2d 131, 141-143, 163 P.2d 443.) Consequently the question to be determined here is whether for the purposes of administering the pertinent succession statute the origin of the property (which actually came from the United States government) may and should be treated as (1) community, (2) separate property of the "previously deceased spouse" (here, the husband on whose life the insurance policy was issued), or (3) separate property of the surviving spouse (here, the decedent wife).

[2, 3] The general rule is that where premiums on a life insurance policy issued on the life of one of the spouses were paid with community funds, the policy is community property (*Grimm v. Grimm* (1945), 26 Cal.2d 173, 175, 157 P.2d 841, and cases there cited), and the policy proceeds retain their community character for purposes of intestate succession, notwithstanding the fact that such proceeds are paid only after dissolution of the community by

death. (*In re Estate of Castagnola* (1924), 68 Cal.App. 732, 737 [5], 230 P. 188.) However, a National Service Life Insurance policy is issued pursuant to federal law and the principal consideration for it is the relationship between the policyholder and the government. Premiums, when paid at all, are at a rate far less than the rates normally charged by privately owned insurance companies, and the character of the funds from which premiums are paid cannot affect the character of the rights of the insured with respect to the benefits of the policy. In *Wissner v. Wissner* (1950), *supra*, 338 U.S. 655, 70 S.Ct. 398, the United States Supreme Court dealt with a case in which the policyholder had named his mother as beneficiary. Such premiums as accrued were assumed to have been paid with community funds, and upon the insured's death his widow sought to recover one-half of the proceeds of the policy. The California courts had held (*Wissner v. Wissner* (1949), 89 Cal.App.2d 759, 764-770[2], 201 P.2d 837; hearing by Supreme Court denied by a divided court) that inasmuch as premiums paid by the insured "were paid from community funds; and \* \* \* plaintiff [wife] had a vested interest in one-half of such community property" (89 Cal.App.2d at page 764, 201 P.2d at page 841), the "federal government had no power to provide, as it is contended it did in section 454a [of the World War Veterans' Relief Act, 38 U.S.C.A.] that payments made to a beneficiary of a national service life insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary" (89 Cal.App.2d at page 767, 201 P.2d at page 843), and that any such provision would constitute the taking of private property without due process of law, in violation of the Fifth Amendment of the United States Constitution. Judgment awarding the widow one-half the proceeds of the policy, which she had sued to recover from the beneficiary, was affirmed by the California court.



In reversing the California courts the Supreme Court of the United States pointed out that under that court's view of the case it was "unnecessary to decide whether California is entitled to call army pay community property" (note 2, at page 657 of 338 U.S., at page 399 of 70 S.Ct.); that the widow made no claim for the premiums paid on the policy but sought the proceeds of the insurance; that the National Service Life Insurance Act provides, in section 802(g) of 38 U.S.C., that the insured under such a policy "shall have the right to designate the beneficiary or beneficiaries \* \* \* [within a designated class], and shall \* \* \* at all times have the right to change the beneficiary \* \* \*." The court further declares that (at pages 658-659 of 338 U.S., at pages 399-400 of 70 S.Ct.) "Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice," and that to award a share of the proceeds to the widow would frustrate "the deliberate purpose of Congress." Moreover, such an award would violate the provision of section 454a of 38 U.S.C. that payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary \* \* \*." Also, commented the court (at pages 660-661 of 338 U.S., at pages 400-401 of 70 S.Ct.), "Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the \* \* \* full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end \* \* \*. And since the statute which made the insurance proceeds possible was explicit in announcing that the insured shall have the right to designate the

recipient of the insurance, and that 'No person shall have a vested right' to those proceeds, 38 U.S.C. § 802(i), appellee could not, in law, contemplate their capture. The federal statute establishes the fund in issue, and forestalls the existence of any 'vested' right in the proceeds of federal insurance. Hence no constitutional question is presented. However 'vested' her right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance."

It is thus clear that the insured is fully protected and assured by federal law that the proceeds of his National Service Life Insurance policy (the fund which the "federal statute establishes") will be paid to the beneficiary of his choice and that the beneficiary is likewise protected in receiving and retaining such proceeds free from claims based either upon community property laws or principles or upon the origin or source of funds used to pay the policy premiums. We must then determine what law governs succession to the fund having the unique source here established.

In the first place we note that none of the parties involved in the present litigation seek to disturb, and the issues presented will not and do not involve, the full and complete protection of insured and beneficiary so established by the federal Act and confirmed by the federal court in the Wissner decision. The wishes expressed by the insured have already been fully carried out by payment of the policy proceeds into the estate of his beneficiary (his wife, decedent herein), and if his beneficiary had left a valid last will and testament expressing her own wishes as to further disposition of such proceeds, those wishes would likewise be respected. The issues now before us involve, rather, the distribution of the policy proceeds from the estate of the insured's chosen beneficiary under the laws of intestate succession of California, as expressed in its Probate Code, which, of course, are invoked only when the beneficiary of the National Service Life Insurance policy fails to make a

valid testamentary disposition of the proceeds she has received.

[4] As already stated hereinabove, the settled statement on which this appeal is presented declares that premiums on the policy were paid during the marriage of the insured and decedent, and that there is no evidence other than that the assets of decedent's estate were acquired during the marriage by the earnings of the parties, and no evidence that the premium payments were made from funds other than community property of the parties. We are therefore persuaded that on this record we are not precluded from treating the insurance proceeds as having their origin or source in community property *solely for the purpose of intestate succession* under the laws of California (since, as mentioned hereinabove, the wishes of the insured have already been carried out, and the beneficiary has died without making her wishes known), and that to so treat them will violate neither the congressional purpose in enacting the National Service Life Insurance Act, the government contract entered into pursuant to that Act, the right and desire of the insured serviceman that the policy proceeds go to the beneficiary of his choice (where they have already gone), or the privilege of the beneficiary to receive the insurance proceeds free and exempt from the claims of others (as they have actually been received in this case). (Cf. *Clark v. Allen* (1947), 331 U.S. 503, 508, 67 S.Ct. 1431, 91 L.Ed. 1633.) Inasmuch as the beneficiary failed to herself dispose of the proceeds or to express her wishes concerning them, no right of insured or of beneficiary is defeated by applying to such proceeds the provisions of section 228 of the Probate Code, which sets forth the rules of intestate succession to property having its source in community property of a decedent and a previously deceased spouse. Rather, such treatment of the policy proceeds will subserve the legislative scheme, which this court has declared to be fair and reasonable, that where the intestate decedent leaves neither spouse nor issue and the predeceased spouse is al-

so without issue, such property as was community in origin should be shared equally by the relatives of the predeceased spouse and those of the surviving spouse. (In re Estate of Rattray (1939), supra, 13 Cal.2d 713-715, 91 P.2d 1048-1049; see also In re Estate of Abdale (1946), supra, 28 Cal.2d 587, 590, 170 P.2d 918; In re Estate of Perkins (1943), 21 Cal.2d 561, 569-571, 134 P.2d 231.)

For the reasons above stated the decree in the present case, under which the property was distributed entirely to the surviving relative of the wife to the exclusion of relatives of the predeceased husband, is reversed, and the cause is remanded to the superior court with directions to enter a decree distributing the proceeds of the subject policy in accordance with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.



50 Cal.2d 778

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Manuel Joe CHAVEZ and Clyde Bates,  
Defendants and Appellants.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Manuel HERNANDEZ, Defendant and  
Appellant.

Cr. 6199, 6210.

Supreme Court of California,  
In Bank.

Sept. 19, 1958.

Rehearing Denied Oct. 15, 1958.

Defendants were found guilty of murder in the first degree and of the offense of

arson and from judgments of the Superior Court of Los Angeles County, Maurice C. Sparling, J., the defendants appealed. The Supreme Court, Gibson, C. J., held that the word "arson" in Penal Code section 189 includes the offenses of the types described in section 448a as well as those in section 447a; that the evidence sustained conviction; that instructions regarding murder perpetrated by means of torture were proper; that refusal to instruct regarding manslaughter and murder of the second degree was not error; that alleged error in the admission of conversation of an acquitted defendant containing accusatory statements did not require a reversal and that overruling objections to photograph as to the degree of burns on certain bodies was not prejudicial, and that remarks of the court did not require the reversal.

Judgments and orders affirmed.

#### 1. Arson ☞5

The burning of a building in which a bar was located is within the statute, making it a crime for a person to willfully and maliciously burn any building not a parcel of a dwelling. West's Ann.Pen.Code, §§ 447a, 448a.

#### 2. Homicide ☞18(1)

The word "arson" within the statute providing that all murder committed in perpetration or attempt to perpetrate arson shall be murder in the first degree includes offenses of the type described in section 448a as well as those set forth in section 447a. West's Ann.Pen.Code, §§ 189, 447a, 448a.

See publication Words and Phrases, for other judicial constructions and definitions of "Arson".

#### 3. Homicide ☞235

Evidence sustained conviction for murder committed in the perpetration of arson. West's Ann.Pen.Code, §§ 189, 447a, 448a.

#### 4. Homicide ☞15

Murder is perpetrated by means of torture when the intent is to cause cruel suffering for the purpose of revenge.

#### 5. Homicide ☞290

In prosecution for murder committed in the perpetration of arson, evidence justified instructions regarding murder perpetrated by means of torture, where gasoline was thrown on the floor of a bar by defendants and ignited and the jury could conclude that the victims suffered pain from burning. West's Ann.Pen.Code, §§ 189, 447a, 448a.

#### 6. Homicide ☞234(1)

Evidence supported conviction of one defendant of murder committed both in the perpetration of arson and by means of torture as against defendant's claim that he was a mere onlooker and did not participate in the subsequent throwing of gasoline which set a bar afire and caused the death of persons therein. West's Ann.Pen.Code, §§ 189, 447a, 448a.

#### 7. Criminal Law ☞829(21)

In prosecution for murder committed in the perpetration of arson, refusing instructions regarding manslaughter and murder in the second degree because of alleged intoxication of defendants was not error where issues of intent and intoxication were submitted by the court's instructions. West's Ann.Pen.Code, §§ 189, 447a, 448a.

#### 8. Criminal Law ☞338(7), 1144(15), 1163(3)

Where statements of a defendant are admitted which are irrelevant in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from the evidence, but where the statements are relevant to the defendant, and jury is instructed that the evidence is admitted only as to him presumption obtains that the jury followed the instruction and that there was no prejudice to the codefendant.

#### 9. Criminal Law ☞673(4)

In prosecution for murder, evidence relative to a conversation between codefendant and police officers which contained admissions against such defendant were properly admitted where the judge admonished the jury that the evidence was to be received solely as to such defendant and that it should not be used with reference to



other defendants. West's Ann.Pen.Code, §§ 189, 447a, 448a.

**10. Criminal Law** ⇨407(1)

In prosecution for murder, conversations consisting of accusatory statements made by an acquitted defendant in response to questions by the police in the presence of codefendants were properly admitted as to the codefendant who made minor corrections with respect to such statements but said they were substantially true. West's Ann.Pen.Code, §§ 189, 447a, 448a.

**11. Criminal Law** ⇨407(1)

Evidence of accusatory statements made by a defendant is not admissible against a codefendant where there is a denial by the codefendant, but may be received if the truth of the accusation is admitted or if, under the circumstances calling for a denial, there was silence or equivocal or evasive answers indicating a consciousness of guilt or acquiescence in the truth of the statements.

**12. Criminal Law** ⇨422(8), 673(4)

In murder prosecution, accusatory statements made by an acquitted defendant in response to questions by the police in presence of codefendant were not admissible as against a codefendant who was present and denied everything but no harm resulted to such defendant where the court admonished the jury that such conversation was not to be considered in any way with regard to such codefendant. West's Ann. Const. art. 6, § 4½.

**13. Criminal Law** ⇨422(7, 8), 1186(4)

In murder prosecution, conversation consisting of accusatory statements made by an acquitted defendant in response to police questions in presence of codefendants was erroneously admitted as to a codefendant insofar as it related to a trip to a gasoline station to procure gasoline which was used to set the building on fire, the return to bar and incriminating remarks made by codefendant on the night of the fire, where codefendant claimed he was unable to remember the conversation because he was intoxicated, but the error did not require

a reversal in view of evidence admitted by the court. West's Ann.Const. art. 6, § 4½.

**14. Criminal Law** ⇨438

In prosecution for murder committed during perpetration of arson, photographs showing bodies of persons killed in fire should be excluded, where the principal effect would be to inflame the jurors against the defendant because of horror of the crime, but if they have probative value with respect to a fact in issue that outweighs the danger of prejudice to the defendant, they are admissible, and resolution of such question is primarily for the trial court in the exercise of its discretion. West's Ann. Pen.Code, §§ 995, 1239(b).

**15. Criminal Law** ⇨438

In prosecution for murder committed during perpetration of arson, photograph showing bodies inside the premises and the charred condition of the bar, which were used in connection with testimony of a fireman who was called as an arson expert, were admissible as relevant in determining the point of origin of the fire and corroborative of the expert's testimony. West's Ann. Pen.Code, §§ 189, 447a, 448a.

**16. Criminal Law** ⇨1186(4)

**Stipulations** ⇨14(7)

In prosecution for murder committed during perpetration of arson, photographs of bodies of persons in the burned building which were taken of the bodies after removal from the premises were improperly admitted where defendants offered to stipulate as to the cause of death and identification of the victims, but error did not call for a reversal, in view of the entire record, including testimony as to the burned condition of the bodies. West's Ann.Pen.Code, §§ 189, 447a, 448a; West's Ann.Const. art. 6, § 4½.

**17. Criminal Law** ⇨723(3)

In prosecution for murder, prosecutor's argument in commenting on testimony of People's witnesses that she hoped the guilty persons would get the gas chamber was not improper.

**18. Criminal Law** ⇨1037(1)

Alleged improper argument of the prosecutor with reference to cross-examination of an acquitted defendant could not be complained of when no objection was made to such portion of the argument.

**19. Criminal Law** ⇨1035(3)

In prosecution for murder committed during perpetration of arson where defendant during argument to the jury suggested the possibility of verdicts of second degree murder or manslaughter, remarks of court that the offense of arson had been committed to which no objection was made could not be complained of, where if there had been an objection the court would have made it clear that it did not intend to withdraw the factual question of guilt from the jury, but was merely referring to a matter of law which would be covered in its instructions. West's Ann.Pen.Code, §§ 189, 448a.

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Richard Gladstein, San Francisco, Joseph T. Forno, Harold J. Ackerman and Ward Sullivan, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow and Albert Bianchi, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

A jury found defendants Manuel Chavez, Clyde Bates, and Manuel Hernandez guilty of murder of the first degree as charged in six counts. The punishment of Bates and Chavez was fixed at death and that of Hernandez at life imprisonment. The jury further found that each of the three defendants was guilty of arson and that, as alleged, Bates had suffered four prior convictions. The appeals of Bates and Chavez are before us automatically under section 1239, subdivision (b), of the Penal Code. Separate notice of appeal was filed by Hernandez.

A fourth man, Oscar Brenhaug, was charged with the same offenses, but the indictment was set aside as to him on the ground that he had been indicted without reasonable or probable cause. See Pen. Code, § 995.

About 11 p. m. on April 4, 1957, six persons died as a result of a fire in a Los Angeles bar called the Mecca. Five were killed by carbon monoxide, and the death of the sixth was caused by asphyxia and burns. During the morning and afternoon of that day Bates and Brenhaug consumed considerable amounts of alcoholic beverages, including wine, beer, bourbon, and tequila. Early in the evening they met Chavez and Hernandez, who joined them in heavy drinking. Later they went to the Corner Cafe, and then they drove in Chavez' car to the Mecca bar where they ordered more drinks. Hernandez, who was 18 years old, was asked for his identification card and said he did not have it. Chavez was also asked for his card and refused to show it. The bartender, believing Chavez and Hernandez might be minors, refused to fill their orders. The evidence appears to be without conflict that all of the defendants were under the influence of alcohol.

A disturbance arose which apparently developed in part out of the refusal of a waitress and another woman to dance with some of the defendants. The bartender, with the assistance of a patron, ejected Chavez, Bates and Hernandez, and there was considerable fighting both inside and outside the building, during which Chavez was knocked down. A few minutes later Chavez returned for Brenhaug, who had remained inside, and Chavez was again knocked down and ejected. Brenhaug, who was in a drunken stupor during the disturbance, left when he was told to do so. There is a conflict in the evidence as to whether Hernandez took any part in the fight. An employee of the Mecca testified that Bates and Chavez re-entered to get Brenhaug and that when the latter got up to leave, one of them said, "We'll be back, and we'll get even." Another witness heard one of the defendants say, "We will be back."

At the trial Brenhaug testified: He and defendants drove away from the Mecca in Chavez' automobile but soon parked it and got into one owned by Bates. They stopped to pick up a five-gallon paint

bucket, drove to a gasoline station, and parked the car on a street nearby. Hernandez and Bates went into the station, with Bates carrying the bucket, and bought some gasoline. (According to the station attendant the amount purchased was nearly five gallons.) Bates took the bucket back to the car and put it in the front compartment between his legs, and Hernandez drove them back to the vicinity of the Mecca. Before starting the trip to the gasoline station either Bates or Chavez said "they were going back and get even with them," and when Bates got out to pick up the bucket one of the defendants "said they were going back to the Mecca and fix them people back there." Thereafter, on the way to the station, Bates said that "we were going to get some gas and go back and scare them." When they returned to the Mecca Brenhaug got out of the car and said that he did not want to get into any trouble. Bates seized him and shoved him into the passenger side of the front seat. Bates and Chavez left the automobile, with Bates carrying the bucket of gasoline. The engine of the car was running, and Hernandez was seated behind the steering wheel.

When Bates and Chavez arrived at the door of the Mecca, Bates threw the gasoline on the floor, and the waitress heard him say, "I will get every one of you in there." Chavez threw a book of lighted matches on the gasoline, and there followed an explosion or flash fire which traveled rapidly, destroying the carpeting and damaging the interior. Bates and Chavez ran from the Mecca and got into the rear seat of the car, saying, "Let's get out of here." They left immediately, with Hernandez driving.

Defendants and Brenhaug drove to the Corner Cafe, and en route the bucket was thrown out of the car. All of them except Brenhaug, who remained in the car and slept, went into the cafe and stayed there until closing time. They separated soon after, and Bates and Brenhaug drove to Bates' residence, where they parked in the driveway and went to sleep. Officers took Bates and Brenhaug into custody about

3:10 in the morning. Bates did not stagger and, in the opinion of one of the officers, was not intoxicated. The officer noticed a smell of gasoline on the inside of the car when he opened the door. A chemist who examined the automobile about two hours later detected odors of gasoline and wine on the passenger side of the floor of the front compartment.

Bates was questioned by a police officer at about 4 a. m. on April 5. He said that he had been at the Mecca with Brenhaug the evening before but that he did not know the identity of the other two men and that they had come in later. Chavez was placed under arrest at his home by two police officers on the afternoon of the same day, and, before they indicated why they were there, he said, "I have been expecting you all day." He requested his wife to get him a lawyer, stating, "I didn't do it." When she asked him what he was talking about he replied, "That thing in the bar with all those people, the one you read about in the paper. I was in the bar."

Hernandez told two police officers, when questioned on the morning of April 6, that two men whose names he did not know picked him up in an automobile and drove him to the bar where "all of those people were burned" and that after an argument with the bartender they left and went home. Later he acknowledged that they had gone to a filling station where he purchased gasoline. He said that he bought the gasoline because Bates told him to get it, but he did not know then what Bates was going to do with it; that he drove the car when they left the gasoline station; that he did not want to go back to the Mecca, but Bates "kept" telling him to go there and gave him directions; and that Bates sat in the front seat, with the gasoline container near his feet. Bates and Chavez got out of the car at the Mecca, with Bates carrying the gasoline. After a couple of minutes, they came running back to the car, and the place was on fire.

On April 9, Bates, Chavez, Hernandez and Brenhaug were questioned together in the police administration building. Bren-



haug stated: Defendants "got into a fight" at the Mecca, and Bates and Chavez said that they were going to "get even." After the four of them left the Mecca, Bates and Chavez picked up a can, and Bates drove to a filling station where Hernandez purchased gasoline. Bates said they would return to the Mecca and throw some gasoline into the place. They parked near the Mecca, and Bates and Chavez got out of the car, taking the can with them. Hernandez was in the front seat behind the steering wheel. He (Brenhaug) saw a flash of light, and Bates and Chavez came running back to the car, saying they should "get out of there." Either Bates or Chavez said, "We sure fixed them," and they left, with Hernandez driving.

The police, in the presence of Brenhaug, questioned defendants about his statement. Hernandez said that Brenhaug was mixed up a little in some places but had told the truth about what had occurred and that, when something was said about buying gasoline, he (Hernandez) thought they were only going to "scare somebody or something." Bates said he remembered that he and Brenhaug had picked up Chavez and Hernandez, that they had gone to the Mecca and had had a "beef" there, and that he was at the Corner Cafe about closing time with Chavez and Hernandez, but that he did not recall anything else. Chavez said that Brenhaug and Hernandez were lying.

Hernandez did not take the stand at the trial. Bates testified that commencing on the morning of April 4 and continuing into the evening, he and Brenhaug drank considerable amounts of alcoholic beverages. He recalled going to the Mecca, but it was "more of a dream." He did not remember

returning to the Mecca, and, if he threw gasoline there, he did not remember it.

Chavez testified that he was at the Mecca during the first visit and was ejected; that the three others left in Bates' automobile; that he entered his own car and drove away; and that he did not see Bates, Hernandez, or Brenhaug again that night or the following morning, nor did he return to either the Mecca or the Corner Cafe.

Defendants have filed separate briefs, and, although their claims of error differ in some respects, their principal contentions may be summarized as follows: (1) the evidence is insufficient to support a finding that murder was committed in the perpetration of arson, and the court erred in instructing the jury on the subject; (2) the evidence is insufficient to support a finding that murder was perpetrated by means of torture, and the court erred in instructing the jury on that issue; (3) it was error to refuse instructions requested by defendants on second degree murder and manslaughter; (4) errors were committed in the admission of evidence; and (5) the district attorney was guilty of prejudicial misconduct.

It is the position of the prosecution that the evidence shows that the homicides were committed in the perpetration of arson and by means of torture and, therefore, constituted murder of the first degree under section 189 of the Penal Code.<sup>1</sup> The jury was instructed on that theory.

[1] The burning of a building such as the one in which the Mecca was located comes within section 448a of the Penal Code, which makes it a crime for a person to wilfully and maliciously burn any building not a parcel of a dwelling.<sup>2</sup> The word

1. Section 189 of the Penal Code provides:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 238, is murder of the first degree; and all other kinds of murders are of the second degree."

2. Section 448a of the Penal Code provides:

"Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church,

"arson" does not appear in this section but in section 447a, which provides that any person who wilfully and maliciously sets fire to a dwelling or an adjoining building is guilty of arson.<sup>3</sup>

[2] Defendants argue that only the offense proscribed by section 447a constitutes arson and that section 448a, under which they were charged, sets forth a different offense. This argument was rejected in the case of *In re Bramble*, 31 Cal.2d 43, 187 P.2d 411, where the defendant was accused of having set fire to store buildings, and the court said, "This contention is based on an untenably (in California) narrow meaning of the word 'Arson.'" 31 Cal.2d at page 48, 187 P.2d at page 414. After setting forth the history of the word "arson," the opinion further states: "It thus appears that there are ample historical and legal bases for designating the acts enumerated in section 448a as 'arson.' The real purpose of differentiating the acts listed in section 448a from those included in section 447a is apparently not to change the nomenclature but to provide a convenient method of pleading and identifying the two classes of acts which are deemed to merit different punishments. \* \* \* For the foregoing reasons it is obvious that the use of the word 'arson' in the indictment and in the judgments is not inconsistent with the specification that the offenses were committed by the burning of store buildings." 31 Cal.2d at page 50, 187 P.2d at page 415.

Although the *Bramble* case did not involve construction of the word "arson" as used in section 189 of the Penal Code, there is no sound basis for concluding that the word as used in that section is not intended to apply to the offense dealt with in section 448a. From 1850 to 1872 the burn-

ing of any building was by statute expressly denominated arson, and any homicide resulting from such burning was murder. Stats.1850, pp. 229, 234-235, as amended by Stats.1856, pp. 131, 132, 219. When section 189 was adopted in 1872 the Legislature provided that the burning of any building capable of affording shelter to a human being, whether or not a dwelling, constituted arson. (Former section 447 et seq. of the Penal Code.) These provisions remained substantially unchanged until 1929 when sections 447a and 448a were adopted. Section 448a was placed in the chapter entitled "Arson," and the 1929 amendments contained nothing to indicate that the offense described by that section should no longer be regarded as arson. The Legislature did not qualify the word "arson" as used in section 189, nor has it done so since 1929, even though the section was amended in other respects subsequent to the decision of the *Bramble* case in 1947. On the other hand in section 644 of the Penal Code, which relates to prior offenses of an habitual criminal, the Legislature made such a qualification in 1945 when it limited the offense of "arson" to "arson as defined in Section 447a," thereby impliedly recognizing that, unless qualified, the word "arson" in a provision such as section 189 includes offenses of the type described in section 448a as well as those set forth in section 447a. See *In re Bramble*, 31 Cal.2d 43, 50, 187 P.2d 411.

[3] The evidence is clearly sufficient to support a finding that defendants wilfully and maliciously set fire to the building and that the murders were committed in the perpetration of arson within the meaning of section 189.

meeting house, courthouse, work house, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years."

3. Section 447a of the Penal Code provides: "Any person who wilfully and maliciously sets fire to or burns or causes to be

burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other out-house that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years."

[4, 5] The trial court was also justified in giving instructions regarding murder perpetrated by means of torture. Murder is so perpetrated when the intent is to cause cruel suffering for the purpose of revenge, and where a man killed his wife by burning her with gasoline it was held that the jury could reasonably conclude that his intention was to inflict cruel suffering. *People v. Martinez*, 38 Cal.2d 556, 561, 241 P.2d 224.

As we have seen, statements were made during the trip to purchase gasoline which could be interpreted as indicating that defendants were motivated by revenge, and, when the fire was set, Bates said, "I will get every one of you in there." There were a number of people visible in the Mecca from the doorway when the gasoline was thrown on the floor, and one patron was so close that his leg was hit by gasoline and burned. The death of one of the victims, who had been at the bar, was caused by asphyxia and by third and fourth degree burns involving the entire body surface, and the jury could reasonably have concluded that he suffered pain from burning. The evidence is amply sufficient to warrant instructions on the theory that murder was committed by means of torture.

[6] Hernandez contends that there is no evidence to support his conviction of murder in connection with either arson or torture, and he points to testimony to the effect that he was a mere onlooker and did not participate in the fighting at the time of the first visit to the Mecca or in the subsequent throwing of gasoline. There was other testimony, however, to the effect that he joined in the fighting outside the door after he was ejected from the bar and that he admitted buying the gasoline. One witness testified that she saw Hernandez at the door just before Chavez threw the lighted book of matches. Hernandez drove the car from the gasoline station to the Mecca and, subsequently, away from the scene of the fire. It could be inferred that he knew that the purpose of the gasoline

purchase was to "get even" with the people at the Mecca and that he knew that the gasoline was to be lit. The jury was entitled to find that he was guilty of murder both in the perpetration of arson and by means of torture.

[7] In support of the claim that the court erred in refusing to instruct regarding manslaughter and murder of the second degree, defendants assert that the jury was thus precluded from finding that they were so intoxicated that they could not form the specific intent which is a necessary element of the crimes of arson and murder by torture. The issues of intent and intoxication were submitted to the jury by the court's instructions, and it is obvious that these issues were decided against defendants in a manner which prohibited a finding of a lesser offense than murder of the first degree. The court instructed the jury that specific intent is a necessary element of arson and murder by means of torture, that there must be an inquiry into the state of mind of defendants at the time the alleged acts were committed, that in this connection the evidence of intoxication must be considered, and that the degree of intoxication might be such as to render a person incapable of forming the necessary intent. We must, of course, presume that the jury followed these instructions in returning a verdict of guilty on the count of arson against each of the defendants, and since it was established that the homicides were caused by the fire, the provisions of section 189 of the Penal Code required convictions of first degree murder.

[8] Bates and Chavez contend that the court erred in admitting evidence relative to the conversation on April 6 between Hernandez and two police officers and the conversation on April 9 when Brenhaug and the three defendants were questioned in the police administration building. Where statements of a defendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible



hearsay as to a codefendant, they should be excluded from the evidence. But where the statements are relevant to the defendant, and the jury is instructed that the evidence is admitted only as to him, it will ordinarily be presumed that the jury followed the instruction and that there was no prejudice as to the codefendant. See *People v. Foote*, 48 Cal.2d 20, 23, 306 P.2d 803.

[9] The April 6 conversation with Hernandez, which was admitted without objection on his part, contained admissions and was relevant in establishing the case against him. The judge admonished the jury that the evidence was to be received solely as to Hernandez and that it should not be used in any way with reference to Bates or Chavez. Under the rule set forth above, it was not error to admit the conversation subject to the admonition of the court.

[10,11] The April 9 conversation consisted of accusatory statements by Brenhaug in response to questions put to him by the police in the presence of the three defendants, together with defendants' reactions when asked what they had to say concerning Brenhaug's version of what occurred on April 4. In general, evidence of this type is not admissible where there was a denial by the defendant, but it may be received if the truth of the accusation was admitted or if, under circumstances calling for a denial, there was silence or equivocal or evasive answers indicating a consciousness of guilt or acquiescence in the truth of the statements. *People v. Simmons*, 28 Cal.2d 699, 711 et seq., 172 P.2d 18; see *People v. Abbott*, 47 Cal.2d 362, 373, 303 P.2d 730; *People v. Davis*, 43 Cal.2d 661, 669-672, 276 P.2d 801.

[12] The conversation was properly admitted as to Hernandez, who made minor corrections with respect to Brenhaug's statements but said that they were substantially true. Chavez, on the other hand, denied everything and said that Brenhaug

and Hernandez were lying. The prosecution offered to exclude the portions of the conversation which disclosed that Chavez was present during the questioning and that he had made statements in the nature of denials. Chavez objected to the introduction of the evidence but insisted that if any part of it was to be received it should all be admitted. The trial court recognized that the conversation was not admissible as to Chavez, and admonished the jury that it was not to be considered in any way with regard to him, and we must assume that the jury followed the court's admonition.

[13] With respect to Bates it is clear that part of the conversation was admissible in view of the fact that he said he remembered going to the Mecca with Brenhaug, Chavez and Hernandez, that they had a "beef" there, and that he was with Chavez and Hernandez at the Corner Cafe about closing time. As to the remainder of the conversation, he insisted that he did not remember, and while he did not expressly say so, it seems obvious that his position was that he was unable to remember because he was intoxicated. Under the circumstances his asserted failure to remember cannot properly be taken as an evasive or equivocal response indicating consciousness of guilt or acquiescence in the truth of Brenhaug's account, and it follows that the conversation was erroneously admitted as to Bates insofar as it related to the trip to the gasoline station, the return to the Mecca, and incriminating remarks made by him on the night of the fire. We are satisfied however, that the error does not require a reversal. See Cal.Const. art. VI, § 4½. At the trial Brenhaug took the stand and testified to substantially the same facts as were set forth in the conversation, and he was subjected to lengthy cross-examination. This testimony, together with other evidence, amply established the case against Bates, irrespective of the erroneously admitted conversation. Indeed, Bates' position at

the trial was not based on a denial of what happened on the night of April 4 but on the claim that he did not remember and that he was so intoxicated as to be guiltless of the crimes charged, a claim which the jury rejected, as it was entitled to do under the evidence. Moreover, in receiving the conversation and, again, in giving formal instructions to the jury, the court made clear that, unless the conduct of Bates indicated an admission, the conversation should be entirely disregarded, and it is highly unlikely that Bates' response that he did not remember would have been viewed by the jury as an admission.

[14] Defendants complain of the admission, over objection, of a number of photographs showing bodies of persons killed in the fire. Such photographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime; on the other hand, if they have a probative value with respect to a fact in issue that outweighs the danger of prejudice to the defendant, they are admissible, and the resolution of this question is primarily for the trial court in the exercise of its discretion. *People v. Carter*, 48 Cal.2d 737, 751, 312 P.2d 665; *People v. Cheary*, 48 Cal.2d 301, 311-312, 309 P.2d 431.

[15] Two of the photographs, showing bodies inside the premises and the charred condition of the bar, were used in connection with the testimony of a fireman who was called as an arson expert. They were relevant in determining the point of origin of the fire and were corroborative of the expert's testimony. In our opinion the trial court did not abuse its discretion in concluding that the probative value of these photographs justified their reception in evidence.

[16] The other photographs, which were taken of the bodies of all the victims after removal from the Mecca, were admitted on the theory that an autopsy surgeon

testified as to the degree of burns on certain bodies and that the burns contributed to the deaths. Defendants, however, offered to stipulate to the cause of death and identification of the victims, and, moreover, it was with respect to only one victim that the medical testimony showed that the death was caused in part by burns. The trial court abused its discretion in overruling the objections to these photographs, but, in view of the entire record, including the testimony as to the burned condition of several bodies, the error did not result in a miscarriage of justice. See Cal.Const. art. VI, § 4½.

[17] Defendants point to the prosecution's argument to the jury in support of their claims of prejudicial misconduct. In commenting on testimony to the effect that one of the People's witnesses had stated she hoped the guilty persons would get the gas chamber, the prosecutor said, "I wish I had a dollar for every person in this community that did not know anyone that died there, did not even know where the place was; that when they saw it in the paper, made the same utterance that those who did it should die." Defendants' request that the prosecuting attorney be cited for misconduct in making the statement was properly refused by the trial judge, who pointed out that the remarks were not evidence "but purely a matter of argument."

[18] With reference to the cross-examination of Brenhaug as to whether he or his attorney had made "a deal," the prosecutor said, "A deal with the District Attorney's Office? I know of no such deal. It's my case; and accept my word, there was no deal with Mr. Brenhaug." No objection was made to this portion of the argument. Even though the statement of the prosecuting attorney was improper, we must assume that the court would have admonished the jury if an objection had been made.

[19] Defendants also complain that the jury was misled by what occurred when

counsel for Chavez, during his argument to the jury, suggested the possibility of verdicts of second degree murder or manslaughter. The prosecutor objected, saying that the court "has disposed of that matter as a matter of law, and has indicated that the facts of this case constitute arson within the meaning of 448a of the Penal Code." The court stated it would so instruct the jury and directed the attorney for Chavez not to "discuss any other possibilities." Later in the discussion Chavez' counsel said that "448a does not say that this is a crime of arson." The court then made the following statement: "The Court has told you that the Court does find that it is arson, and you are not to argue that law to the jury. The Court will instruct the jury as to the law. You are not to attempt to argue that law to the jury." Counsel then said that he felt he was "entitled to discuss that law with them and the application to this case," and the court replied, "Well, you may do that, but as to whether or not it is arson within the purview, the Court has already expressed it, that under 448a, the Court finds that that is arson." Counsel, instead of making any objection to the court's remarks, said, "I'll take it from there, then." If there had been an objection the court would undoubtedly have made it perfectly clear that it did not intend to withdraw the factual question of guilt from the jury but was merely referring to a matter of law which would be covered in its instructions, i. e., that the offenses specified in section 448a constitute arson, as the term is used in section 189 of the Penal Code.

Other contentions made by defendants are wholly without merit and need not be discussed.

The judgments and orders denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR,  
SCHAUER, SPENCE and McCOMB, JJ.,  
concur.

**The PEOPLE of the State of California,**  
**Plaintiff and Appellant,**

**v.**

**Richard Robinson SPICER, Defendant**  
**and Respondent.**

**Cr. 6204.**

**District Court of Appeal, Second District,**  
**Division 1, California.**

**Sept. 22, 1958.**

Accused was charged with possession of marijuana. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., granted accused's motion to set aside information and people appealed. The District Court of Appeal, White, P. J., held that where officers observed accused drop what appeared to be homemade cigarette and then attempt to flee, officers were entitled to reasonably believe that accused was probably engaged in violation of law, and it was their duty to make investigation, and evidence sustained order holding accused to answer to Superior Court.

Reversed.

#### **1. Criminal Law** $\S$ 238

Evidence at preliminary examination established corpus delicti of crime of possession of marijuana and accused's connection with crime. West's Ann. Health & Safety Code,  $\S$  11500.

#### **2. Criminal Law** $\S$ 59(3), 568

While mere presence at scene of crime standing alone is insufficient to justify finding of guilt, nevertheless, guilty knowledge and intent to violate law may be shown by facts and circumstances of case, including conduct of accused.

#### **3. Poisons** $\S$ 9

Where officer observed marijuana cigarette drop near feet of accused, after first observing this cigarette when it was foot or two from ground and foot behind accused, when there was no one else in immediate area and when sidewalk was clean at particular location, it was reasonable to infer that accused was in possession of



marijuana cigarette before it was dropped. West's Ann.Health & Safety Code, § 11500.

#### 4. Criminal Law ☞234

Where accused was charged with possession of marijuana, committing magistrate was entitled to take into consideration flight of accused as indicating consciousness of guilt on his part. West's Ann.Pen.Code, § 1127c.

#### 5. Criminal Law ☞245

By failure to object accused waived right to claim that introduction of marijuana cigarette into evidence at preliminary examination was improper because it had been illegally obtained, and committing magistrate properly considered it in determining whether there was sufficient cause to believe that accused had committed public offense. West's Ann.Health & Safety Code, § 11500.

#### 6. Searches and Seizures ☞1

Where officers observed accused drop what appeared to be homemade cigarette and then attempt to flee and officer picked up cigarette, there was no search or seizure such as is contemplated by law.

#### 7. Searches and Seizures ☞1

To observe that which is open and patent is not a search.

#### 8. Arrest ☞63(4)

Where officer observed accused drop what appeared to be homemade cigarette and then attempt to flee, officers were entitled to reasonably believe that accused was probably engaged in violation of law, and it was their duty to make an investigation.

#### 9. Criminal Law ☞238

##### Indictment and Information ☞140(2)

It is record before magistrate that is decisive, on issue as to whether accused should be held to answer charge, and in arriving at his decision magistrate may weigh evidence, resolve conflicts, and give or withhold credence to witnesses; but in testing, on motion to quash information, sufficiency of showing made before magistrate, Superior Court cannot do these things, and on motion to set aside informa-

tion, court may not substitute its judgment as to weight of evidence for that of magistrate conducting preliminary examination, and will not inquire into sufficiency of evidence if there is some evidence in support of information. West's Ann.Pen.Code, § 995.

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Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Los Angeles, Jere J. Sullivan, Lewis Watnick, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendant was accused of a violation of Section 11500 of the Health and Safety Code, in that he did, on or about November 26, 1957, have in his possession flowering tops and leaves of Indian Hemp (*cannabis sativa*), commonly referred to as marijuana.

At the time fixed for his plea, defendant made a motion under Section 995 of the Penal Code on the ground that defendant had been committed without reasonable or probable cause. The motion was granted and the information was ordered set aside. From such order the People prosecute this appeal.

As to the factual background surrounding this prosecution, the record reveals testimony before the committing magistrate that about 12:30 p. m., on the afternoon of November 26, 1957, two police officers were seated in a police automobile marked black and white. Both officers were in uniform. The police vehicle was standing near the curb at Fifth Street and Stanford Avenue. J. W. Ramey, one of the officers, testified that he first observed defendant talking to another man in front of a liquor store at Fifth Street and Towne Avenue. Defendant and his friend started walking east on Fifth Street toward the officers. As defendant approached the police vehicle, the officers asked him to "step over to the car

a minute". Defendant ignored the request of the officers and "kept right on walking". Officer Ramey's partner, Officer Drake, got out of the police automobile and "hollered to the defendant to stop, that we would like to talk to him". Defendant arrived at the corner of Fifth Street and Stanford Avenue, and as he was near the corner building, he started to turn left on Stanford Avenue. At that time, defendant looked in the direction of the officers. As defendant passed Officer Ramey, the latter observed defendant's right hand which was "cupped, the fingers drawn into the palm and the thumb laid alongside of it". Defendant was holding his hand, "Alongside—right alongside of his body. He wasn't swinging it at all". As he arrived at the corner, defendant started to turn his head in the direction of Officer Ramey. The latter observed something "drop" near defendant's feet, a "yellowish brown", that looked to the officer like a homemade cigarette. When the officer first saw it, as it was dropping to the ground, it was approximately a foot or maybe two feet from the ground, and it was maybe a foot behind the defendant. When he, the defendant, walked around the corner the cigarette was dropping. There was no one else in the immediate area of the defendant. The officer observed the cigarette strike the ground. The sidewalk was clean and as the officers saw the cigarette fall on the ground, Officer Ramey got out of the vehicle and went over to the cigarette and picked it up.

The officer identified People's Exhibit 1 for identification as the cigarette that he found on the ground, and which he had heretofore described. After picking it up, the officer ran to the corner and observed defendant running north on Stanford Avenue. Officer Drake pursued defendant on foot. They arrived at the alley at the rear of the Torch Club, which is on the corner of Fifth Street and Stanford Avenue, where they turned left into the alley, going west. Officer Ramey ran back to the police vehicle and drove west on Fifth Street to Towne, north on Towne to the alley, and

then east in the alley. Officer Ramey observed the defendant run behind a building into an empty lot, and observed the former's partner running after defendant. The witness drove to that location, parked the vehicle, got out, and his partner had already placed the defendant under arrest.

Officer Ramey had often before seen defendant and saw him only two days before the happenings with which we are here concerned. About a week previous the officer encountered defendant with a lady and had stopped them and talked to them on that occasion.

Jack Olin Carter testified that he was a Los Angeles city police officer assigned to the Scientific Investigation Division as a chemist. His qualifications as an expert forensic chemist were stipulated to. The brown-wrapped cigarette testified to by Officer Ramey was found to contain a green leafy material which the witness examined microscopically and tested chemically. As a result of such examination the witness testified that in his opinion the substance was marijuana.

The sole question presented on this appeal is whether the foregoing testimony established reasonable and probable cause to hold defendant to answer to the superior court.

[1, 2] Appellant contends that the *corpus delicti* of the crime of illegal possession of marijuana and defendant's connection with the crime were established at the preliminary examination. We find ourselves in accord with appellant's claim. A cursory examination of the aforesaid evidentiary features present in the instant prosecution brings it within the sphere of cases holding that while mere presence at the scene of the crime standing alone is insufficient to justify a finding of guilt, nevertheless, guilty knowledge and intent to violate the law may be shown by the facts and circumstances of the case, including the conduct of the accused (People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25; People v. Foster, 115 Cal.App.2d 866, 868, 253 P.2d 50).

*People v. Belli*, 127 Cal.App. 269, 15 P.2d 802, involved a prosecution for the illegal possession of morphine, wherein the facts were that shortly before his arrest, while walking along the street, defendant dropped a small white package on the sidewalk; that it was immediately picked up by another person walking in the opposite direction, and that, upon a search of the latter person, a small white package similar to the one defendant had thrown on the sidewalk was found, which contained an illegal quantity of morphine. The court held that the evidence was sufficient to establish defendant's possession, and that proof of possession at the very time of arrest was not essential. See also *People v. McDaniel*, 154 Cal.App. 2d 475, 481, 316 P.2d 660; *People v. Newman*, 127 Cal.App.2d 430, 435, 273 P.2d 917.

In several cases in which the facts indicated that defendants threw away narcotics at or about the time of arrest, the evidence was held sufficient to establish defendants' possession of the narcotics. *People v. Terrazas*, 42 Cal.App.2d 281, 108 P.2d 680; *People v. Rodrigues*, 25 Cal.App. 2d 393, 77 P.2d 503; *People v. Herbert*, 59 Cal.App. 158, 159, 210 P. 276. Also, where heroin capsules were found by officers on the seat of defendant's automobile, which defendant had just abandoned, it was held that the inference was justified that defendant had possession of the capsules while in the vehicle. *People v. Shafer*, 101 Cal.App.2d 54, 58, 224 P.2d 778.

[3, 4] If we consider that in the instant case the officer observed the marijuana cigarette drop near defendant's feet; that the officer first observed this cigarette when it was a foot or two from the ground, and a foot behind the defendant; that there was no one else in the immediate area of the defendant; and that the sidewalk was clean at the particular location, then it appears that it is quite reasonable to infer that defendant was in possession of the marijuana cigarette before it was dropped. This conclusion is fortified by the fact that defendant ignored the officers after they

requested him to stop for a minute; that defendant's right hand was "cupped" with the fingers drawn into the palm and the thumb laid alongside of it, and defendant was holding his hand alongside of his body and not swinging it at all; and that defendant started to run from the officers, and it was necessary to pursue him in order to make the arrest. Also, the committing magistrate was entitled to take into consideration the flight of respondent as indicating a consciousness of guilt on his part (Penal Code, Section 1127c).

[5] It is also noteworthy that at the preliminary examination respondent made no objection to the introduction into evidence of the marijuana cigarette. He thereby waived his right to claim that such evidence was improperly received because it had been illegally obtained contrary to the rule announced in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, and the committing magistrate properly considered it in determining whether there was sufficient cause to believe that the accused had committed a public offense (*People v. Pruitt*, 155 Cal.App.2d 585, 595, 318 P.2d 552; *Robison v. Superior Court*, 49 Cal.2d 186, 187, 316 P.2d 1; *People v. McFarren*, 155 Cal.App.2d 383, 384, 317 P.2d 998).

[6] Since the officers observed respondent drop what appeared to be a "home-made" cigarette and then attempt to flee, there was no search or seizure in this case such as is contemplated by law. As was said in *People v. West*, 144 Cal.App.2d 214, 219, 220, 300 P.2d 729, 733: "A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search'. A seizure contemplates a forcible dispossession of the owner and it is not a voluntary surrender. 79 C.J.S. Searches and Seizures § 1, pages 775-776."



[7] That to observe that which is open and patent is not a search was the holding in *People v. Martin*, 45 Cal.2d 755, 762, 290 P.2d 855; *People v. Jaurequi*, 142 Cal.App.2d 555, 561, 298 P.2d 896. Analogous to the situation with which we are here concerned is the case of *People v. Edwards*, 142 Cal.App.2d 419, 421, 298 P.2d 664, 665, wherein it is said: “\* \* \* Furthermore, here the appellant voluntarily dropped the bundle of heroin to the floor. Hence there is no question of any illegal search involved. After appellant’s attempted flight the officer was entitled to pick up the bundle from the floor as part of his police investigation.” See also *People v. Sterling*, 154 Cal.App.2d 401, 405–406, 316 P.2d 405.

[8] Although, in the case at bar, there was no search or seizure involved, we are persuaded that under the facts above narrated and the actions and conduct of respondent, the officers were entitled to reasonably believe that respondent was probably engaged in a violation of the law, and that it was their duty to make an investigation. The facts herein speak for themselves (*People v. Martin*, 46 Cal.2d 106, 108, 293 P.2d 52; *People v. Edwards*, supra, 142 Cal.App.2d at page 421, 298 P.2d 664; *People v. Dore*, 146 Cal.App.2d 541, 544, 304 P.2d 103; *People v. Garnett*, 148 Cal.App.2d 280, 283, 306 P.2d 571).

[9] The applicable rule governing the superior court in the determination of motions, under Section 995 of the Penal Code is set forth in *People v. Bradley*, 152 Cal.App.2d 527, 535, 314 P.2d 108, 113, as follows:

“The rule defining the function of the trial court when confronted with a motion to set aside an information under the section just cited, was thus enunciated in *People v. Jackson*, 146 Cal.App.2d 553, [556], 303 P.2d 767, 769: ‘\* \* \* It is the record before the magistrate that is decisive. In arriving at his decision the magistrate may weigh the evidence, may resolve conflicts, and may give or withhold credence to witnesses. In testing the

sufficiency of the showing made before him on motion to quash the superior court cannot do these things. (Citing cases.)’ In *People v. Flanders*, 140 Cal.App.2d 765, 768, 296 P.2d 13, 14, it is stated: ‘\* \* \* On a motion to set aside an information, the court may not substitute its judgment as to the weight of the evidence for that of the magistrate conducting the preliminary examination. On such motion the court will not inquire into the sufficiency of the evidence if there is some evidence in support of the information.’” See also *People v. Jablon*, 153 Cal.App.2d 456, 459, 314 P.2d 824.

Guided by the rule just stated, and under the facts and circumstances of the case now engaging our attention, it is manifest that the evidence was sufficient to justify the order holding respondent to answer to the superior court.

The order setting aside the information is reversed.

FOURT and LILLIE, JJ., concur.



163 Cal.App.2d 705

**EQUITABLE PLAN COMPANY, a California corporation, Plaintiff and Respondent,**  
**v.**

**DIX BOX CO., a California corporation, Benjamin Dix, Max Dix, Hyman Dix and Rose Mistofsky, Defendants, Dix Box Co., Appellant.**

Civ. 22993.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 23, 1958.

Action for money based on checks on which chattel mortgagor had stopped pay-

ment and for money had and received. With the complaint, mortgagee filed affidavit for writ of attachment, writ was issued and mortgagor filed motion to discharge attachment. The Superior Court of Los Angeles County, William E. Fox, J., denied motion to discharge writ of attachment, and mortgagor appealed. The District Court of Appeal, Vallée, J., held that where personal property was mortgaged as security for payment of note for \$58,816.82, and mortgage provided that it also secured to maximum extent and amount of \$60,000, any other sums thereafter advanced to or for benefit of mortgagor, mortgage secured all advances and indebtedness, including note, to maximum amount of \$60,000, not \$118,816.62, and in view of fact that balance due on note was more than \$48,000, and mortgagor was liable to mortgagee on contingent liability of about \$34,000, mortgagee was entitled to attach mortgagor's personal property for amount of checks on which mortgagor had stopped payment and for money had and received.

Affirmed.

### 1. Liens ☞2

A lien may be created by contract as security for performance of obligations not then in existence. West's Ann.Civ.Code, § 2884.

### 2. Attachment ☞11

#### Chattel Mortgages ☞109

Where personal property was mortgaged as security for payment of note for \$58,816.82, and mortgage provided that it also secured to maximum extent and amount of \$60,000, any other sums thereafter advanced to or for benefit of mortgagor, mortgage secured all advances and indebtedness, including note, to maximum amount of \$60,000 not \$118,816.82, and in view of fact that balance due on note was more than \$48,000, and mortgagor was liable to mortgagee on contingent liability of about \$34,000, mortgagee was entitled to

attach mortgagor's personal property for amount of checks on which mortgagor had stopped payment and for money had and received. West's Ann.Civ.Code, §§ 2884, 2975.

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Jerome Weber and Howard Meyerson, Los Angeles, for appellant.

McCutchen, Black, Harnagel & Greene, G. William Shea, Frederick J. Kling, Los Angeles, and Jack T. Swafford, San Francisco, for respondent.

VALLÉE, Justice.

Appeal by defendant Dix Box Company from an order denying its motion to discharge a writ of attachment.

The action is for money. The complaint is in five counts. The first count is on a check dated June 26, 1957 made by defendant payable to plaintiff for \$1,187.80. The second count is on a check dated June 27, 1957 made by defendant payable to plaintiff in the amount of \$2,318. The third count is on a check dated June 28, 1957 made by defendant payable to plaintiff in the amount of \$255.28. Defendant stopped payment on each check. The fourth and fifth counts are for money had and received totaling \$20,227.94. The prayer is for \$23,959.02.

With the complaint, plaintiff filed an affidavit for a writ of attachment which stated "that the payment of the same has not been secured by any mortgage, deed of trust, or lien upon real estate or personal property, or any pledge of personal property." The writ issued and about \$888.81 was attached.

Defendant filed a motion to discharge the attachment. In support thereof it filed an affidavit of its president which stated: he believes and is advised by his counsel that plaintiff has no reasonable ground for alleging the indebtedness; the debt sued on arose out of a transaction between plaintiff and defendant; defendant executed a

chattel mortgage dated January 24, 1957 to plaintiff; the mortgage is "a security" for all debts arising out of the transaction and is a security for all debts sued on in the action; he is advised and believes plaintiff should have availed itself of foreclosure proceedings on the mortgage before it was entitled to a writ of attachment. In a supplemental affidavit he attached a copy of the chattel mortgage which is dated January 24, 1957, mortgages certain personal property as security for the payment of a promissory note of the same date for \$58,816.82 with interest at 10 per cent, payable in installments of \$1,000 or more on the 24th of each month beginning February 24, 1957. The mortgage contains this provision:

"This mortgage also secures: (a) any and all renewals of said promissory note; (b) the repayment of all sums and amounts that may be necessarily advanced or expended by Mortgagee for the maintenance or preservation of the mortgaged property, or any part thereof; (c) to the maximum extent and amount of Sixty Thousand and No/100 ..... Dollars (\$60,000.00), any and all other sums that may hereafter be advanced by Mortgagee to or for the benefit of Mortgagor, any and all other expenditures that may hereafter be made by Mortgagee pursuant to the provisions hereof or for the benefit of or at the instance of Mortgagor, and any and all other indebtednesses and obligations of Mortgagor to Mortgagee that may hereafter be incurred."

This affidavit stated that the total amount secured by the mortgage was \$118,816.82.

In opposition to the motion, plaintiff filed two affidavits by its secretary which stated: the causes of action alleged in the complaint did not arise out of the chattel mortgage transaction; the first, second, and third counts are based on checks executed by defendant on which defendant stopped payment; the checks were not given in payment of any obligation secured by the mortgage; the fourth count is on a claim for moneys paid by plaintiff to defendant in the

purchase of fictitious accounts receivable sold by defendant to plaintiff; the fifth count is on a claim for moneys collected by defendant without the consent or permission of plaintiff on accounts receivable that had been previously absolutely assigned to plaintiff; the balance due on the principal of the note secured by the mortgage as of July 26, 1957 was \$48,886.77, which is in default; in addition, defendant is liable to plaintiff on a contingent liability of about \$34,000 for accounts receivable which had been assigned previously to plaintiff and payment of which within 90 days has been guaranteed by defendant.

The motion to discharge the attachment was denied. Defendant appeals.

Defendant claims the chattel mortgage secures future advances to the maximum amount of \$118,816.82, and that the debts sued on are within that amount. Defendant also argues that a chattel mortgage need not state the maximum of future advances secured. Plaintiff contends that by its terms the mortgage secures to the maximum extent and amount of only \$60,000, including the promissory note and all such amounts, if any, as might be advanced in the future in reliance on the mortgage, or as might qualify as being debts or obligations incurred subsequent to the making of the mortgage and pursuant to respondent's reliance thereon.

[1] A lien may be created by contract as security for the performance of obligations not then in existence. Civ.Code, § 2884. "A mortgage of personal property or crops may be given to secure the repayment of sums that may be advanced, expenditures that may be made, or indebtedness or obligations that may be incurred subsequent to the execution of such mortgage. If the maximum amount the repayment of which is proposed to be secured by such mortgage, is expressed therein \* \* \* such mortgage \* \* \* shall be and constitute a lien or encumbrance of rank, effect, status and standing equal to that established thereby initially and as it may thereafter obtain, as security for the



repayment of any sums, expenditures, indebtedness and obligations, owing or due or becoming owing or due thereunder, up to and including such expressed maximum amount which shall be considered only as a limit of the debts, sums, expenditures, indebtedness and obligations that may be secured thereby at any one time, and not to include such as may have existed and been repaid or discharged thereunder." Civ. Code, § 2975.

[2] We are of the opinion that the clause of the mortgage in question secures any and all advances and indebtedness, including the promissory note, to the maximum extent and amount of \$60,000, not to the extent and amount of \$118,816.82. Section 2975 of the Civil Code requires that the maximum amount the repayment of which is to be secured shall be expressed in a mortgage of personal property in order that the mortgage shall constitute security for future advances and debts and obligations incurred subsequent to the making of the mortgage. *Hollywood State Bank v. Cook*, 99 Cal.App.2d 338, 342, 221 P.2d 988. Section 2975 was enacted in 1935. Stats. 1935, p. 2228. *Frank H. Buck Co. v. Buck*, 162 Cal. 300, 122 P. 466, decided in 1912, which apparently held that a crop mortgage need not state the maximum amount of future advances, is therefore not in point. In *Oaks v. Weingartner*, 105 Cal. App.2d 598, 234 P.2d 194, the encumbrance was a deed of trust of real property. In any case the question is of no consequence since the chattel mortgage at bar expresses the maximum amount as \$60,000. That is the amount that is secured by the mortgage at any one time, including the promissory note. There is nothing in the mortgage indicating any intent that it was given to secure obligations in excess of \$60,000.

The court was warranted in concluding that the obligations alleged in the complaint are not secured by the chattel mortgage.

Affirmed.

PARKER WOOD, Acting P. J., concurs.

163 Cal.App.2d 633

**E. W. VAN BUSKIRK and L. H. Price**, Individually and as surviving partners of a partnership consisting of themselves and **Edward Cornblum**, deceased, doing business as co-partners under the firm name and style of **Coastwise Construction Co.**, Plaintiffs and Appellants,

v.

**William F. McCLENAHAN and Maryan McClenahan**, Defendants and Respondents.

Civ. 17760.

District Court of Appeal, First District,  
Division 1, California.

Sept. 19, 1958.

Vendors' action for breach of contract. The Superior Court, San Mateo County, A. R. Cotton, J., granted defendants' motion for nonsuit, and plaintiffs appealed. The District Court of Appeal, St. Clair, J. pro tem., held that evidence had sufficiently proved damage to plaintiffs and had been sufficient to take case to jury, and that evidence had not required finding as a matter of law that plaintiffs had failed to mitigate damages.

Reversed.

#### I. Trial 165

On motion for nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from evidence adduced must be considered as facts proved in favor of plaintiffs; and where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, court must take view most favorable to plaintiffs; and if contradictory evidence has been given, it must be disregarded; and evidence, whether erroneously admitted or not, if relevant to issues joined, must be given credit and benefit of its full probative strength; and any question arising from fact of variation between evidence of witnesses cannot be raised or considered.

**2. Trial** ⇨139(1)

Fact that some witness in behalf of plaintiff, or even plaintiff himself, in giving his testimony, may have contradicted or discredited himself in some particular is not determinative on motion for nonsuit.

**3. Vendor and Purchaser** ⇨322, 330

Proof of damage is vital part of cause of action for breach of contract to purchase; and, as a general rule, value of property to vendor is market value at time of breach. West's Ann.Civ.Code, § 3307.

**4. Vendor and Purchaser** ⇨329

Evidence of resale price is properly admitted as one of factors in determining market value of property at time of purchaser's breach; but if resale time was different or later than time of breach, evidence should be adduced as to difference, if any, in market value between two dates.

**5. Trial** ⇨139(1)

A nonsuit is proper when plaintiff's evidence conclusively establishes a defense.

**6. Vendor and Purchaser** ⇨329, 331

In vendors' action for breach of contract, evidence sufficiently proved damage to plaintiffs and was sufficient to take their case to jury; and evidence did not require finding as a matter of law that they had failed to mitigate damages. West's Ann. Civ.Code, § 3307.

**7. Vendor and Purchaser** ⇨330

Vendor is bound by value to him (market value) at time of breach, without regard for time he sells; and Civil Code section providing that value of property to seller shall be deemed, for purposes of estimating damages, to be price which he could have obtained therefor in market nearest to place it should have been accepted by buyer, and at such time after breach of contract as would have sufficed, with reasonable diligence, for seller to effect resale, does not apply to sales of real property. West's Ann.Civ.Code, § 3307.

Mullin & Cost, Hugh F. Mullin, Jr., San Mateo, for respondents.

ST. CLAIR, Justice pro tem.

Plaintiffs appeal from an order granting defendants' motion for a nonsuit. In granting the motion, the trial court said: "It is the opinion of the Court that there was no diligence shown in this case in the sale of this house. The plaintiffs being in the building business and knowing the market value, and, in fact, the market rising rather than dropping, the Court feels that the defendants in this case didn't have much to say as to the sale of this property."

On September 20, 1948, plaintiff as "Seller", defendant as "Purchaser", signed a document entitled "Deposit Receipt." "Purchaser" agreed to buy and "Seller" agreed to sell in accordance with the terms and conditions of the receipt. The total purchase price was "Overhead [sic] [the parties at the trial apparently proceeded on the theory that this meant 'cost of building the house'] plus 10% profit in addition to \$4900.00 for the lot." Defendant was to furnish plumbing, heating, sheet metal and kitchen cabinets and equipment "which amount sellers shall not pay or allow to purchasers until said deal is consummated." \$5,000 was to be paid on or before September 27, 1948. " \* \* \* the balance of same is to be paid within ——— days from the date hereof \* \* \*." The number of days was never inserted nor was any evidence taken thereon at the trial.

At the trial plaintiffs proved (1) the contract, (2) that the house had been started prior to the date of the contract, (3) that the type and design of the house had been decided by the defendant, (4) that defendant had ordered the plumbing, etc., referred to in the agreement, (5) that plaintiffs had paid for the last items, (6) that the \$5,000 was never paid, (7) that direct costs were \$32,305.21, (8) that total amount due under the contract was \$41,905.39, (9) that on March 15, 1949, they demanded that defendant perform under the agreement within five days or meet a third party's offer, (10) that defendant did not perform or

Foley & Foley, James W. Foley, San Jose, for appellants.

meet the offer, (11) that plaintiffs then sold the house for \$32,500 to the third party in question.

The suit by plaintiffs was for the difference between \$41,905.39 and \$32,500, to wit, \$9,405.39. This last figure is correct mathematically, according to plaintiffs' proof, although the prayer of the complaint differs by a few cents.

On cross-examination one of plaintiffs testified that in his opinion the fair market value of the property on April 1, 1949, was \$45,000; that \$32,500 " \* \* \* was all we could get for it at the time"; that the house had been listed with three or four real estate brokers from October, 1948, to date at \$45,000; that there had been no offers other than the one accepted.

The defendant (called under Code of Civil Procedure, § 2055) testified that, after September 20, 1948, he listed the house for sale; tried to sell it; assisted plaintiffs in trying to sell; that he felt a certain responsibility and was trying to help move the home; that he knew before signing the agreement that the cost would be thirty-six or thirty-seven thousand without the plumbing, heating or kitchen cabinets.

Over the continuing objection of counsel for plaintiffs that it was an attempt to vary a written agreement by parol evidence the defendant testified that it had been agreed, prior to signing, (1) the cost was not to exceed \$10 a square foot, (2) total cost was not to exceed \$23,000, (3) if the total cost was over the last figure, the house was to be sold as a speculative venture, (4) plaintiffs wanted the agreement signed (a) to protect their interests and (b) to have something to show as to the reason the house was built.

[1,2] On a motion for nonsuit, "[e] very favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most

favorable to the plaintiffs. *If contradictory evidence has been given, it must be disregarded.* \* \* \* Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered." (Emphasis added.) *Wulfjen v. Dolton*, 24 Cal.2d 878, 880, 151 P.2d 840, 841, quoting from *Berger v. Lane*, 190 Cal. 443, 452-453, 213 P. 45. "The fact that some witness in behalf of plaintiff, or even plaintiff himself, in giving his testimony, may have contradicted or discredited himself in some particular, is not determinative." *Cash v. Los Angeles Ry. Corp.*, 6 Cal.App.2d 738, 742, 45 P.2d 280, 282; see also *In re Ross' Estate*, 173 Cal. 178, 183, 159 P. 603.

[3-6] Applying the above rule to the above facts, it would appear that the judgment of nonsuit should be reversed. Defendant urges here, and urged in the trial court that one other element negatives the ordinary application of the rule, to wit, that the plaintiffs failed to prove damage. Proof of damage is a vital part of the cause of action. *Senter v. Monroe*, 77 Cal. 347, 349, 19 P. 580; *Westwater v. Rector*, etc. of Grace Church, 140 Cal. 339, 73 P. 1055; *Southall v. Security Title Ins. etc. Co.*, 112 Cal.App.2d 321, 323, 246 P.2d 74; see *Domino v. Mobley*, 144 Cal.App.2d 24, 29, 300 P.2d 324. Civil Code, section 3307, provides: "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him." As a general rule, the value to the seller of the property is the market value at the time of the breach (*Employees' Participating Ass'n v. Pine*, 91 Cal.App.2d 299, 301, 204 P.2d 965).

Defendant seizes upon the testimony of one of appellants that the market value of the property on April 1, 1949 (see *infra*, discussion as to the time of breach) was



\$45,000. He then argues that it is not possible for plaintiffs to be injured as the contract price was below the market value.

In *Shurtleff v. Marcus Land etc. Co.*, 59 Cal.App. 520, at page 522, 211 P. 244, at page 245, the court had the following to say as to how one proves market value: "In arriving at the value of the property to the seller the court properly received evidence not only of the amount realized by the seller through the sale which she made, but also of the rental value of the property, the condition of the title, and the reasonable market value as testified to by experts, which included those elements which they regard as relevant to the issue, such as: The activity of the market, the use for which the property is adapted, its relation to transportation facilities, and other matters which we need not here delineate. The appellant's expert witnesses in response to questions asked by her counsel, gave opinions as to the market value of the property at the date of the breach of contract."

It is clear from the above quotation, and from *Royer v. Carter*, 37 Cal.2d 544, 233 P.2d 539, and *Mathews v. McArthur*, 119 Cal.App.2d 196, 258 P.2d 1068, that evidence of the resale price is properly admitted as one of the factors in determining market value.

If the resale time is different or later than the time of the breach, then evidence should be adduced as to any difference, if any, in the market value between the two dates. *Mathews v. McArthur*, supra.

In the instant case, all parties apparently tried the case on the theory that the breach occurred on March 15, 1949, or April 1, 1949. The question by which defendant elicited that the market value was \$45,000 (the prime basis for respondents' position on appeal) keyed the value to April 1, 1949. *The resale was at substantially the same time as the breach.*

There having been considerably more evidence relating to market value than the opinion relating to \$45,000, including a resale at the time of breach at \$32,500, the

application of the above quoted rule applicable to nonsuits brings the conclusion that a trier of facts could reasonably deduce that the value to the plaintiffs at the time of the breach was \$32,500 and hence the plaintiffs were damaged, as prayed.

Did the evidence conclusively establish a defense?

Defendant's second argument, that a defense of failure to mitigate damages had been conclusively proved, also depends upon uncontradicted proof that the market value of the house was actually \$45,000. It is true that a nonsuit is proper when the plaintiff's evidence conclusively establishes a defense. *Crebs v. Uplifters Country Home*, 133 Cal.App. 88, 95, 23 P.2d 807; *Nulsen v. Nulsen*, 3 Cal.App.2d 407, 409, 39 P.2d 509; *Meadows v. Emmett and Chandler*, 86 Cal.App.2d 1, 11, 193 P.2d 785; 16 Cal.Jur.2d 215, § 48. However, since it was not conclusively proved that the market value of the house was greater than the contract price, and the contrary inference is permissible, it cannot be said that the defense was conclusively established here.

[7] In view of the fact that the case must be returned to the trial court for further hearing it seems appropriate to comment on the grounds given by the trial judge for the nonsuit. It is assumed that the reference to lack of diligence on the part of the appellants invokes the rule that a vendor must so act as to mitigate the damages to the vendee.

The rule as to diligence is set forth in Civil Code, section 3353, reading: "In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

In *Royer v. Carter*, supra, 37 Cal.2d 544, 233 P.2d 539, the Supreme Court squarely held that that section does not apply to

sales of real property. And in logic, it should not, as the vendor is bound by the value to him (market value) at the time of breach, without regard for the time he sells.

Judgment is reversed.

PETERS, P. J. and BRAY, J. concur.



163 Cal.App.2d 758

**A. LINCOLN, Plaintiff and Appellant,**

**v.**

**A. Thomas GRAZER, H. W. Kennedy, K. N. Chantry, Wm. E. Fox, Bayard Rhone, and Eugene W. Biscailuz, Defendants and Respondents.**

**Civ. 23014.**

District Court of Appeal, Second District,  
Division 3, California.

Sept. 26, 1958.

Action for false imprisonment. The Superior Court, Los Angeles County, Mildred L. Lillie, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that complaint alleging that defendant had been arrested for misdemeanor without warrant, confined in jail, and injured while confined, stated cause of action for unlawful arrest and false imprisonment.

Reversed with directions to grant plaintiff leave to amend complaint.

#### 1. Pleading ⚡225(1)

Unless it is clear that a complaint cannot be amended to state a cause of action, it is error to sustain a demurrer thereto without leave to amend.

#### 2. False Imprisonment ⚡20(1)

Complaint, filed by defendant who allegedly had been arrested for misdemeanor without warrant, confined in jail, and injured while confined, stated cause of action for unlawful arrest and imprisonment. West's Ann.Pen.Code, §§ 849, 4001.

#### 3. False Imprisonment ⚡15(1)

All who take part or assist in an unlawful arrest are joint tort-feasors, and each participant in wrongful act is responsible as joint tort-feasor for all damages ensuing from the wrong, regardless of whether he was a direct actor and regardless of degree of his activity.

#### 4. False Imprisonment ⚡20(1)

Complaint, filed by party who had been allegedly held in jail without bail, stated cause of action on theory that there was an unnecessary delay in bringing him before a magistrate. West's Ann.Pen.Code, § 849.

#### 5. False Imprisonment ⚡8

An action for false imprisonment may be maintained if defendant unlawfully detains prisoner for unreasonable length of time and unnecessarily delays taking him before a magistrate. West's Ann.Pen.Code, § 849.

#### 6. Pleading ⚡225(2)

It is an abuse of discretion to sustain a special demurrer to an original complaint without leave to amend if a cause of action is or can be stated.

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A. Lincoln, in pro. per.

Harold W. Kennedy, County Counsel,  
and Robert C. Lynch, Deputy County  
Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on an order sustaining the demurrers of defendants to the original complaint without leave to amend.

The complaint alleges:

1. On August 14, 1957, defendants "without warrant or legal right or authority, whatsoever, wilfully and maliciously caused, instigated, perpetrated, directed, procured, stirred up and agitated the arrest and impri[s]onment of the plaintiff, to his damage in the sum of \$5,000.00"; they "did so corruptly and by collusive arrangement among themselves, commonly known as a 'fix,' on a false, malicious, untrue and fabricated misdemeanor contempt charge,

without facts evidence or jurisdiction to support it."

2. Defendants wilfully and maliciously deprived plaintiff of his right to secure legal counsel, held him without bail, and failed and refused to comply with sections 849 and 4001 of the Penal Code,<sup>1</sup> but "forced plaintiff to be confined under maximum security to sleep on the floor, without proper care, in unfit, unsafe and overcrowded conditions, and in condemned detention facilities, thereby endangering his life, limbs and health to his further damage in the sum of \$5,000.00."

3. Defendants wilfully, maliciously, and corruptly failed to protect the rights, health, safety and well-being of plaintiff while he was thus unlawfully confined; but they caused, directed, encouraged, suffered, and permitted brutal assaults on plaintiff to his further damage in the sum of \$5,000.

4. Defendants maliciously caused and directed jail trustees to spray plaintiff three times in five days with a strong and burning solution about his head and body to his damage in the sum of \$750.

5. Defendants had an untrained and incompetent person—not a doctor, and not qualified to do so—carelessly, recklessly, and negligently, without the consent of plaintiff and without warrant or authority, jab plaintiff in the right arm with a needle and remove and extract blood from him to his damage in the sum of \$250.

The prayer is for \$16,000 damages.

Defendants Grazer, Chantry, Fox, Rhone, and Biscailuz demurred jointly on the grounds the complaint does not state

facts sufficient to constitute a cause of action against them; it is uncertain and ambiguous in various particulars; and several causes of action are not separately stated. Defendant Kennedy filed a separate demurrer on the same grounds. The record does not disclose the ground or grounds on which the demurrers were sustained.

[1] "On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ.Proc., sec. 475. 'Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears.' [Citation.] All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. [Citation.] 'In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' [Citation.] In passing upon the sufficiency

1. Section 849, in pertinent part: "When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate."

Section 4001: "Each county jail must contain a sufficient number of rooms to allow all persons belonging to either

one of the following classes to be confined separately and distinctly from persons belonging to either of the other classes:

"1. Persons committed on criminal process and detained for trial;

"2. Persons already convicted of crime and held under sentence;

"3. Persons detained as witnesses or held under civil process, or under an order imposing punishment for a contempt;

"4. Males separately from females."



of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. [Citations.] 'While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.' [Citation.]" *Hardy v. San Fernando Valley Chamber of Commerce*, 99 Cal.App.2d 572, 577-578, 222 P.2d 314, 317. Unless it is clear that a complaint cannot be amended to state a cause of action, it is error to sustain a demurrer thereto without leave to amend. 39 Cal.Jur.2d 244, § 168.

[2,3] The complaint alleges an unlawful arrest and imprisonment. "Where a complaint is based upon an arrest made without a warrant, for a misdemeanor not committed within the presence of an officer, as it is here, all that need be alleged to charge the unlawful arrest is 1) the arrest without process, 2) the imprisonment, and 3) the damage. *Collins v. Owens*, supra, 77 Cal.App.2d [713] at page 718, 176 P.2d 372; *Kaufman v. Brown*, 93 Cal.App.2d 508, 511-512, 209 P.2d 156. While other matters not necessary to a cause of action for false imprisonment are here alleged, the complaint contains the vital allegations. As against a general demurrer the surplus allegations must be disregarded." *Miller v. Glass*, 44 Cal.2d 359, 361-362, 282 P.2d 501, 503. "A cause of action for false imprisonment based on unlawful arrest is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." *Dragna v. White*, 45 Cal.2d 469, 471, 289 P.2d 428, 430. All who take part or assist in an unlawful arrest are joint tortfeasors. Each participant in the wrongful act is responsible as a joint tortfeasor for all damages ensuing from the wrong, regardless of whether he was a direct actor and regardless of the degree of his activity. *McAlmond v. Trippel*, 93 Cal.App. 584,

587, 269 P. 937; *Turner v. Whittel*, 2 Cal.App.2d 585, 589, 38 P.2d 835.

[4,5] The complaint also states a cause of action on the theory that there was unnecessary delay in bringing plaintiff before a magistrate. An action for false imprisonment may be maintained if the defendant unlawfully detains the prisoner for an unreasonable period of time and unnecessarily delays taking him before a magistrate. *Dragna v. White*, supra, 45 Cal.2d 469, 472, 289 P.2d 428.

[6] There are uncertainties in the complaint and at least two causes of action are not separately stated. It is an abuse of discretion to sustain a special demurrer to an original complaint without leave to amend if a cause of action is or can be stated. *Kauffman v. Bobo & Wood*, 99 Cal. App.2d 322, 323, 221 P.2d 750.

The judgment is reversed with directions to the superior court to grant plaintiff leave to amend the complaint.

PARKER WOOD, Acting P. J., concurs.



163 Cal.App.2d 768

**The PEOPLE of the State of California,  
Plaintiff and Respondent,**

**v.**

**Homer GRIFFEN, Defendant and Appellant.  
Cr. 2846.**

District Court of Appeal, Third District,  
California.

Sept. 26, 1958.

Defendant was convicted in the Superior Court, San Joaquin County, R. M. Dunne, J., for murder of the second degree, and he appealed. The Third District Court of Appeal, Peek, J., held that evidence would support finding that defendant had acted willfully, with malice and without

provocation, rather than upon a sudden quarrel or heat of passion, and would sustain second degree murder conviction, notwithstanding defendant's contention that he was, at most, guilty of manslaughter.

Affirmed.

### 1. Criminal Law Ⓒ260(11)

Weight to be given testimony and its credibility were matters for determination by trier of facts, and not by reviewing court.

### 2. Homicide Ⓒ254

In homicide prosecution, evidence would support finding that defendant had acted willfully, with malice and without provocation, rather than upon a sudden quarrel or heat of passion, and would sustain second degree murder conviction, notwithstanding defendant's contention that he was, at most, guilty of manslaughter. West's Ann.Pen.Code, § 192, subd. 1.

Robert O. Fort, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction of murder of the second degree following a trial before the court sitting without a jury.

The evidence shows that defendant had loaned a dollar to one Williams upon his statement that he would repay defendant that same evening. However when defendant asked Williams for the return of the money, Williams stated he would pay the defendant when he got it. The following morning while the two men were in a bar in the city of Stockton, the subject of the loan was brought up again. Williams informed defendant he wasn't going to pay him the money. Williams thereafter left and with one Mingo walked across the street to a second bar. A few moments thereafter defendant entered the second

bar and again demanded the money from Williams. When Williams informed him he had no money, defendant became angry and was admonished by Mingo to be quiet. Shortly thereafter Williams and the defendant came out of the bar and continued their argument on the sidewalk. Before leaving the bar defendant made sure that he had his knife in his pocket. Williams stood facing the defendant, holding his coat over his arm with his hands at his sides. According to one witness, Williams did not appear to be arguing with the defendant but did appear like a man who was "kind of drunk." Defendant said something to Williams who shook his head. At that moment defendant sprang at him and stabbed him in the chest, the impact of the blow knocking Williams off his feet. As he lay on his back on the sidewalk defendant kicked him in the face two or three times. Persons nearby helped Williams to his feet and to an adjourning hotel where he requested that someone call for an ambulance. Defendant immediately left the scene and went to his hotel where he hid the knife. When apprehended by the police that same evening, he denied any connection with the stabbing; however he later admitted his acts but stated they were done in self defense. The autopsy revealed that the cause of death was a stab wound which entered the pericardium of the heart causing an acute hemorrhage in the left chest.

[1] Defendant contends that under the record he at most could only be convicted of manslaughter. The Supreme Court of this state has defined murder of the second degree as " \* \* \* a willful act characterized by the presence of malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation." *People v. Bender*, 27 Cal.2d 164, 181-182, 163 P.2d 8, 18. Applying this rule to the facts in this case, there can be no question but that all of the elements noted in the *Bender* case are present here.

But, says the defendant, much of the evidence relied upon by the prosecution in support of the conviction was inherently

improbable; that is, that a person wounded as was the decedent could have arisen from the sidewalk and walked to a nearby hotel to summon aid. And, secondly, the testimony of the main witness for the prosecution was so contradictory and incredible as to be unworthy of belief.

As regards defendant's first argument, the record shows testimony by the autopsy surgeon that the length of survival of an individual receiving a like wound depended upon the facts of the particular case. Nothing to the contrary appears. Secondly, any conflict in the testimony of the state's witnesses, the weight to be given such testimony and its credibility, were matters for determination by the trier of fact and not this court on appeal. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

[2] Defendant's further contention, that at most he could only be guilty of manslaughter, is also without merit. Under the provisions of Penal Code, section 192, subdivision 1, manslaughter is defined as the unlawful killing of a human being without malice "upon a sudden quarrel or heat of passion." In amplification of such statutory definition, our Supreme Court has held that voluntary manslaughter is "a wilful act, characterized by the presence of an intent to kill engendered by sufficient provocation and by the absence of premeditation, deliberation and (by presumption of law) malice aforethought \* \* \* [and that] to be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would naturally be aroused in the mind of an ordinary, reasonable person, under the given facts and circumstances, or in the mind of a person of ordinary self-control." *People v. Bridgehouse*, 47 Cal.2d 406, 413, 303 P.2d 1018, 1022. Here the record discloses ample evidence from which the trial court could reasonably have found that defendant did not act "upon a sudden quarrel or heat of passion" but, to the contrary, that he acted wilfully, with malice and without provocation and hence was guilty of the crime of murder of the second degree. Under such

circumstances this court would not be warranted in reducing the homicide to manslaughter or otherwise interfering with the judgment as entered.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



163 Cal.App.2d 777

**Harold SENTELL and Gerald Sentell, co-partners, doing business as Glendale Quality Dairy; F. E. Miller, Irene Z. Robling and N. L. Grider, co-partners, doing business as Meadowgreen Dairies; M. V. Wolfe, doing business as Wolfe Dairies; Ivan Miller and Ivan Miller, Jr., co-partners, doing business as Boyal Dairies; Charlotte Richman, doing business as Blue Ribbon Dairies, Plaintiffs and Respondents,**

**v.**

**W. C. JACOBSEN, Director of the Department of Agriculture of the State of California; C. J. Carey, Deputy Director of said Department; D. A. Weinland, Chief of the Bureau of Milk Control of said Department, Defendants and Appellants.**

Civ. 22795.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 26, 1958.

Proceeding by wholesale subdistributors of fluid milk in Los Angeles County marketing area to enjoin the director of agriculture and members of his staff from enforcing portion of order relating to minimum subdistributor prices for milk in quart and half-gallon containers, and from determining, in the future, minimum prices for packaged fluid milk sold by processor-distributors to subdistributors. The Superior Court, Los Angeles County, Clarence M.



Hanson, J., rendered judgment enjoining the defendants, and defendants appealed. The District Court of Appeal, Parker Wood, Acting P. J., held that where portion of trial court's judgment enjoined director of agriculture from determining minimum prices for packaged fluid milk sold by processor-distributors to subdistributors unless director of agriculture selected packaging costs which would result in the lowest total reasonably necessary cost at the platform, whereas statute merely required director to determine the "reasonably necessary costs", trial court's judgment improperly restricted the director of agriculture in the exercise of the discretion vested in him as an administrative officer.

Dismissed in part and reversed in part.

#### 1. Evidence ⇐46

Judicial notice could be taken of order of State Department of Agriculture. West's Ann.Code Civ.Proc. § 1875, subd. 3.

#### 2. Appeal and Error ⇐843(2)

A reviewing court will not determine issues on appeal from judgment enjoining enforcement of order of director of agriculture determining minimum prices for packaged fluid milk in the Los Angeles County marketing area, where order referred to in the judgment appealed from has been superseded by various orders of the director of agriculture, thereby rendering all such issues moot.

#### 3. Appeal and Error ⇐843(1)

An appellate court will not review or determine questions which are moot.

#### 4. Food ⇐4

The director of agriculture is vested with the administrative duty and authority to prescribe and enforce minimum wholesale prices for fluid milk, and in performing such duties may exercise a wide discretion. West's Ann.Agric.Code, § 4350.

#### 5. Injunction ⇐208

Where portion of trial court's judgment enjoined director of agriculture in the matter of fixing minimum subdistribu-

tor prices for packaged fluid milk sold by processor-distributors to subdistributors from selecting any packaging costs at the platform other than the packaging costs which would result in the lowest total reasonably necessary cost at the platform, whereas statute merely required director to determine the "reasonably necessary costs" expended by such portion of the distributors in area as is determined by the director to be sufficiently representative to indicate the "reasonably necessary costs" of efficient distribution in the area, trial court's judgment improperly restricted the director in the exercise of the discretion vested in him as an administrative officer. West's Ann.Agric.Code, § 4355.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for appellants.

Gordon, Knapp & Gill and Joseph C. Gill, Los Angeles, for respondents.

PARKER WOOD, Acting Presiding Justice.

On October 1, 1956, the director of agriculture made an order (No. 63) determining minimum prices for packaged fluid milk in the Los Angeles County Marketing Area. The order provided that, in sales by a processor-distributor to a sub-distributor, the minimum price for a quart of such milk was 15 cents, and the minimum price for a half-gallon of milk was 29.5 cents.

The plaintiffs, who are wholesale sub-distributors of fluid milk within said area, sought to enjoin the director and certain members of his staff from enforcing the portion of the order relating to the minimum sub-distributor prices for milk in quart and half-gallon containers. They also sought to enjoin them from determining, in the future, minimum prices for packaged fluid milk sold by processor-distributors to sub-distributors.

The complaint alleged that defendants, in fixing the minimum sub-distributor prices, acted arbitrarily and failed to regularly

pursue their statutory authority in that they fixed such prices upon the basis of the cost of packaging milk in fiber containers rather than upon the basis of the lower cost of packaging milk in glass containers.<sup>1</sup>

The trial court found that the minimum sub-distributor prices (for a quart and half gallon), fixed by the order, were based upon the cost of bringing processed milk to the sales platform packaged in fiber containers, and that the cost of bringing a quart of milk to the platform in a fiber container was approximately nine-tenths of a cent higher than the cost of bringing a quart of milk to the platform in a glass container.

One of the conclusions of law was that the defendants, in establishing the minimum sub-distributor prices for milk in quart and half-gallon containers, failed to regularly pursue their statutory authority in that they selected the cost of fiber containers rather than the lower cost of glass containers when they were determining the reasonably necessary costs of delivering such milk at the sales platform.

By the judgment the defendants and their successors were enjoined, as follows: (1) from enforcing the minimum sub-distributor price schedule which is in said order No. 63; (2) from selecting, in the determination of reasonably necessary costs in any future surveys in said area with respect to such prices, any packaging costs other than "the packaging costs which will result in the lowest total reasonably necessary costs at the platform"; and (3) from enforcing any minimum price established by any present or future order with respect to such sales unless the defendants comply with the provisions as set forth in subdivision (2) of this judgment (above referred to) in the determination of reasonably necessary costs.

1. The complaint also alleged that the order violated provisions of the federal and the state constitutions. The court found against plaintiffs on those issues, and such findings are not involved on appeal.

It was also alleged that there were other errors in determining the minimum prices. The trial judge stated, in the

The judgment also directed the defendants to notify all persons, whose names are on the Los Angeles area mailing list of the director, that the sub-distributor prices for quart and half-gallon sizes of milk, fixed by order No. 63, are no longer in effect.

Defendants appeal from the judgment.

As above indicated, the issue herein relates to the minimum prices for packaged fluid milk which a processor-distributor of such milk may charge a sub-distributor. A processor-distributor, as referred to herein, means a person who processes or prepares fluid milk for resale and who delivers the packaged milk (at the processor-distributor's platform) to wholesale or retail sub-distributors. Wholesale sub-distributors purchase milk at the sales platform of the processor-distributor and sell the milk to food markets, restaurants, and other wholesale customers. Retail sub-distributors purchase milk at the sales platform and sell it to consumers on home-delivery routes. Wholesale sub-distributors usually purchase and sell the milk in fiber containers. Retail sub-distributors usually purchase and sell the milk in glass containers. The minimum prices, at the sales platform, for a quart or half-gallon of milk are the same irrespective of whether the container is fiber or glass.

For the purpose of indicating part of the background of the present action, reference should be made to some of the prior orders of the director. Order No. 55, made by the director in December, 1953, determined the minimum prices for packaged fluid milk in sales by processor-distributors to sub-distributors. The prices therein were based upon the cost of packaging milk in glass containers. In March and April, 1956, the director held hearings for the purpose of determining whether order No. 55 should be

findings, "That with respect to other issues of fact presented by the pleadings and on which evidence was received, the Court makes no Findings, it being of the view that additional Findings are unnecessary and therefore immaterial in light of the other Findings hereinabove made."

modified. Prior to those hearings the director made cost surveys in order to determine whether there had been any changes in the costs of processing and distributing milk. As a result of the surveys, the director prepared a schedule of proposed minimum prices for fluid milk in sales by processor-distributors to sub-distributors; and prior to said hearings (in March and April, 1956) he sent a copy of the schedule to all the distributors and sub-distributors in the marketing area. The schedule stated that the proposed minimum prices for milk (during summer months) at the platform of processor-distributors were 14.1 cents for a quart, and 28.2 cents for a half gallon. Those prices were based upon the cost of bringing milk to the platform in glass containers. At the hearings in March and April, 1956, numerous witnesses testified, and documentary evidence was received. Representatives of two processor-distributors testified that all the milk sold by those distributors to sub-distributors was packaged in fiber. Representatives of two other processor-distributors testified that substantially all the milk sold by those other distributors to sub-distributors was packaged in fiber. A wholesale sub-distributor testified that all the milk purchased by him from processor-distributors was packaged in fiber. The president of the Retail Milk Distributors Association testified that there were 78 or 79 members of his association; he believed that all the milk purchased by those members was purchased in glass bottles; most of the milk was purchased by them from processor-distributors. A retail sub-distributor testified that, at the hearing, he was representing himself and 12 other retail sub-distributors; he delivers milk in glass bottles on a home-delivery route; there are approximately 300 retail sub-distributors in the Los Angeles area; those distributors deliver milk in glass bottles on home-delivery routes; only a small amount of the milk delivered by such distributors is delivered in fiber containers. After those hearings the director made order No. 60 (effective May 10, 1956) which fixed the sub-distributor prices at the platform, as follows: 15 cents

for a quart, and 29 cents for a half gallon. Those prices were based upon the cost of bringing milk to the platform in fiber containers. (The chief of the bureau of milk control, who presided at the hearings, testified that the minimum sub-distributor prices, as stated in order No. 60, were based on the cost of packaging in fiber, rather than on the cost of packaging in glass, for the reasons: (1) that the testimony of several processor-distributors, at the hearings, indicated that practically all the milk sold by them to sub-distributors was sold in fiber containers; and (2) it appeared, in connection with stability in the industry, that the sub-distributor prices based on the fiber cost were more appropriate.)

According to a statement by counsel for plaintiffs, made at the beginning of the trial herein, these plaintiffs commenced an action (not the present action) on June 2, 1956, to enjoin these defendants from enforcing order No. 60; thereafter the director made orders Nos. 62 and 63 (effective September 1 and October 1, 1956, respectively) which fixed minimum sub-distributor prices; the prices in order 62 were the same as in order 60; the prices in order 63 were the same as in order 60, except that the half-gallon price in order 63 was one-half cent higher than in order 60; before the date set for the trial of the action regarding order 60, the present action regarding the then existing order, No. 63, was commenced. (The former action was placed off calendar.)

Appellants (defendants) contend that the portion of the judgment enjoining them from enforcing the minimum sub-distributor prices, as stated in order No. 63, is not supported by the evidence. They argue to the effect that the evidence shows that the director did not act arbitrarily, or abuse his discretion, in fixing the minimum sub-distributor prices in order No. 63, based upon the cost of packaging milk in fiber containers; and that the director acted pursuant to legislative standards. They also argue to the effect that, in establishing such prices in order No. 63, the director's determination of "reasonably necessary costs" was supported by substantial evidence in the



light of the whole administrative record, insofar as the determination was based upon the cost of packaging milk in fiber containers; and there was substantial evidence, at the administrative hearings, that the fiber container was the predominant package at the platform.

[1-3] Respondents state in their brief that order 63 has been superseded by subsequent orders but that fact is immaterial herein. This court takes judicial notice of orders of the Department of Agriculture of this state. See *O'Neal v. Seabury*, 24 Cal. App.2d 308, 311, 74 P.2d 1082; Code Civ. Proc. sec. 1875, subdiv. 3; 18 Cal.Jur.2d 446-447, sec. 24. Orders 71 and 73 made by the director of agriculture (effective June 1 and September 1, 1958, respectively) provide that the minimum sub-distributor prices (during summer months) are: 15.2 cents for a quart, and 29.4 cents for a half gallon. Also, each of those orders provides, in part, that: "The costs used in determining the minimum prices contained in this Order include the costs of acquisition and maintenance by the seller of adequate reusable containers, and such costs are spread over the average period of use of such containers. Therefore, such minimum prices do not make any provision for the sale of such reusable containers to the customer. If a distributor or retail store charges a container deposit or a charge above the minimum prices contained herein or sells a reusable container to a customer, such deposit, charge, or container sales price shall be in addition to the applicable minimum prices set forth herein. \* \* \*" It cannot be determined from orders 71 and 73 whether the minimum subdistributor prices were based on the cost of packaging milk in fiber or in glass. It does appear that those orders include a provision regarding reusable containers (that is, glass, etc.), which provision is, in part, that the "costs used in determining the minimum prices \* \* \* include the costs of acquisition and maintenance by the seller of adequate reusable containers \* \* \*." It might well be that the fact is, with respect to the present existing order, that the mini-

um sub-distributor prices are not based on the cost of packaging milk in fiber (as were the prices in order 60), but are based on a lower cost of packaging in glass. In any event order No. 63, which is referred to in the judgment appealed from, has been superseded by various orders. The issue herein with respect to the minimum sub-distributor prices fixed by order No. 63 is now of academic interest only. In *O'Neal v. Seabury*, supra, 24 Cal.App.2d 308, at page 311, 74 P.2d 1082, at page 1084, it was said: "An appellate court will not review or determine questions which are moot, since the decision will serve no beneficial purpose to the litigants or at all." The said issue with respect to order No. 63 has become moot, and it need not be determined herein.

[4] Appellant contends further that the permanent injunction restraining the director in the matter of fixing minimum sub-distributor prices is invalid in that it is contrary to statutory provisions defining administrative duties of the director in fixing such prices. That portion of the judgment, just referred to, enjoins the director perpetually "From selecting, in the determination of reasonably necessary costs in any future cost surveys \* \* \* with respect to \* \* \* 'subdistributor prices,' any packaging costs \* \* \* at the platform \* \* \* other than the packaging costs which will result in the *lowest total* reasonably necessary costs at the platform." (Italics added.) Section 4355 of the Agricultural Code enumerates various economic factors, in addition to other matters, which are to be considered by the director in determining minimum prices. That section does not include the language included in the judgment herein, namely, "the lowest total reasonably necessary costs." The language in the section is "reasonably necessary costs." That section provides, in part: "In determining minimum wholesale \* \* \* prices for fluid milk \* \* \* the director shall take into consideration the following economic factors operative in such marketing area \* \* \*. (e) The reasonably necessary cost of handling fluid milk \* \* \* incurred by

distributors, including all costs of hauling, processing, selling and delivering and reasonable return on necessary capital investment, for each of the several methods of distribution used in such marketing area \* \* as such costs are determined by impartial cost surveys, or examination of the books and records \* \* \* of all, or such portion of the distributors in such marketing area as are reasonably determined by the director to be sufficiently representative to indicate the *reasonably necessary costs of sufficient efficient distribution* for such marketing area." (Italics added.) It thus appears that the director is required to determine the "reasonably necessary costs" expended by such portion of the distributors in the area as is determined by the director to be *sufficiently representative* to indicate the "reasonably necessary costs" of efficient distribution in the area. The director is vested with the administrative duty and authority to prescribe and enforce minimum wholesale prices for fluid milk. Agr.Code, sec. 4350. In performing such duties the director may exercise a wide discretion. See Knudsen Creamery Co. of California v. Brock, 37 Cal.2d 485, 495, 234 P.2d 26; Brock v. Superior Court, 109 Cal.App.2d 594, 604, 241 P.2d 283.

In Knudsen Creamery Co. of California v. Brock, supra, it was said at page 495 of 37 Cal.2d, at page 32 of 234 P.2d: "Considering the complexities of the administration of the Milk Control Act and the plain intent of the Legislature to give to the director a wide discretion in formulating regulations

for the effective production and distribution of milk throughout the state, Order No. 26 must be sustained \* \* \*."

In Ray v. Parker, 15 Cal.2d 275, at page 311, 101 P.2d 665, at page 684, it was said: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. \* \* \* Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

In the present case the effect of the injunction is to require the director to select, in the future, the packaging cost which will result in the "lowest total" reasonably necessary costs at the platform irrespective of (1) whether the lowest cost container is the predominant container in the marketing area, or (2) whether the lowest cost container is in widespread or general use, or (3) whether there are any other factors in the area which would justify the selection of another kind of container as a part of the "reasonably necessary costs" of efficient distribution. The director, in determining packaging costs, will be confronted, of course, with varied combinations of cost factors. It might well be that under some circumstances the cost of packaging which would result in the "lowest total" reasonably necessary costs at the platform (as required by the injunction) would not be a proper factor in determining the reasonably necessary cost of sufficient efficient distribution in the area (as required by the statute). Section 4360 of the Agricultural Code<sup>1</sup> provides that under certain circumstances the

1. Section 4360 of the Agricultural Code provides, in part: "Following such hearings, investigation, surveys or examinations authorized above, the director shall establish minimum wholesale \* \* \* prices \* \* \* for distributors \* \* \* which \* \* \* prices shall be sufficient \* \* \* to cover costs, as such costs are described in Section 4355 of this code \* \* \* and reasonable return upon necessary capital investment \* \* \*; provided, however, that whenever the director shall determine from credible evidence that any prices established as hereinabove set forth will not or would not conform to and effectuate the legislative declarations, purposes and intent set

forth in this chapter, then he shall instead establish minimum wholesale \* \* prices which are higher or lower than those sufficient to cover said costs and reasonable return on capital investment, upon the condition that he shall determine in his judgment and shall find in writing with respect to such higher or lower minimum prices: (a) That such minimum prices will tend to maintain in the business of distributing fluid milk \* \* \* such reasonably efficient retail stores and distributors of fluid milk \* \* \* as the director finds necessary to insure to consumers \* \* \* sufficient distribution facilities to supply the quantity of fluid milk \* \* \* required

director may fix minimum wholesale prices higher or lower than the "reasonably necessary costs" fixed pursuant to said section 4355 (above mentioned); provided he shall determine in his judgment and shall find in writing that such higher or lower minimum prices (1) will tend to maintain certain efficient conditions (therein specified) in the distribution of fluid milk, (2) will not tend to induce certain unfair trade conditions (therein specified), and (3) will tend to encourage the efficient marketing of fluid milk.

[5] In the present case the injunction, specifying a method to be followed by the director in fixing future minimum prices, improperly restricted the director in the exercise of the discretion vested in him as an administrative officer. The court erred in granting that injunction.

Reference should be made to the position plaintiffs occupy in asserting that the minimum prices should have been based on the cost of packaging milk in glass containers. Plaintiffs, as wholesale sub-distributors, buy milk in fiber containers only. Orders 60 and 63 fixed the minimum sub-distributor prices upon the basis of the cost of packaging milk in fiber containers. The cost of packaging milk in glass containers was less than the cost of packaging in fiber (about nine-tenths of a cent less per quart). Plaintiffs, who use only fiber containers, are complaining herein because the director did not fix the minimum prices on the basis of the lower cost of packaging in glass. It is to be noted that retail sub-distributors, who usually buy milk in glass containers and who are required to pay the fiber container prices, are not parties to this action and apparently are not contending that the director should have fixed the prices on the basis of packaging in glass. (Orders 60 and 63 provided that retail sub-distributors

should make a service charge of five cents on each sale at a single delivery location.) If the minimum prices had been fixed on the basis of packaging in glass, the plaintiffs might have had the advantage of buying fiber packages of milk at the lower cost of glass packages. Plaintiffs assert, however, in substance that the minimum price is only a minimum, and that even if the minimum price were based on the cost of the glass package, the processor-distributors could charge more than the minimum for fiber packages and thereby require plaintiffs to pay a price based on the higher cost of the fiber package. It is to be noted, however, that plaintiffs alleged in their complaint that the milk market has been so highly competitive that minimum prices are in practical effect the maximum prices. If the minimum prices are controlling, as plaintiffs allege, and if the minimum prices are based on the cost of the glass package, as plaintiffs assert they should be, the plaintiffs would have the advantage of buying the fiber packages (which they use exclusively) at the lower cost of glass packages. Also, it is to be noted that under orders 60 and 63 (of which plaintiffs complain and which were based on the cost of packaging in fiber) plaintiffs' gross margin of profit was greater than it was under the prior order 55 (which was based on the cost of packaging in glass).

In view of the conclusions hereinabove stated it is not necessary to discuss other contentions on appeal.

The appeal with respect to the portion of the judgment enjoining defendants from enforcing order No. 63 (as to which portion the issue has become moot) is dismissed. The judgment is reversed as to all other portions thereof. Appellants to recover their costs on appeal.

VALLÉE, J., concurs.

by such consumers<sup>8</sup> without requiring such consumers to pay more for their supplies of such fluid milk \* \* \* than is necessary to maintain adequate and efficient distribution facilities in such marketing area. (b) That such minimum prices will not tend to induce or author-

ize the development of unfair trade practices, unfair competition, conditions of monopoly or combinations in restraint of trade, and that such minimum prices will tend to encourage the orderly and efficient marketing of fluid milk \* \* \*."



163 Cal.App.2d 732

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Davis Carl ATKINS, Defendant and**  
Appellant.

Cr. 2754.

District Court of Appeal, Third District,  
California.

Sept. 25, 1958.

Hearing Denied Nov. 19, 1958.

Accused was convicted of first degree burglary. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment upon verdict and order denying new trial and accused appealed. The District Court of Appeal, Van Dyke, P. J., held that where accused testified that he had recently bought jacket which had been introduced in evidence and identified by witnesses as jacket worn by accused on evening of burglary, rebuttal testimony that witness had bought jacket for her son and had written his name, which was still there, inside jacket in India ink, and jacket had either been lost by her son or stolen from him prior to burglary, was admissible even though it might connect accused with another crime than one charged.

Judgment affirmed.

#### 1. Criminal Law §1159(2, 4)

Questions pertaining to weight of evidence and credibility of witnesses are matters which rest entirely with jury and before challenge to sufficiency of evidence can be upheld it must appear that on no reasonable hypothesis is there sufficient evidence to support conclusion reached in trial court.

#### 2. Criminal Law §741(2)

In first degree burglary prosecution, where witness identified accused as man she saw in her yard after her doorbell had been rung, question whether witness had such view of accused as to enable her to make at trial positive identification which she did make was for jury.

#### 3. Burglary §41(1)

Evidence sustained conviction for first degree burglary.

#### 4. Burglary §46(7)

In first degree burglary prosecution, instruction that while mere possession of stolen property, however soon after taking, unexplained by person having possession, was not sufficient to justify conviction, it was circumstance which jury might consider in connection with other evidence in determining question of guilt or innocence was proper when there was evidence, that he could not satisfactorily explain, that accused, when arrested was in possession of \$20 bill, and there was testimony to support inference that \$20 bill had been taken from purse of witness by man she had seen in her yard after burglary.

#### 5. Burglary §42(3)

In first degree burglary prosecution, evidence that accused, when arrested, was in possession of \$20 bill, and testimony to support inference that \$20 bill had been taken from purse of witness by man she saw in her yard after burglary, and failure of accused to satisfactorily account for his possession of such a bill was to be considered by jury along with other circumstances in determining issue of guilt.

#### 6. Criminal Law §369(2), 683(1)

In first degree burglary prosecution, where accused testified that he had recently bought jacket which was introduced in evidence and identified by witnesses as jacket worn by accused on evening of burglary, rebuttal testimony that witness had bought jacket for her son and had written his name, which was still there, inside jacket in India ink, and jacket had either been lost by her son or stolen from him prior to burglary, was admissible even though it might connect accused with another crime than one charged.

#### 7. Criminal Law §339

In first degree burglary prosecution, police officer's testimony, after witnesses' positive identification of accused, that he and other officers had taken accused out of pool hall to automobile in which witnesses were seated, that he informed accused that he was taking him there for purpose of identification, and that when they were near automobile occupants all

indicated by finger motion or head nods that accused was man witness had seen in her yard and man that other two had seen proceeding down street and entering pool hall was admissible.

#### 8. Criminal Law ⚖️444

In first degree burglary prosecution, refusal to permit voir dire examination of witness by accused's counsel, at time photograph of scene of alleged crime was introduced and witness testified concerning it, was not prejudicial error, where accused's counsel examined witness extensively on cross-examination touching fidelity of photograph and her ability to see under conditions existing at time of burglary.

#### 9. Criminal Law ⚖️720(8), 1171(3)

In first degree burglary prosecution, although court struck police officer's testimony that accused was seen leaving place of burglary, prosecuting attorney's statement that accused was seen walking away from home where burglary took place in certain direction was not misconduct or prejudicial error, in view of testimony of other witnesses that they had seen accused leave premises where burglary was committed and walk down street in that direction.

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Ralph D. Drayton, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

The appeal herein is from the judgment and order denying motion for new trial following a jury verdict finding appellant guilty of the crime of burglary of the first degree.

Appellant contends that the evidence was insufficient to support the verdict, that the trial court committed prejudicial error in the admission of evidence, in the giving of certain instructions, and in refusing appellant's counsel the right of preliminary cross-examination before admitting evi-

dence of prior identification. Appellant also contends that the district attorney was guilty of prejudicial misconduct. Before discussing these contentions we will summarize the evidence upon which the prosecution relies.

[1] This we will do in line with the well-settled rule that questions pertaining to the weight of evidence and the credibility of witnesses are matters which rest entirely with the jury and that before a challenge to the sufficiency of the evidence can be upheld it must appear that on no reasonable hypothesis is there sufficient evidence to support the conclusion reached in the trial court. *People v. Hills*, 30 Cal.2d 694, 185 P.2d 11; *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778. There was testimony that at about 8:45 P.M. on September 19, 1956, the front doorbell of a Mrs. Siegfried was rung. She resides with her husband and son in a two-story house located at the intersection of Walnut and Lee Streets in the City of Lodi. She was in an upstairs bedroom and had been in bed for about thirty minutes when she heard the ring. Due to her ill health she disregarded the bell, but within a few minutes heard the rear door buzzer sound. She then arose and went to the window and looked out. The lights in the house were out and the doors were unlocked; it was a bright moonlight night and the area of Walnut and Lee Streets was lighted by two street lamps. There were no screens on the windows and no objects that would obstruct the view from Mrs. Siegfried's bedroom window to the ground at the rear of the house. As Mrs. Siegfried watched, she saw a man, whom she later identified as appellant, coming from the back of the house carrying a brown object over one arm and holding several objects in his hands. She saw the man take a few steps, then stop and throw a white object, and another article that made a thud when it landed, under an orange tree in the yard. She then saw the man proceed down Lee Street towards Oak Street. After the man left she searched under the orange tree and found a white purse belonging to her, and a jug or vase that had

been on her dining room table. Returning to the house she discovered that there was missing a black patent leather purse which had contained a \$20 bill, a \$10 bill and a \$5 bill. She also discovered that her husband's suit coat, which had been hanging on a dining room chair, was gone. She called her husband at his music store in town, and informed him and their son of the burglary. She gave them a description of the burglar as a man of slight build, with a thin face, dark, "slick" hair, who was wearing suntanned trousers and a dark green jacket. Mr. Siegfried notified the police and gave them his wife's description of the burglar. He and his son then drove down Oak Street towards Lee Street. They encountered a man they identified as appellant as he was crossing an intersecting street. They parked their vehicle and watched him cross the street. As he went, he was counting some green objects in his hands which they described as looking like greenbacks. They followed this man along Oak Street to the Rex Pool Hall which he entered about 9:10 P.M. They then went to the police station, where they reported appellant's whereabouts to the officers who requested them to get Mrs. Siegfried over to the pool hall for purposes of identification. The police went to the pool hall where they found appellant playing poker. There was testimony that appellant had entered the pool hall and purchased a beer, using a five or ten dollar bill to pay for it; that he then went into an adjoining room where a poker game was going on and joined the game at about 9:15 P.M.; that during thirty minutes of play he made two five dollar purchases of poker chips. There was testimony that at about 9:30 P.M. two officers, having received Mrs. Siegfried's description of the man who had left her yard, went to the pool hall and found appellant. They said he fitted the description they had received. They took him from the card game to the street where Mrs. Siegfried and her family were waiting in their automobile. Mrs. Siegfried there identified him as the man she had seen in her yard and her husband and son identi-

fied him as the man they had followed to the Rex Pool Hall. He was arrested and searched. The officers found a \$20 bill, five \$1 bills, and over \$1 in change. When questioned about the money, appellant said he had been in Lodi four days, had come from Sacramento, and possessed \$18 on his arrival; that he had worked two days since, earning a total of \$15.50. When requested to account for the \$20 bill he was unable to do so. Mrs. Siegfried's black patent leather purse was found on Oak Street about 100 feet from Lee Street. Some of the contents of the purse were found scattered on the sidewalk along Oak Street. Mr. Siegfried's coat was found on a lawn adjacent to the Oak Street sidewalk. There was testimony by the Siegfrieds and the arresting officers that when arrested appellant was wearing a dark green jacket.

[2,3] From the foregoing recital of evidence, it is apparent that appellant's contention the evidence was insufficient to support the verdict is without merit. While appellant seriously challenges the ability of Mrs. Siegfried to identify him as the man she saw in her yard after the doorbells had been rung, the argument goes merely to the weight of the evidence. It was for the jury to determine whether, under the circumstances as described in the testimony, Mrs. Siegfried had such a view of appellant as to enable her to make at the trial the positive identification which she did make. In addition to that identification the record as related contains many supporting circumstances. It is unnecessary to reiterate them. We hold the evidence was sufficient to support the jury's verdict.

[4,5] Appellant contends that People's Instruction No. 13 should not have been given. Therein the court told the jury that, although mere possession of stolen property, however soon after the taking, unexplained by the person having possession, was not sufficient to justify conviction, it was a circumstance which the jury might consider in connection with other evidence in determining the question of guilt or innocence. When arrested, appellant was in possession of a \$20 bill and



there was testimony to support an inference that a \$20 bill had been taken from Mrs. Siegfried's purse by the man whom she had seen in her yard. This circumstance is coupled with the appellant's failure to satisfactorily account for his possession of such a bill. While of little weight, this evidence was nevertheless to be considered by the jury along with other circumstances in determining the issue of guilt. *People v. Arbaugh*, 82 Cal.App.2d 971, 187 P.2d 866. The giving of the instruction complained of was not error.

[6] Appellant complains of the court's permitting rebuttal evidence concerning the jacket worn by appellant on the night of the burglary. The jacket had been introduced in evidence and identified by a number of witnesses as the one which appellant had been wearing on that evening. Appellant testified that he had just recently bought the jacket at a Sacramento department store. In rebuttal, a Mrs. Gatzert testified that she had bought the jacket for her son and had written his name inside it with India ink. The name was still there. She testified further that the jacket had either been lost by her son or stolen from him several months prior to the burglary. There was no error in permitting the rebuttal testimony. Appellant argues that the district attorney introduced the rebuttal testimony merely for the purpose of rebutting appellant's testimony concerning his acquisition of the jacket. The rebuttal testimony was properly admitted in view of appellant's testimony and the fact that it might incidentally connect him with another crime than the one charged was not a circumstance sufficient to justify its exclusion. *People v. Sizelove*, 134 Cal.App. 2d 104, 285 P.2d 4.

[7] Appellant contends for prejudicial error in the court's admitting evidence of extrajudicial identification of appellant by Mrs. Siegfried. One of the arresting officers, after Mrs. Siegfried's positive identification of the appellant during the trial, testified concerning the circumstances of the arrest and during that testimony stated

that the officers had taken appellant out of the pool hall and to a car in which the Siegfrieds were seated; that he informed the appellant he was taking him there for purposes of identification; that when they were near the Siegfried car the occupants all indicated by finger motion or by head nods that appellant was the man Mrs. Siegfried had been in her yard and that the other two had seen proceeding down Oak Street to and entering the pool hall. Objection was made to that part of the testimony which included testimony of the extrajudicial identifications and the conduct of the prosecuting attorney in eliciting the testimony was assigned as prejudicial misconduct. Under the circumstances it was not error to permit the testimony objected to. *People v. Slobodion*, 31 Cal.2d 555, 559-560, 191 P.2d 1. The circumstances here are similar to those recited in the Supreme Court's discussion of the point in the *Slobodion* case.

[8] Appellant contends that the trial court committed prejudicial error by refusing his request for a voir dire examination of Mrs. Siegfried at the time *People's* Exhibit No. 8 was introduced in evidence. This exhibit is a photograph showing the area at the rear of Mrs. Siegfried's home, as she observed it from her upstairs bedroom window on the night of the burglary. The photograph shows a peace officer standing in a location marked by Mrs. Siegfried as that where she observed appellant on that night. Mrs. Siegfried had been shown the photograph and had testified that the officer depicted was standing where she had first seen appellant; that the photograph showed the window from which she had looked and the yard below which she had seen; that before the picture had been taken as depicting what she saw as she looked down she had assisted in placing the officer in the position occupied by the appellant. She said: "I could see everything that you have in that picture." The picture was then offered in evidence for illustrative purposes only and was admitted by the court over the objection of appellant's counsel for that limited purpose. From the

record we think the jury must have fully understood this. Counsel asked for permission at that time to examine Mrs. Siegfried touching the fidelity of the picture as such illustration. The court refused at that time to permit this. While it would have been well to allow counsel's request, we think there is no error and certainly no prejudicial error in its refusal. On cross-examination counsel examined Mrs. Siegfried extensively touching the fidelity of the photograph and her ability to see under the conditions existing at the time of the burglary.

[9] Appellant cites two instances of what he claims to have been misconduct on the part of the prosecuting attorney. The first concerned the elicitation of testimony of extrajudicial identification hereinbefore discussed, and the second had to do with testimony obtained from the same officer with regard to the distance from the Siegfried home to the Rex Pool Hall and the time required to walk it. The officer said: "This distance was measured by an automobile speedometer \* \* \* it showed  $\frac{5}{40}$ ths of a mile \* \* \* from the sidewalk area and where the defendant was observed, seen leaving, to the front of the Rex Pool Hall." On motion the court struck out the reference to defendant's having been seen leaving the Siegfried home. The officer then testified as to the length of time it had taken him to walk the distance and that he had walked it at a normal walk or rate. Motion to strike was based upon want of evidence that appellant had walked the indicated route and counsel for the People said, "the defendant was seen walking away from this house in this direction here, up to Oak Street." The making of that statement was assigned as misconduct. In view of the fact that at the time of the occurrence of this incident in the trial Mrs. Siegfried had testified that she saw the appellant leave her premises and proceed down Oak Street and Mr. Siegfried had testified that he and his son had seen him walking down Oak Street and had followed him to the Rex Pool Hall, the inference could well be drawn that appel-

lant had been seen walking the route indicated and that counsel's statement to that effect was at least inferentially correct. However, appellant's counsel asked the court to admonish the jury to disregard the statement and the court did so. It would have been better for counsel for the People to have stated his conclusion that the appellant had been seen walking the route as mere argument from the preceding testimony, but we are satisfied that there was nothing worthy of the name of misconduct and certainly nothing prejudicial in the assignment of error under discussion.

There are no other assignments of error which merit discussion.

For the reasons heretofore stated, the judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.



163 Cal.App.2d 691

Mimis J. GENTEKOS, Plaintiff, Appellant  
and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation, Defendant,  
Respondent and Appellant.

Civ. 17630.

District Court of Appeal, First District,  
Division 1, California.

Sept. 23, 1958.

Rehearing Denied Oct. 23, 1958.

Hearing Denied Nov. 19, 1958.

Action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken piece of sidewalk which was tilted so that one jagged end was raised inch and quarter above sidewalk and another end projected two inches over hollow space and which had allegedly existed for about six months before accident. The Superior Court, San Francisco County, Daniel R.

Shoemaker, J., granted city's motion for judgment notwithstanding verdict and motion for new trial, but limited new trial to issue of damages and city appealed from limited new trial order and pedestrian appealed from judgment notwithstanding verdict. The District Court of Appeal, Peters, P. J., held that questions whether condition of sidewalk was dangerous and defective one, whether it was of such nature that reasonable inspection would have disclosed its nature and existence, and whether it existed long enough to give city constructive notice of it in time to repair it were for jury, and that whether new trial should have been granted on all issues or on issue of damages alone was for trial court whose discretion in matter could not be reversed unless city demonstrated that such discretion had been abused.

Judgment notwithstanding verdict reversed and order granting new trial on issue of damages affirmed.

#### 1. Appeal and Error ⚡934(1)

On appeal from judgment notwithstanding verdict for defendant, evidence most favorable to plaintiff must be accepted as true by appellate court.

#### 2. Municipal Corporations ⚡761(1)

City is liable for dangerous and defective condition of sidewalk resulting in injury to pedestrian under Public Liability Act where condition is known to city and exists for reasonable time after city acquires such knowledge so that the city has reasonable opportunity to repair condition. West's Ann.Gov.Code, §§ 53050, 53051.

#### 3. Municipal Corporations ⚡755(1)

Duty imposed on city to keep its sidewalks in repair is not that of insurer, but duty is to maintain streets and sidewalks in reasonably safe condition. West's Ann. Gov.Code, §§ 53050, 53051.

#### 4. Municipal Corporations ⚡821(6)

Whether city has complied with requirement of maintaining streets and sidewalks in reasonably safe condition and whether particular condition is dangerous or defective one are generally questions

of fact. West's Ann.Gov.Code, §§ 53050, 53051.

#### 5. Municipal Corporations ⚡847

Condition existing in public property is dangerous or defective one if hazard is one from which injury may reasonably be anticipated to those properly using area for purpose intended.

#### 6. Municipal Corporations ⚡821(6)

If condition existing in city sidewalk is trivial then it is neither dangerous nor defective, and, as matter of law, city is not liable for injuries to pedestrian who fell over broken place in sidewalk. West's Ann.Gov.Code, §§ 53050, 53051.

#### 7. Municipal Corporations ⚡768(1)

In order for city to be liable under Public Liability Act for injuries sustained because of condition of city sidewalk, condition existing must be such that it constitutes danger to persons using sidewalk in lawful manner. West's Ann.Gov.Code, §§ 53050, 53051.

#### 8. Municipal Corporations ⚡768(1)

City is not liable for minor defects in sidewalk that could not reasonably be anticipated to result in accidents, but public is entitled to be protected from even small defects if injury is likely to result from them. West's Ann.Gov.Code, §§ 53050, 53051.

#### 9. Municipal Corporations ⚡857

Fact that person has been proximately injured as result of defect is some indication that condition is dangerous or defective.

#### 10. Municipal Corporations ⚡788(1)

Before city can be liable under Public Liability Act it must have knowledge of dangerous or defective condition, but actual notice of dangerous or defective condition is not required. West's Ann.Gov. Code, §§ 53050, 53051.

#### 11. Municipal Corporations ⚡791(2)

City will be charged with, and finder of fact may find that city has, constructive knowledge of dangerous or defective condition if condition has existed long enough that it may be inferred that reasonable in-



spection would have ascertained its existence, but if defect is so minor that it would not be disclosed by reasonable inspection no liability attaches to city. West's Ann. Gov.Code, §§ 53050, 53051.

**12. Municipal Corporations** ⇨761(1)

In determining liability of city under Public Liability Act for injuries received by one because of dangerous or defective condition of city sidewalk questions as to nature of defect, that is, whether it is constructional one, one caused by natural causes such as normal wear or tear, elements or tree roots, or whether it is artificial break in sidewalk, how long it has existed, condition of sidewalk surrounding defect and its location on sidewalk are all important. West's Ann.Gov.Code, §§ 53050, 53051.

**13. Municipal Corporations** ⇨857

If reasonable minds can differ on questions whether reasonable inspection by city would have disclosed defect in public property, and, if so, whether city, having knowledge, should have repaired it, or if they are reasonably debatable, they are questions of fact and should be submitted to the jury.

**14. Municipal Corporations** ⇨768(1)

In determining liability of city for injuries received by one because of dangerous or defective condition of city sidewalk, size of defect is an important factor to be considered, but all conditions surrounding defect must be considered in light of facts of particular case.

**15. Municipal Corporations** ⇨857

If reasonable minds can differ on question whether reasonable inspection by city would disclose defective condition of public property, question is one of fact, and it is only when reasonable minds must come to conclusion that defect is so trivial that reasonable inspection would not disclose it that question becomes one of law.

**16. Municipal Corporations** ⇨821(6, 16)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk which was

tilted so that one jagged end was raised inch and quarter above sidewalk and another end projected two inches over hollow space, and which substantial evidence indicated had existed for about six months before accident, questions whether condition of sidewalk was dangerous and defective one, whether it was of such nature that reasonable inspection would have disclosed its nature and existence, and whether it existed long enough to give city constructive notice of it in time to repair it were for jury. West's Ann.Gov.Code, §§ 53050, 53051.

**17. New Trial** ⇨9

Where issues are severable trial court may grant new trial on one issue and deny it as to others.

**18. Appeal and Error** ⇨977(3)

**New Trial** ⇨9

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, issue of liability was severable from issue of damages, and whether new trial should have been granted on all issues or on issue of damages alone was question for trial court, and its discretion in matter could not be reversed unless city demonstrated that such discretion had been abused. West's Ann.Gov. Code, §§ 53050, 53051.

**19. Appeal and Error** ⇨877(1)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, where pedestrian did not appeal from limited new trial order, he could not challenge it on appeal. West's Ann.Gov.Code, §§ 53050, 53051.

**20. Trial** ⇨295(6)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, while some of instructions were awkwardly expressed, and others could have been given, as a whole, charge was full, fair and equitable and adequately covered all basic issues. West's Ann.Gov.Code, §§ 53050, 53051.

**21. Trial** ⇨241

While it is dangerous to frame instructions based on isolated extracts of court opinions, this does not mean that it must never be done, or that to do so is necessarily error.

**22. Municipal Corporations** ⇨822(4)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, instructions that, in absence of notice to contrary, pedestrian exercising ordinary care in making normal use of public sidewalk has right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury, he is not required to keep eyes fixed on ground or to be on constant lookout for danger, and whether plaintiff made reasonable use of his faculties and whether he should have observed condition which allegedly caused injury are questions of fact for jury to decide were proper. West's Ann.Gov.Code, §§ 53050, 53051.

**23. Trial** ⇨260(8)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, where proffered instructions stated correct principles of law applicable to facts of instant case, fact that they were not given in language desired by city was not error when issues involved were adequately covered by other instructions. West's Ann.Gov.Code, §§ 53050, 53051.

**24. Municipal Corporations** ⇨806(1)

As respects issue of contributory negligence in city sidewalk injury case, pedestrian was not inspector.

**25. Trial** ⇨244(4), 260(8)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, city could not properly complain that its theory was not overemphasized or not stated in particular way in instructions, so long as theory

was adequately and fairly covered. West's Ann.Gov.Code, §§ 53050, 53051.

**26. Municipal Corporations** ⇨822(3)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, instruction on constructive notice was proper. West's Ann.Gov.Code, §§ 53050, 53051.

**27. Trial** ⇨260(8)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, failure to give correct proffered instruction to effect that to impose liability jury must not only find that city had notice of defect, but also of its dangerous character, was not error when principle was fully and adequately covered by other instructions. West's Ann.Gov.Code, §§ 53050, 53051.

**28. Municipal Corporations** ⇨822(1)

In action by pedestrian against city under Public Liability Act for injuries received when pedestrian tripped and fell over broken place in sidewalk, failure to give instruction on unavoidable accident was not error. West's Ann.Gov.Code, §§ 53050, 53051.

**29. Negligence** ⇨140

Instruction on unavoidable accident is confusing, misleading, superfluous and serves no useful purpose.

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Philander Brooks Beadle, John A. Hodges, San Francisco, for plaintiff and appellant.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for defendant and appellant.

PETERS, Presiding Justice.

Plaintiff, Mimis Gentekos, tripped and fell over a broken place in the sidewalk on the north side of Eddy Street in San Francisco. He brought this action against the city pursuant to sections 53050 and 53051 of the Government Code for the injuries allegedly then received. After defendant's motions for a nonsuit and for a directed

verdict had been denied, the jury returned a verdict for the plaintiff in the sum of \$8,000. Judgment was entered accordingly. The defendant then moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. The trial court granted both motions, but limited the new trial to the issue of damages. Plaintiff has appealed from the judgment notwithstanding the verdict, and defendant has appealed from the limited new trial order, claiming that if a new trial is to be granted it should be on all issues.

The making and granting of these two apparently conflicting motions is permitted by statute. § 629, Code Civ.Proc. When both motions are granted "the order granting a new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed and the order granting a new trial \* \* \*, if appealed from, is affirmed." § 629, Code Civ.Proc.

The accident happened shortly after 9 a. m. on July 15, 1954, on the sidewalk located on the north side of Eddy Street between Mason and Taylor Streets in downtown San Francisco. The sidewalk in this area is about 12 feet wide. The day was dry and the sky was overcast. Plaintiff lives about a block from where he fell. He was walking towards Market Street. He had walked along Eddy Street occasionally in the past and knew that the sidewalk was "kind of rough down there" but had never observed the broken place where he fell. At the time of the accident there was no other pedestrian near the place where it occurred.

The defect in the sidewalk was located about seven feet from the curb and between a laundry and the entrance to the Empress Hotel. The sidewalk for some distance surrounding the defect is in good condition. The defective section was pie-shaped. Its longest dimension, which was parallel to the curb, measured 13 inches, while at the east end it measured 10½ inches and on the west end 4½ inches. The broken portion was loose and tilted so that the west side of the break was raised about an inch and a quarter above the sidewalk. The edges

of the break were irregular and jagged, and some parts of the broken piece were missing. There was a hollowed out space below a part of the broken portion so that in this area the broken piece projected about two inches above the bottom of the depression. The plaintiff was walking easterly and fell over the westerly edge of the defect, at the point where it is highest above the surrounding sidewalk. These physical facts were testified to by an engineer who examined the area the afternoon of the accident, and by several lay witnesses. Photographs taken the day of the accident amply corroborate the descriptive testimony.

[1] There was substantial evidence that the defect had existed for about six months before the accident. There is some conflict on this issue, but this being an appeal from a judgment notwithstanding the verdict, the evidence most favorable to the plaintiff must be accepted as true. During this six-month period several people stumbled over the defect, but there is no evidence that anyone had fallen. There was no evidence that anyone had ever complained to the city about the condition, and admittedly there was no evidence that the city otherwise had actual notice that the defect existed.

#### The Appeal from the Judgment Notwithstanding the Verdict.

This action was brought under the Public Liability Act now codified in sections 53050 and 53051 of the Government Code. Under section 53050 the term "public property" is defined as including the public streets. Section 53051 provides that:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."



[2] Under these provisions, if the conditions set forth in the section are shown to exist, a city is liable for the dangerous and defective condition of a sidewalk resulting in injury to a pedestrian. *Ackers v. City of Los Angeles*, 40 Cal.App.2d 50, 104 P.2d 399.

Under the sections the conditions that must exist are, first the condition must be a "dangerous or defective" one; second, the city must have knowledge of the condition; and third, the condition must exist for a reasonable time after acquiring such knowledge so that the city has a reasonable opportunity to repair the condition.

[3-9] The duty imposed on the city to keep its sidewalks in repair is not that of an insurer. The duty is to maintain the streets and sidewalks in a reasonably safe condition. Whether the city has complied with this requirement, that is, whether the condition complained of constitutes a "dangerous or defective" condition is normally a question of fact. *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723. A condition is a dangerous or defective one if the hazard is one from which injury may reasonably be anticipated to those properly using the area for the purpose intended. *Jones v. City of Los Angeles*, 104 Cal.App.2d 212, 231 P.2d 167. Whether a particular condition is a dangerous or defective one is generally a question of fact. *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal. App.2d 215, 82 P.2d 216; *Bauman v. City and County of San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989. Of course the condition must be one that is truly dangerous or defective. If it is trivial then it is neither dangerous nor defective, and, as a matter of law, the city is not liable. The condition existing must be such that it constitutes a danger to persons using the sidewalk in a lawful manner. *Bigelow v. City of Ontario*, 37 Cal.App.2d 198, 99 P.2d 298. In other words, a city is not liable for minor defects that could not reasonably be anticipated to result in accidents (*Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990; *Balkwill v. City of Stockton*, 50 Cal.App.2d 661, 123 P.2d 596), but the

public is entitled to be protected from even small defects if injury is likely to result from them. *Barrett v. City of Sacramento*, 128 Cal.App. 708, 18 P.2d 356; *Hook v. City of Sacramento*, 118 Cal.App. 547, 5 P.2d 643. The fact that a person has been proximately injured as a result of the defect is some indication that the condition is dangerous or defective. *Balkwill v. City of Stockton*, 50 Cal.App.2d 661, 123 P.2d 596; *Bauman v. City and County of San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989; see generally 35 Cal.Jur.2d pp. 296 to 305, §§ 511 to 518.

In the present case it cannot be said, as a matter of law, that the defect was so trivial that reasonable minds could not differ as to whether the condition was dangerous or defective. That being so, that was a fact question.

[10, 11] But this question of whether a defect is or is not a minor one becomes important in another connection. Before a city can be liable under the public liability act it must have knowledge of the dangerous or defective condition. *Watson v. City of Alameda*, 219 Cal. 331, 26 P.2d 286; *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725; *Howard v. City of Fresno*, 22 Cal.App.2d 41, 70 P.2d 502. But actual notice of the dangerous or defective condition is not required. The finder of the fact may find that the city has constructive knowledge, if the condition has existed long enough that it may be inferred that a reasonable inspection would have ascertained its existence. *Hook v. City of Sacramento*, 118 Cal.App. 547, 5 P.2d 643; *Van Dorn v. City & County of San Francisco*, 103 Cal.App.2d 714, 230 P.2d 393. A city will be charged with constructive notice of substantial defects which have existed for some time, and which are so conspicuous that a reasonable inspection would have disclosed them. *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55. However, if the defect is so minor that it would not be disclosed by a reasonable inspection no liability attaches to the city. There are a substantial number of cases holding that, although a particular

defect may have created a dangerous or defective condition, it was not so conspicuous as to give the city constructive notice of its existence. See *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725; *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990; *Balmer v. City of Beverly Hills*, 22 Cal.App.2d 529, 71 P.2d 854; *Beckley v. Vezu*, 23 Cal.App.2d 371, 73 P.2d 296; *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977; *Cheyney v. City of Los Angeles*, 119 Cal.App.2d 75, 258 P.2d 1099; *Graves v. Roman*, 113 Cal. App.2d 584, 248 P.2d 508; *Ness v. City of San Diego*, 144 Cal.App.2d 668, 301 P.2d 410; *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125; *Sischo v. City of Los Banos*, 26 Cal.App.2d 642, 80 P.2d 116, 1020; *Sischo v. City of Los Banos*, 37 Cal.App.2d 717, 100 P.2d 305; *Meyer v. City of San Rafael*, 22 Cal.App.2d 46, 70 P.2d 533.

The fundamental philosophy of these cases was stated as follows in *Whiting v. City of National City*, 9 Cal.2d 163, 165, 69 P.2d 990, 991, as follows: "A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby."

In determining whether a defect is or is not so conspicuous as to give the city constructive notice of it, some courts in this and other jurisdictions have tended to fix rigid tests, and to hold that a defect of a certain size is, as a matter of law, too trivial to constitute a dangerous or defective condition or too trivial to give the city constructive notice of it, while if the defect is over a certain height it becomes a question of fact as to whether it is dangerous or defective or so conspicuous that a reasonable inspection would have disclosed its condition. See *Annotation*, 37 A.L.R. 2d 1187.

[12, 13] It is obvious that a tape measure cannot be used to determine these questions. The question is not solely one of

height or depth. The nature of the defect, that is, whether it is a constructional one, one caused by natural causes such as normal wear or tear, the elements, or tree roots, etc., or whether it is an artificial break in the sidewalk, and how long it has existed are all important. The condition of the sidewalk surrounding the defect is important, as is its location on the sidewalk. All of the cases recognize that the basic questions are whether a reasonable inspection would have disclosed the defect, and, if so, whether the city, having knowledge of it, should have repaired it. These only become questions of law when reasonable minds cannot differ on them. If reasonable minds can differ on those questions, or if they are reasonably debatable, they are questions of fact and should be submitted to the jury. There are many cases so holding. A few of them are: *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55; *Hook v. City of Sacramento*, 118 Cal.App. 547, 5 P.2d 643; *Balkwill v. City of Stockton*, 50 Cal.App.2d 661, 123 P.2d 596; *Newman v. County of San Mateo*, 121 Cal.App.2d 825, 264 P.2d 594; *Ervin v. City of Los Angeles*, 117 Cal.App. 2d 303, 256 P.2d 25; *Sebern v. City of Riverside*, 42 Cal.App.2d 701, 109 P.2d 747; *Warren v. City of Los Angeles*, 91 Cal.App.2d 678, 205 P.2d 719; *Van Dorn v. City & County of San Francisco*, 103 Cal.App.2d 714, 230 P.2d 393; *Maddern v. City & County of San Francisco*, 74 Cal. App.2d 742, 169 P.2d 425; *Jones v. City of Los Angeles*, 74 Cal.App.2d 183, 168 P.2d 480; *Barrett v. City of Sacramento*, 128 Cal.App. 708, 18 P.2d 356; *George v. City of Los Angeles*, 51 Cal.App.2d 311, 124 P.2d 872; *Sheldon v. City of Los Angeles*, 55 Cal.App.2d 690, 131 P.2d 874; *Ackers v. City of Los Angeles*, 40 Cal.App. 2d 50, 104 P.2d 399; *Owen v. City of Los Angeles*, 82 Cal.App.2d 933, 187 P.2d 860; *Allen v. City of Los Angeles*, 43 Cal.App. 2d 65, 110 P.2d 75; *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773; *Bauman v. City & County of San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989.

[14,15] No useful purpose would be served by analyzing the facts of those cases holding that a particular defect is so minor as to relieve the city of liability as a matter of law and those holding that the question of liability is one of fact. No doubt, some of the cases are apparently inconsistent with some of the others. This conflict has arisen because some of the cases seem to have applied a tape measure to the defect to determine whether or not the question of liability is one of fact or of law. But no California court has expressly adopted the tape measure test. Obviously, such a rigid test is unsound. The size of the defect is a factor, an important factor, that must be considered, but it is not the only factor. The cases all declare that all of the conditions surrounding the defect must be considered in the light of the facts of the particular case, before the issue can be determined. All of the cases purport to adopt the same rule—if reasonable minds can differ on the question it is one of fact, and that it is only when reasonable minds must come to the conclusion that the defect is so trivial that a reasonable inspection would not have disclosed it, that the question becomes one of law. Each case must be determined on its own facts.

[16] In the present case a series of photographs of the defect and of the area surrounding it were introduced into evidence. We have examined those photographs. An expert and several lay witnesses described the defect in detail. We have read their testimony. The evidence shows that this defect was not the type of defect caused by natural wear or tear, or by natural causes. It was an artificial condition that existed in about the center of a 12-foot heavily traveled sidewalk that was otherwise smooth and level. The broken piece was loose and tilted, and its edges jagged and broken. It projected at least an inch and a quarter abruptly above the surrounding area. It existed in this condition for six months. After looking at the pictures and reading the testimony we think that it was for the jury to determine wheth-

er the condition was a dangerous and defective one, whether it was of such a nature that a reasonable inspection would have disclosed its nature and existence, and whether it existed long enough to give the city constructive notice of it in time to repair it. Certainly, reasonable minds can differ on these questions. That being so, they should not have been taken from the jury. The judgment notwithstanding the verdict must be reversed.

#### The Order for a Limited New Trial.

As already noted, the city has taken a precautionary appeal from the order granting the new trial on the issue of damages alone, contending that the new trial should have been granted on all of the issues.

[17,18] It is, of course, elementary, that where issues are severable the trial court may grant a new trial on one of the issues and deny it as to others. It is also obvious that the issue of liability in the instant case is severable from the issue of damages. On the issue of liability the evidence supports the implied findings of the jury. On the issue of damages the evidence was highly conflicting, and would readily support a finding of damages in a lesser sum. Therefore, whether the new trial should have been granted on all of the issues or on the issue of damages alone was a question for the trial court. Its discretion in the matter cannot be reversed unless appellant demonstrates that such discretion has been abused. (See generally 36 Cal.Jur.2d p. 157, § 17.)

[19,20] In the present case the plaintiff has not appealed from the limited new trial order. He, then, cannot and does not challenge it. It is the defendant who contends that it was entitled to a new trial on all of the issues. In this connection it is urged that the jury was erroneously instructed on the issue of liability and that certain instructions on that issue were erroneously refused. We have read the entire charge on that issue. While some of the instructions were awkwardly expressed,



and others could have been given, as a whole, the charge was full, fair and equitable and adequately covered all of the basic issues.

Appellant first challenges the instruction relating to the standard of care relating to a pedestrian. It states: "In the absence of notice or knowledge to the contrary, a pedestrian exercising ordinary care and making normal use of a public sidewalk has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, *he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger.*" (R.T. 137.) (Italics added.) The court also instructed that "Whether plaintiff made reasonable use of his faculties and whether he should have observed the condition which allegedly caused him injury are questions of fact for you to decide."

The appellant complains that the instruction first quoted is predicated on the premise that the city must furnish a pedestrian a safe sidewalk, and contends that the city is under no such duty.

[21,22] The challenged portion of the instruction is taken almost verbatim from language used in the recent case of *Peters v. City & County of San Francisco*, 41 Cal. 2d 419, at page 424, 260 P.2d 55. While it has frequently been held that it is dangerous to frame an instruction based upon isolated extracts from court opinions, this does not mean that it must never be done, or that to do so is necessarily error. The *Peters* case correctly states the law as to duty of pedestrians using the sidewalk and the duty of the city to keep the sidewalk in repair. The cases cited by appellant relate to the duty of a pedestrian crossing a street, an entirely different problem from the one here involved. There was no error in the two challenged instructions.

The city next complains that the refusal of the court to give the following requested instructions was reversible error:

"A duty rests on the plaintiff to exercise reasonable care to look where he is going and to see that which is in plain sight in front of him. It is negligence to fail to exercise such care."

"It is the duty of every adult person, regardless of age or sex, at all times to exercise reasonable care and precaution for his own safety while walking on the sidewalk. If a claimed defect is or should be reasonably apparent to a pedestrian who is exercising reasonable care, the pedestrian is required by law to exercise reasonable care to avoid injury therefrom and if he fails to exercise such care and as a proximate result is injured, he is in such case guilty of contributory negligence and cannot recover any damages."

"It is the duty of a pedestrian traveling on a public sidewalk to exercise reasonable care for his personal safety and to make reasonable use of his faculties of sight, and if he fails to do so and is injured by reason of such failure, he cannot recover damages on account of such injury."

[23] These proffered instructions undoubtedly state correct principles of law applicable to the facts of the instant case. But the fact that they were not given in the language desired by the city was not error. The fact is that the issues involved were adequately covered by other instructions. The court instructed that a pedestrian "must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself"; that whether "plaintiff made reasonable use of his faculties and whether he should have observed the condition which allegedly caused him injury are questions of fact" for the jury to decide; that "Contributory negligence is negligence on the part of the person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains"; and that one "who is guilty of contributory negligence may not recover from another for the injury suffered."

[24,25] These instructions adequately covered the field. It must be remembered that the issue as to the possible contributory negligence of the pedestrian and the issue as to whether a reasonable inspection should have disclosed the defect are not identical. A pedestrian is not an inspector. As was said in *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 424, 260 P.2d 55, 59, a pedestrian making normal use of a sidewalk in the absence of knowledge to the contrary "has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. [Citing many authorities.] Even if a defect is one which might be visible to a person who is looking for such a condition, it does not follow that a pedestrian is guilty of negligence as a matter of law in failing to see and avoid it. [Citing authorities.] Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact. [Citing authorities.]" These principles were adequately covered in the instructions given. While the proffered instructions repetitively stated the same rules, appellant cannot properly complain that its theory was not overemphasized or not stated in a particular way, so long as the theory was adequately and fairly covered. *Jaeger v. Chapman*, 95 Cal.App.2d 520, 213 P.2d 404. That is this case.

[26] The city also complains that an instruction on constructive notice assumed that the condition complained of was dangerous and defective and would import notice. While the challenged instruction was awkwardly expressed, the court fully and carefully instructed that: "\* \* \* before the plaintiff may be entitled to your verdict, you must find from a preponderance of the evidence:

"First, that plaintiff suffered an injury of which a proximate cause was some

dangerous or defective condition to the sidewalk on Eddy Street."

"A dangerous or defective condition, as denoted by the use of that term in these instructions, means a condition in the sidewalk in question that would have caused it to be not reasonably safe for persons who, with ordinary care for their own safety, used said sidewalk, or might have used it for the purpose intended, or as expressly or impliedly invited, or as permitted by the controlling authority."

Thus the jury was properly instructed that the issue of whether the condition was such as to import notice was a question of fact for it to determine. No possible confusion could have resulted from the awkward expression of the rule in the challenged instruction.

[27] The trial court refused a proffered instruction to the effect that to impose liability the jury must not only find that the city had notice of the defect, but also of its dangerous character. The proffered instruction correctly stated this principle. But the principle was fully and adequately covered by a series of instructions appearing on pages 133, 134, 135 and 136 of the Reporter's Transcript. Thus failure to give the proffered instruction was not error.

[28,29] Appellant also complains of the refusal to give a proffered instruction on unavoidable accident. Such an instruction is confusing and misleading and superfluous and serves no useful purpose. *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500. Failure to give it was not error.

The other errors complained of are of a minor character and do not require discussion. Suffice it to say that none of them was prejudicially erroneous.

The judgment notwithstanding the verdict is reversed; the order granting a new trial and limiting such new trial to the issue of damages alone is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.

Hearing denied; SPENCE, J., dissenting.

163 Cal.App.2d 714

**NELS E. NELSON, INC., etc., Plaintiff  
and Respondent,**

v.

**J. H. TARMAN et al., Defendants and  
Appellants.**

**James BALDANZI, etc., et al., Plaintiffs  
and Respondents,**

v.

**J. H. TARMAN et al., Defendants and  
Appellants.**

**Albert M. BURT, Cross-Complainant and  
Respondent,**

v.

**J. H. TARMAN et al., Cross-Defendants  
and Appellants.**

Civ. 17338.

District Court of Appeal, First District,  
Division 1, California.

Sept. 25, 1958.

Rehearing Denied Oct. 24, 1958.

Hearing Denied Nov. 19, 1958.

Action to recover for materials and services, and for foreclosure of mechanics' liens. The Superior Court, Alameda County, Charles Wade Snook, J., rendered judgment for plaintiffs, and an appeal was taken. The District Court of Appeal, Bray, J., held that the evidence would sustain finding that defendants had been engaged in joint venture.

Affirmed.

#### 1. Pleading ⚡252(2)

Technically, an amended complaint will supersede original complaint unless there is something in former showing that it is to be considered merely an amendment to the complaint.

#### 2. Pleading ⚡279(1)

Technically, a "supplementary" complaint is supposed to deal only with acts arising after filing of original complaint, and has nothing to do with amendment to conform to proofs.

#### 3. Pleading ⚡4

It is not what a paper is named, but what it is that fixes its character.

329 P.2d—60½

#### 4. Appeal and Error ⚡230

Question as to sufficiency of pleadings to raise issue came too late when first raised on motion for new trial.

#### 5. Joint Ventures ⚡1.15

In action for materials and services, and to foreclose mechanics' liens, evidence would sustain finding of joint venture between defendants.

#### 6. Joint Ventures ⚡8

Whether there was joint venture is question of fact for trial court to determine from facts and inferences therefrom.

#### 7. Joint Ventures ⚡1.4, 1.15

There need be no specific formal agreement between joint adventurers, and joint venture may be shown by parties' conduct and circumstances from which it is made to appear that the relationship was, in fact, entered into.

#### 8. Joint Ventures ⚡1.7

An agreement to share profits of joint venture implies an agreement to share proportionately in losses.

#### 9. Joint Ventures ⚡1.7

Where failure to provide for sharing of losses is mere contrivance to allow party to escape liability for loss, law will not permit it and will construe relationship as joint venture.

#### 10. Joint Ventures ⚡1.8

Joint venture may exist even though parties thereto do not have equal control of operation.

#### 11. Joint Ventures ⚡7

In absence of special agreement, one joint venturer does not have right to bind others.

#### 12. Joint Ventures ⚡8

In action for materials and services and for foreclosure of mechanics' liens, evidence would sustain finding that one of defendant joint venturers had been authorized to bind other in purchase of materials or labor.

#### 13. Joint Ventures ⚡7

Where purchasing venturer had authority to make purchases, mere fact that



seller did not know of relationship would not preclude him from holding both joint venturers liable.

#### 14. Principal and Agent ⇨131, 132(1)

Principal is responsible to third persons for ordinary contracts and obligations of his agent with third persons, made in course of business of agency and within scope of agent's powers as such, although made in name of agent and not purporting to be other than his own personal obligations or contracts.

#### 15. Principal and Agent ⇨145(1)

A creditor may sue an undisclosed principal when found although he may not have known of existence of such principal at time debt was incurred.

#### 16. Joint Ventures ⇨8

No inhibition exists against a court's finding that agreement was for prosecution of joint venture.

#### 17. Appeal and Error ⇨959(2)

##### Pleading ⇨140, 147

Defendant may file cross complaint at time of answering, but thereafter it may only be done by permission of court; and ruling of trial court on application for permission to file such pleading is within its discretion, and will be reversed only upon a showing that discretion was abused.

#### 18. Pleading ⇨140, 147

In action for materials and services, and for foreclosure of mechanics' liens, it was not an abuse of discretion to refuse permission for defendant to file cross complaint against codefendant, where application for permission was not made until seven months after filing of answer and where cross complaint would have injected into case issues that would have made for confusion.

1. Subsequent to the effecting of this appeal, defendant and appellant Tarman and cross-complainant and respondent Burt filed written stipulation in this court that the judgment in favor of respondent Burt and against appellant Tarman be reversed and that the trial court be directed to

#### 19. Appeal and Error ⇨882(1)

Party may not complain of error invited by it.

Orlando J. Bowman, Oakland, for appellant J. H. Tarman.

Hoffmann & Winkler, San Leandro, for respondents Baldanzi and others.

Wright & Pierson, Hayward, for respondent Burt.

BRAY, Justice.

Defendant Tarman appeals from a judgment against him and defendant Van Vleck in favor of nine plaintiff-materialmen for separate amounts totalling \$13,585.24 and in favor of cross-complainant Burt for \$3,550 as damages in lieu of specific performance of a contract for the sale of a house.<sup>1</sup>

##### Questions Presented.

1. Was the pleading of joint venture eliminated by the "amended and supplemental complaint?"
  2. Is the finding of joint venture supported?
  3. Is the finding of joint venture one of fact?
  4. Did the court fail to find on a material issue?
  5. Alleged error in refusing to permit defendant Tarman to file cross-complaint against Van Vleck.
  6. Did the court err in dismissing Bank of America as a defendant?
  7. Was sending letters by plaintiffs to the trial judge after submission prejudicial?
- Record.

The complaints of the materialmen were consolidated for trial, and were identical in their allegations except for the amounts sought. There were two causes of action,

enter judgment in favor of appellant Tarman on the cross-complaint of said respondent Burt. See order at end of this opinion. No further mention of the Burt cross-complaint and Burt judgment will be made.

one for foreclosure of mechanics' liens, the second for materials and services. Both counts alleged that the materials and services were furnished at the request of defendant Van Vleck and used in the construction of houses on property of defendants J. H. and Bessie Tarman, which houses were being constructed by defendants J. H. and Bessie Tarman and Van Vleck as a joint venture, and that all material and labor was furnished with the knowledge and consent and at the request of said Tarmans. Defendant Van Vleck defaulted. The Tarmans denied the allegations concerning joint venture. After the action was tried and submitted for decision, plaintiff moved to file an "amended and supplemental complaint" to conform to the proofs. This complaint set up three causes of action: (1) alleging an oral third party beneficiary contract between Tarman and Van Vleck; (2) such a written contract, and (3) an agency and employee relationship between Tarman and Van Vleck. Also the parties stipulated to eliminate the lien foreclosure claims as the houses and lots had been sold at trustee's sale under deeds of trust held by Bank of America which were superior to the mechanics' liens.

The court found that Tarman and Van Vleck were in a joint venture in the construction of the homes and gave plaintiffs personal judgment against both. It found against plaintiffs on the three theories set up in the amended and supplemental complaint.

#### 1. Amended and Supplemental Complaint.

As stated, both counts of the original complaint, in addition to alleging that the materials and labor were furnished with the knowledge and consent and at the request of Tarman, alleged that in the construction of the houses Tarman and Van Vleck were engaged in a joint venture. The three causes of action in the amended and supplemental complaint are inconsistent with those in the original complaint. The filing of the second complaint appears to leave

the pleadings in a confused situation. The second complaint incorporated by reference certain allegations of the first complaint but did not incorporate any of the joint venture allegations.

Defendant contends that the second complaint superseded the first one and therefore there was no cause of action on joint venture, and, as the court found against plaintiff on the allegations of the second complaint, there is no pleading of joint venture to support a finding and judgment on that ground.

[1-4] Although technically an amended complaint will supersede the original complaint unless there is something in the former showing that it is to be considered merely an amendment to the complaint and a "supplementary" complaint is supposed to deal only with facts arising subsequently to the filing of the original complaint and has nothing to do with amendment to conform to the proofs,<sup>2</sup> it appears in this case that regardless of its title, the second complaint was intended to be additional to the original complaint and not in substitution of it. Although entitled "amended and supplemental complaint" it states in the beginning "Comes now plaintiffs, and \* \* \* file herein their *supplemental* complaint \* \* \*" (Emphasis added.) It alleges no facts occurring subsequent to the filing of the original complaint. The introductions to both the second and third causes of action in the second complaint state "\* \* \* by way of supplement to and amendment of complaint on file herein to conform to proof \* \* \*" Its only prayer is "\* \* \* plaintiffs pray judgment as is set out in the respective complaints of each of the plaintiffs on file herein." That the trial court understood that the pleading of the issue of joint venture was not eliminated is shown by its referring in its findings and judgment to the "supplementary complaint" and by its finding of joint venture. Too, the parties briefed in the trial court the issue of joint venture without any contention that it was not an issue in

2. See *Giddings v. Seventy-Six Land & Water Co.*, 1895, 109 Cal. 116, 41 P. 788.

the case. The record fails to show that defendant offered any counter-findings showing that the pleading question had been raised. According to the record no question of the sufficiency of the pleadings to raise the issue of joint venture was raised until the hearing of the motion for new trial. It was too late to raise it then and now. Moreover, "It is not what a paper is named, but what it is that fixes its character." *Parnham v. Parnham*, 32 Cal.App. 2d 93, 96, 89 P.2d 189, 190. Defendant was in nowise misled by the second pleading. He had abundant opportunity to, and did, brief the question of joint venture. "No error or defect in a pleading is to be regarded unless it affects substantial rights. \* \* \* Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury." *Buxbom v. Smith*, 23 Cal.2d 535, 542, 543, 145 P.2d 305, 308.

## 2. Joint Venture.

[5] While the evidence probably is sufficiently conflicting to support a contrary finding, there is plenty of it to support the finding that Tarman and Van Vleck were engaged in a joint venture. It is conceded that none of the plaintiffs supplied labor or materials at any one's request other than Van Vleck's and that they did not know Tarman's connection until after the labor and material had been supplied. The evidence supporting the finding follows: Van Vleck was a building contractor. In May of 1952, Tarman, for whom Van Vleck had previously worked, told him that he had 59 lots available in Hayward Heights. Tarman offered Van Vleck the three best lots for \$4,250 and the remainder at a later date for a lower price. Van Vleck accepted the three and Tarman said he would put a deed of them in escrow. Two or three weeks later Tarman asked Van Vleck to sign a note for \$4,250 for the lots. This Van Vleck did. To obtain construction loans Van Vleck gave the Bank of America a deposit receipt as evidence of title. It showed Tar-

man as seller, Van Vleck as buyer, and a cash price of \$4,250. Van Vleck had never executed the receipt in conjunction with Tarman or delivered it to him. August 10, 1952, Van Vleck started construction of the houses on the lots. In the middle of October, Tarman asked that the property be deeded back to him as he needed the deed to show that the property was a part of his assets. He stated that he did not intend to record the deed but would hold it until the houses were completed, and sold, which would enable him to put in escrow a demand for the \$4,250. Van Vleck executed the deed and on November 10 Tarman recorded it. Van Vleck did not discover that it was recorded until some time in February, 1953. Plaintiffs furnished materials and labor for the construction of the houses. Eventually Van Vleck got behind in his payments to them and was unable to obtain the remainder of the progress payments on the construction loan. In January, 1953, at a time when the houses were substantially completed, Van Vleck was employed by Tarman to supervise the subdividing of some of Tarman's acreage at Paradise, being paid weekly a salary and expenses. About March 2, 1953, Tarman told Van Vleck that he, Tarman, would take care of all work to be done on the Hayward houses and would pay the bills therefor, and would sell the houses, as Van Vleck would be better off working in Paradise for Tarman. Shortly thereafter Van Vleck signed a letter prepared by Tarman, to the Bank of America, stating that Tarman was authorized to issue instructions for the disposition of construction money so that all bills outstanding against the three houses in Hayward and one in Oakland would be settled. Tarman, in a letter which at the trial was stapled to the last mentioned letter and which Van Vleck claimed never to have seen, informed the bank that he agreed to deposit sufficient funds in a certain escrow account to cover all liens on the three lots with instructions to release the liens in conjunction with the sums which the Bank of America was holding for Van Vleck on the construction



loans. Tarman stated that he meant that he would deposit funds from the sale of the homes. Tarman told Van Vleck to forget the Hayward job as he was taking care of it; it was his field. In April of 1953 there was a conference at the bank at which Tarman and Van Vleck and the banker were present, at which after considering the financial status of the houses, Tarman stated that he would take over the deal, sell the houses, and pay all the bills. Van Vleck testified that he did not tell Tarman that he could have any of the profits from the construction and sale of the houses, but that as the lots were not worth \$4,250, Tarman because of the artificial value would share any profit resulting. The Veterans Administration issued a certificate of reasonable value valuing the houses each at a minimum of \$12,000 with \$1,400 allocated to the land. Van Vleck testified that from May, 1952, until November 10th he was the owner and operator of the project but that on the latter date Tarman became the owner. In a prior deposition Van Vleck said that he had no agreement to share the profits and was constructing the houses on his own account. At the trial, he explained that at the deposition he was not given an opportunity to explain that he was going to pay for the lots by offsetting their price by an amount owed him by Tarman on another deal.

On May 11, 1953, a creditors' meeting was held at Tarman's office, at which about 15 materialmen and Tarman were present. Tarman said that he would pay all of the bills if the creditors would take a certain discount. Tarman's son, both before the meeting and in Tarman's presence at the meeting, stated that Tarman was going to see that all bills would be paid. Tarman did not deny it. Plaintiff Nelson testified that at this meeting Tarman had an account showing that Tarman had taken over and was selling, or trying to sell, the houses. Tarman included his claim for \$4,300 and one for 5 per cent of the sales prices of the houses as a commission. Tarman then agreed to pay off all of the debts, instructed

the creditors to send their bills to the title company and gave them an escrow number.

Nelson further testified that prior to this meeting, Tarman stated that Van Vleck was a poor business man and that Tarman had to take over the jobs on the three houses, and that he was going to pay all the bills; that Nelson need not segregate his bills between materials for the three houses and a fourth belonging to Tarman.

Tarman testified that he signed the Van Vleck deposit receipt and received Van Vleck's promissory note. On July 1, 1952, Tarman deeded the three lots to Van Vleck with Van Vleck's deed back executed in the same month. Both deeds were placed in escrow until November 10, when, without consulting Van Vleck, he had Van Vleck's deed to him recorded. February 10, 1953, Tarman signed and recorded notice of completion on all three houses. Tarman denied making the promises of payment.

The facts and the reasonable inferences therefrom support the joint venture finding. They show that Tarman and Van Vleck were associated as employee and employer and also in other ventures; that Van Vleck considered himself subject to direction by Tarman as illustrated by Tarman having Van Vleck stop work on the three houses and go to Paradise, by Tarman recording the deed back without consulting Van Vleck, by Tarman having Van Vleck sign the letter of authorization to the bank; that the two agreed to build on the three lots as a pilot project looking toward the development of the remainder of the lots; that they executed a deposit receipt to get a construction loan; that Tarman would get a profit from the price for the lots, with the remainder of the profit to be used to adjust equities between them; that they commingled goods and services on the jobs (three houses and another one belonging to Tarman which was being remodeled); Tarman paid various bills on the three houses; Van Vleck told plaintiff Robello that he and Tarman were together; Robello called the credit association for material dealers and was told that the

construction was a joint venture;<sup>3</sup> Tarman made statements that the project was "his job," "his field"; and Tarman told various people including Van Vleck that he would pay all bills.

A joint venture has been defined as an undertaking by two or more persons jointly to carry out a single business enterprise for profit with its existence dependent upon the intention of the parties as shown by an express agreement or by inference from their acts and conduct. The requisites are stated to be: (1) community of interest in the enterprise; (2) a sharing of profits and losses; (3) joint participation in the conduct of the business. *Lasry v. Lederman*, 1957, 147 Cal.App.2d 480, 485, 305 P.2d 663 and *Beck v. Cagle*, 1941, 46 Cal. App.2d 152, 161, 115 P.2d 613, add thereto the element of a close and even fiduciary relationship between the parties.

There is a difference in the determining of the relationship where third parties are involved, as here, and where the issue is only between the parties themselves. Particularly appropriate here is the statement in *Westcott v. Gilman*, 1915, 170 Cal. 562, 568-569, 150 P. 777, 779: "*In truth, the existence or nonexistence of a partnership in any case cannot be determined by the method appellant adopts of dissecting the whole relationship into broken parts and members, and studying each disjointed fragment as though it were the complete whole.* A partnership, especially where, as here, the rights of third parties are involved, is to be determined by the contract, taken with the conduct and the dealings with the world of those who are parties to it. If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third persons are concerned who have had dealings with them, the defendants are partners." (Emphasis added.)

[6,7] Whether there was a joint venture is a question of fact for the trial court

to determine from the facts and inferences therefrom. *Milton Kauffman, Inc., v. Superior Court*, 1949, 94 Cal.App.2d 8, 17, 210 P.2d 88. The facts need not be shown by a specific formal agreement but may be shown by the parties' conduct and circumstances from which it is made to appear that the relationship was, in fact, entered into. The law then fixes their rights. *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, 1931, 115 Cal.App. 238, 246, 1 P.2d 1008. And the acts and conduct of the parties engaged in the accomplishment of their purposes may speak above their expressed declarations to the contrary. *Universal Sales Corp. v. California Press Mfg. Co.*, 1942, 20 Cal.2d 751, 765, 128 P.2d 665; *San Joaquin Light & Power Corp. v. Costaloupes*, 1929, 96 Cal. App. 322, 332, 274 P. 84; see also 28 Cal. Jur.2d, Joint Adventurers, § 6, p. 484.

Here the appellant was to get \$4,250 upon the completion of the construction as the price for the lots. In that regard, whether the price was inflated or not, it would seem that he was sharing the expected profit resultant from the venture. Whether obtaining such payment was merely payment for the lots or whether it extended beyond and bestowed an interest in the profits themselves so as to constitute the undertaking a joint venture, presents primarily a question of fact. *Singleton v. Fuller*, 1953, 118 Cal.App.2d 733, 741, 259 P.2d 687. Yet even if considered as an interest in the profits, it alone without a showing that appellant had some power of control over the venture would not make him a joint venturer as such sharing of profits is also common in an employer-employee or lessor-lessee relationship. *Westcott v. Gilman*, supra, 170 Cal. at page 568, 150 P. at page 779; *Wiltsee v. California Employment Comm.*, 1945, 69 Cal.App.2d 120, 126, 158 P.2d 612.

[8,9] The facts of this case do not infer or show an agreement on the sharing of losses. However, that factor is immaterial as the law will supply that provision as an agreement to share profits implies an agree-

3. No objection was made to the testimony on this subject.

ment to share proportionately in the losses. *Fitzgerald v. Provines*, 1951, 102 Cal.App.2d 529, 536, 227 P.2d 860; *Constans v. Ross*, 1951, 106 Cal.App.2d 381, 389, 235 P.2d 113. Furthermore, if the agreement of the parties is contrived so as to allow a party to escape liability for loss, the law will not permit it and will construe the relationship as a joint venture. See *San Joaquin Light & Power Corp. v. Costaloupes*, supra, 96 Cal.App. at page 334, 274 P. at page 89.

[10, 11] There is sufficient evidence to infer that appellant had some control over the venture. He recorded the deed back without consultation as well as later filing the notice of completion. He also told Van Vleck to work up in Paradise and that he would take care of the project in Hayward. There are also the statements made to two respondents as well as the letters to the bank, one of which he had Van Vleck sign. It could be said that Van Vleck had supervision of the actual construction while appellant exercised overall control with particular concern with financial matters. It is not necessary that the parties to a joint venture have equal control of the operation as a joint venture may exist where they do not. *Foster v. Keating*, 1953, 120 Cal.App. 2d 435, 452, 261 P.2d 529. The equal right of control of management problem is a result of the rule that a joint venturer, in the absence of a special agreement, does not have the right to bind the others. See *Sime v. Malouf*, 1949, 95 Cal.App.2d 82, 95-96, 212 P.2d 946, 213 P.2d 788.

In view of the fact that third parties are here involved, the complete picture of all the circumstances and statements and conduct of appellant in regard to the project support a finding that the parties were engaged in a joint venture regardless of the fact that perhaps, as between themselves, they did not consider themselves to be in such a relationship.

[12] Tarman contends that even though there was a joint venture, there is no evidence to support the court's finding that Van Vleck was authorized to bind Tarman in the purchase of the materials or labor. While there is no direct evidence of such an

authorization there is indirect evidence of it. Among other matters, Tarman's statements after the construction that he would pay the bills and that the jobs were his, his checks for payments during 1953 for various services and materials for the three houses, reasonably support an inference of authority in Van Vleck. The houses were substantially completed prior to the time that Tarman took over their management for sale purposes, sent Van Vleck to Paradise and agreed to assume payment for them. These actions, although not occurring at or during the construction, together with the other circumstances such as the recording of the deed by Tarman, are highly significant in determining what the true relationship of Tarman and Van Vleck actually was.

[13-15] Defendant cites *Hansen v. Burford*, 1931, 212 Cal. 100, 297 P. 908 and *Hayward's v. Nelson*, 1956, 143 Cal.App.2d 807, 299 P.2d 1013, which held that notwithstanding a joint venture relationship, one joint venturer is not liable for the purchase by his coadventurer of materials and services for the venture where the purchasing coadventurer had no authority to use the other's credit and did not lead the materialmen to believe that he had such authority and where the materialmen did not know of the relationship but relied upon the purchasing coadventurer for payment. Our case is distinguishable from those cited in that here the purchasing coadventurer had the authority to make the purchases. The mere fact that the sellers did not know of Tarman's relationship to Van Vleck does not relieve Tarman of liability, and does not preclude the third parties from being able to hold both joint venturers liable. If the law were such that that fact would prevent liability, then all the rules relating to the liability of an undisclosed principal would be meaningless. As this court stated in *Luce v. Sutton*, 115 Cal.App.2d 428, 433, 252 P.2d 352, 355: "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made



in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract.' Geary St., [Park & Ocean] R. Co. v. Rolph, 189 Cal. 59, 64, 207 P. 539, 541. 'A creditor may sue an undisclosed principal when found although he may not have known of the existence of such principal at the time the debt was incurred.' Hulsman v. Ireland, 205 Cal. 345, 352, 270 P. 948, 951."

In *Wahyou v. Kiernan*, 145 Cal.App.2d 443, 445, 302 P.2d 638, 639, the court announced the same elementary rule, and then stated: "Again, here \* \* \* there was no intervening circumstance such as was present in *Rigney v. De La Salle Institute*, 10 Cal.App.2d 492, 52 P.2d 579, which would warrant a conclusion by this court that credit had been extended exclusively to Hemley, and it is only by such a circumstance that the defendant can escape liability under the general rule previously set forth."

If this is the rule as to undisclosed principals, and it clearly is, it certainly applies to an undisclosed partner. If a case is necessary to support such an obvious rule it is to be found in *Schwaegler Co. v. Marchesotti*, 88 Cal.App.2d 738, at page 743, 199 P.2d 331, at page 334, where the court laid down the rule by quoting from *Bissell v. King*, 91 Cal.App. 420, 267 P. 356, as follows:

"\* \* \* 'Thus, in cases of secret partnership and dormant partners, a creditor is entitled to recover from all the partners when discovered, though the debt was not originally charged to all [citation], and even though one partner holds himself out as the sole owner, the ostensible partner is the agent of the dormant one, and the latter is bound by his representations.'

"And in Section 500 of the text of *Rowley on Partnership*, last cited, it is said:

"\* \* \* As a rule, he [the dormant or undisclosed partner] is liable to the firm creditors to the same extent as if he were known to the creditor at the time the credit

was obtained, under the doctrine that an undisclosed principal is liable for the acts of his agent. \* \* \* If the dormant partner be completely so, and not known as such to the firm creditor, he will be liable to the firm creditor for indebtedness incurred by the firm to the creditor during the dormant partner's connection with the firm \* \* \*." See, generally, *Lindner v. Friednash*, 160 Cal.App.2d 511, 325 P.2d 612.

### 3. Finding of Joint Venture.

[16] Defendant's contention that the finding of joint venture is merely a conclusion and not one of fact is answered in *Oakley v. Rosen*, 76 Cal.App.2d 310, 312, 173 P.2d 55, 56: "No inhibition exists against a court's finding that an agreement was for the prosecution of a joint adventure. It was so found in *Tiffany v. Short*, 22 Cal.2d 531, 139 P.2d 939, and in *Hansen v. Burford*, 212 Cal. 100, 297 P. 908, and no adverse comment followed. In the latter case it was held that the finding of a joint adventure was one of probative fact." Here the court found the fact of joint venture plus the fact of Van Vleck's authority. Moreover, the findings distinguish the relationship from that of employer-agent, seller-buyer, and from that arising under a third party beneficiary agreement.

### 4. Material Finding.

Defendant contends that although the court found that Tarman purported to convey the three lots to Van Vleck it failed to find that Tarman sold them to Van Vleck, and that a stipulation made by the parties conclusively established that the transaction was a sale. Appellant's contention has no merit. The findings do not state expressly that there was no sale or that there was a sale. But the clear import of them is that there was only a purported sale and that from the time of the recording of the deed from Van Vleck to appellant, appellant held legal title. It is also implicit from the finding that Van Vleck was not engaged in the construction of the homes as an owner thereof but that appellant remained the owner at all times.

As to the purported stipulation, a reading of the transcript shows that the parties were intending to stipulate to preliminary matters, primarily to dates, without attempting to stipulate to the effect of the transactions. Counsel for appellant remarked that the statements did not state the full facts. Counsel for respondents replied that they were not intended to, that "These are only dates. I haven't gone into the other angles of it because I know some of it you won't stipulate to."

#### 5. Refusal of Cross-Complaint.

[17,18] Tarman filed his original answer August 28, 1953. March 30, 1954, he asked leave to file a cross-complaint against his codefendant Van Vleck, which was denied. In the proposed cross-complaint Tarman alleged an agreement between him and Van Vleck in which the latter agreed to pay plaintiffs' bills for material and labor and asking that the prosecution of actions brought by Van Vleck against Tarman in the Oakland-Piedmont Judicial Court and in Solano County respectively be enjoined. In it Tarman also sought recovery on a promissory note of Van Vleck to him for \$4,250 and one of \$3,150, and of moneys advanced. The record does not show the reason for denying the motion to file. A defendant may file a cross-complaint at time of answering. Thereafter, it may only be done by permission of the court. The ruling of the trial court is within its discretion and will be reversed only upon a showing that the court abused its discretion. *Glogau v. Hagan*, 107 Cal. App.2d 313, 320, 327 P.2d 329. In that case it was held that the defendant's dereliction in not asking to file the cross-complaint for 11 months after answer filed, where a prior action based upon the causes alleged in the cross-complaint was still pending, was sufficient cause for denying the motion. In our case the motion was not made until 7 months after answer filed. Moreover, the Solano County case referred to in the proposed cross-complaint involved other persons. To inject it into this case would have made for confusion.

The issue as to the \$4,250 note was already in this case. The court did not abuse its discretion.

#### 6. Bank of America.

[19] At the close of the case Bank of America, then a defendant, moved that the action be dismissed as to it. Plaintiffs opposed the motion. Tarman's attorney stated: "If your Honor please, we see no evidence against the Bank of America in this case and, as a matter of fact, it is very doubtful whether or not the allegations of the complaints even state a cause of action against the Bank of America in my judgment." Thereupon the court granted the motion. We see no reason for discussing the merits of the court's ruling for the reason that if it was erroneous, the error was invited by defendant Tarman. A party may not complain of error invited by it. See *People v. Ocean Shore Railroad*, 1948, 32 Cal.2d 406, 429, 196 P.2d 570, 6 A.L.R. 2d 1179; 3 Witkin, *California Procedure*, pp. 2257-2260; 4 Cal.Jur.2d 420, 424.

#### 7. Letters.

On motion for new trial defendant's attorney filed an affidavit stating that he had protested to plaintiffs' attorney against the latter sending certain letters to the trial judge after submission of the case and before decision. The letters dealt merely with the effort of plaintiffs' attorneys and the bank's attorney to get the parties to agree to reduce the homes to cash to be held to await the outcome of the case after paying the bank's loans. The letters showed that defendant Tarman's attorney refused to cooperate in this effort. As to them the court stated on the hearing of the motion for new trial: "I will say for the record right now that it had nothing to do with the method or manner in which the Court made the decision. I read the letters; as far as I was concerned, they explained the reason for certain delays and I paid no attention to them otherwise." We find nothing in the record which would justify this court in determining that the court's determination of this case was influenced by those letters.

Pursuant to stipulation the judgment in favor of respondent Burt and against appellant Tarman is reversed and the trial court is directed to enter judgment in favor of appellant Tarman on the cross-complaint of said respondent Burt. In all other respects, the judgment is affirmed.

PETERS, P. J., and ST. CLAIR, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



163 Cal.App.2d 740

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Carl G. SAUER, Defendant and Appellant.**  
Cr. 2858.

District Court of Appeal, Third District,  
California.

Sept. 25, 1958.

As Modified on Denial of Rehearing  
Oct. 20, 1958.

Hearing Denied Nov. 19, 1958.

Defendant was convicted of forgery of checks. The Superior Court, Shasta County, Richard B. Eaton, J., rendered judgment, and defendant appealed. The Third District Court of Appeal, Schottky, J., held that permitting handwriting expert to use post litem motam signatures of parties, whose names were allegedly forged, as basis of comparison was erroneous, but in view of fact that expert used other signatures which were not post litem motam, that parties testified that signatures on checks were not theirs, and that defendant did not testify, use of post litem motam signatures did not result in miscarriage of justice and did not require reversal.

Affirmed.

**1. Indictment and Information** ⇨110(15)

Informations charging forgery in language of applicable statute sufficiently charged public offense and informed de-

fendant of offenses charged and were not defective on ground that they did not allege that forged instruments, if genuine, would have been of legal efficacy or could have any tendency to defraud another. West's Ann.Pen.Code, § 470.

**2. Indictment and Information** ⇨71

All that is required for an information to be sufficient is that it in substance charge defendant with commission of public offense in words sufficient to give him notice of offense of which he is accused.

**3. Criminal Law** ⇨627½

Pretrial inspection of reports in hands of prosecution is not a matter of right in all cases.

**4. Criminal Law** ⇨1044

Where motion of defendant, who was charged with forgery, for pretrial inspection of prosecution's handwriting expert's report was denied without prejudice to renewal of motion at trial if it became necessary, but motion was not renewed at trial, defendant was in no position to raise point on appeal.

**5. Criminal Law** ⇨620(1)

Where two informations, each charging three counts of forgery, dealt with crimes committed approximately 22 months apart and informations were filed about four months apart, consolidating of cases for trial was not an abuse of discretion. West's Ann.Pen.Code, §§ 470, 954.

**6. Criminal Law** ⇨620(1), 1148

Whether consolidation of two or more accusatory pleadings should be granted rests in sound discretion of trial judge whose decision will only be disturbed where an abuse of discretion is shown. West's Ann.Pen.Code, § 954.

**7. Criminal Law** ⇨404(5)

In prosecution for forgery, post litem motam signatures are not admissible for purposes of comparison.

**8. Criminal Law** ⇨491(2), 1169(9)

In prosecution for forgery of checks, permitting handwriting expert to use post litem motam signatures of parties, whose



names were allegedly forged on checks, as basis of comparison was error, but in view of fact that expert used other signatures, which were not post litem motam, that parties testified that signatures on checks were not theirs, and that defendant did not testify, use of post litem motam signatures did not result in miscarriage of justice and did not require reversal. West's Ann.Pen.Code, § 470.

#### 9. Criminal Law ⇨721(1)

In prosecution for forgery of checks, prosecuting attorney's commenting several times in his argument to jury upon fact that defendant had not taken witness stand to testify in his own behalf and explain or deny incriminating evidence which had been introduced against him was not improper. West's Ann.Pen.Code, §§ 470, 1323; West's Ann.Const. art. 1, § 13.

#### 10. Criminal Law ⇨721(1)

It is proper for prosecution to point out to jury that defendant has failed or refused to take witness stand and that he has failed to explain or deny incriminating facts which have been produced against him especially in cases where facts concern matters which are peculiarly within knowledge of defendant, and such comments do not violate any constitutional rights of defendant. West's Ann.Pen.Code, § 1323; West's Ann.Const. art. 1, § 13.

#### 11. Criminal Law ⇨1037(1, 2)

Where no objection to alleged prejudicial remarks by prosecuting attorney in his argument to jury was made at time remarks were made, nor was court requested to instruct jury to disregard them, question could not be raised for first time on appeal.

William H. Phelps, Fall River Mills, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Carl G. Sauer was charged with six counts of forgery. He has appealed from

the judgment entered after a jury found him guilty as charged.

Two informations, each charging three counts of forgery, were filed against Sauer. The first, which will be referred to as the Warner matter, charged three counts of forgery in May, 1957. The second, which will be referred to as the Copeland matter, charged three separate forgeries on August 25, 1955. A typical count reads as follows:

"That said Carl G. Sauer, on or about the 25th day of August, 1955, in the County of Shasta, State of California, did fraudulently make, forge and counterfeit a certain check in writing for the payment of money in the sum of One Hundred Seventy and 43/100 Dollars (\$170.43) and did then and there utter, publish and pass the same, knowing that the said check was false, forged and counterfeited, with the intent then and there to defraud James H. Rodgers, Verner Copeland, Red Mt. Lumber Company and Bank of America, a corporation."

A motion to consolidate the two informations for trial was granted. Thereafter; Sauer sought inspection of certain evidence in the sheriff's possession. The court ordered the sheriff's office and the district attorney to deliver all exemplars of handwriting which were used in the investigation of the case and inspection of all books of account of the concerns which Sauer was accused of defrauding by forging checks. The motion was denied as to any reports and papers and investigation information in the hands of the sheriff or district attorney. As to the documents denied, the court said that the motion was denied without prejudice to a renewal of the motion at the trial if it became proper.

The evidence as to the Warner counts shows that Sauer was employed by Dawson & Warner, a lumber concern, as a bookkeeper. As part of his job he prepared all the payroll checks. Sauer passed three checks with Mr. Warner's signature to various merchants. Mr. Warner testified that he had not signed the checks in ques-

tion nor had he authorized anyone else to sign his name to the checks. Lewis Davis, an examiner of questioned documents for the Bureau of Criminal Identification, compared the signatures on the allegedly forged checks with exemplars of Mr. Warner's signature and stated that in his opinion the signatures on the checks were not those of Mr. Warner.

The evidence as to the Copeland accounts shows that at the time of the alleged forgeries, Sauer was employed as a bookkeeper by a company Mr. Copeland controlled. All checks drawn by this company were drawn on an account known as the Vernon Copeland Special Account. Mr. Copeland also testified that he had not signed the checks which were the basis of the charge nor had he authorized anyone else to sign his name to the checks. Mr. Davis also testified that these checks were not signed by Mr. Copeland. Again Mr. Davis used exemplars of Mr. Copeland's signature in making his comparisons. Sauer passed each of the checks in question. Sauer admitted to Deputy Sheriff Richard Hart that the endorsement of his name on the back of each check was written by him.

Appellant's first contention is that the informations fail to charge a public offense under the provisions of section 470 of the Penal Code and that the informations do not inform him of the charge. It is contended that the charge is fatally deficient because there is no allegation that the instruments would, if genuine, be of legal efficacy or could have any tendency to defraud another.

[1,2] We do not agree with this contention. Section 470 of the Penal Code provides that "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits any \* \* \* check, draft, bill of exchange \* \* \* for the payment of money \* \*; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above

named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person \* \* \*, is guilty of forgery." It is apparent that the informations charged the several offenses in the language of the statute. As stated in section 952 of the Penal Code: "Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." All that is required is that the pleading in substance charge the defendant with the commission of a public offense in words sufficient to give him notice of the offense of which he is accused. (26 Cal.Jur.2d, Indictment and Information, p. 495.)

The informations in the instant case without doubt informed the appellant of the offenses charged against him.

[3,4] Appellant next contends that the trial court abused its discretion in not permitting pretrial inspection of the handwriting expert's report. The court denied the motion without prejudice to a renewal of the motion at the trial if it became necessary. It is contended that the basis of the prosecution's case was the testimony of the handwriting expert and that without an opportunity to examine it before trial the defense could not adequately prepare to meet it. The motion was not renewed at the trial. Pretrial inspection of reports in the hands of the prosecution is not a matter of right in all cases. The record does not show that a motion for inspection was made at the trial. Under such circumstances we do not believe that appellant is in a position to raise the point on appeal.

[5,6] Appellant contends also that the trial court abused its discretion in consolidating the two cases for trial. The two

informations dealt with crimes committed approximately twenty-two months apart. The informations were filed about four months apart. Section 954 of the Penal Code permits consolidation of two or more accusatory pleadings charging the same class of crimes. This test was met. In *People v. Feigelman*, 65 Cal.App. 319, 223 P. 579, consolidation was approved where the crimes were committed thirteen months apart. The rule is that whether or not consolidation should be granted rests in the sound discretion of the trial judge whose decision will only be disturbed where an abuse of discretion is shown. *People v. Duane*, 21 Cal.2d 71, 130 P.2d 123. In view of the similarity of the charges we cannot hold that there was any abuse of discretion in consolidating the cases for trial.

The most serious contention of appellant is that the trial court erred in admitting in evidence certain handwriting exemplars. At the trial, Lewis Davis, an examiner of questioned documents, was called by the prosecution and in his examination of the questioned signatures on the several checks which were alleged to have been forged he used for comparison a number of known genuine signatures of Mr. Warner and Mr. Copeland. Included among these signatures were a number of cards and a sheet of paper upon which had been placed the signatures of these persons. Some of these signatures were written by Mr. Warner and Mr. Copeland for the purpose of comparing their genuine signatures with the questioned checks.

The appellant contends that the trial court erred in admitting these signatures in evidence and that the handwriting expert used improper standards of comparison in presenting his testimony with respect to the forged signatures on the checks. The basis of the appellant's contention is that these signatures were made especially for the purpose of this trial and are what he refers to as post litem motam signatures. Appellant states that on the Warner counts three out of eight signatures were post

litem motam, and in the Copeland counts two out of four were post litem motam.

While there seems to be a division of authority on the question of whether post litem motam signatures may be used as a basis of comparison, we think the better rule is stated in 20 Am.Jur., Evidence, sec. 746, p. 623, as follows:

"\* \* \* A signature or specimen writing that is made for the occasion and post litem motam may not be used for comparison by the party making it. It is only when a writing is written, not by design, but unconstrainedly and in the natural manner of the writer so as to bear the impress of the general character of his chirography as the involuntary and unconscious result of constitution, habit, or other permanent cause that it furnishes, if otherwise admissible in evidence, any satisfactory test of genuineness."

[7] Two California cases have considered the question and appear to be in accord with the rule that post litem motam signatures are not admissible for purposes of comparison. In *People v. Briggs*, 117 Cal.App. 708, 4 P.2d 593, the defendant was accused of a violation of section 288 of the Penal Code. The defense seriously challenged the credibility of the complaining witness, a girl of thirteen, by introducing a writing allegedly written and signed by her to the effect that she and her sister should tell a lie concerning the defendant so that he and his wife, who was a codefendant, would go to jail. After the case was closed the prosecution was allowed to reopen the case and was permitted to have the complaining witness write in the presence of the jury, in an attempt to corroborate her testimony that she did not write the note. It was held to be reversible error for the court to permit her to corroborate her testimony by writing in the presence of the jury. The court indicated that post litem motam signatures are inadmissible to corroborate a witness' testimony. In *People v. Golembiewski*, 25 Cal.App.2d 115, 76 P.2d 717,



the appellant contended that the trial court erred in sustaining an objection of the prosecution to a question relative to comparison of the handwriting of the appellant with the signature of the appellant in the pawnbook of the second-hand dealer who had purchased some of the property appellant was alleged to have stolen. In that case the exemplars submitted were made after the arrest of the appellant. The court ruled the objection properly sustained.

[8] We think that it was error to permit the handwriting expert to use the post litem motam signatures of Warner and Copeland as a basis of comparison but we do not believe that this error requires a reversal of the judgment. The record shows that the handwriting expert used other signatures which were not post litem motam and also that both Warner and Copeland testified that the signatures on the questioned checks were not their signatures. In view of this testimony and the other testimony in the case, together with the fact that appellant did not testify, we do not believe that the fact that the court permitted a number of post litem motam signatures to be used along with others as a basis for comparison resulted in a miscarriage of justice.

[9] Appellant contends also that the prosecuting attorney was guilty of prejudicial misconduct in commenting several times in his argument to the jury upon the fact that the appellant had not taken the witness stand to testify in his own behalf and explain or deny the incriminating evidence which had been introduced against him. This contention cannot be sustained.

The provisions of California Constitution, Art. I, section 13, and Penal Code, section 1323, specifically provide that the failure of a defendant to testify or to explain or deny incriminating facts which have been produced against him may be commented upon by the prosecuting attorney. The constitutional provision provides as follows:

“\* \* \* but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. \* \* \*”

Penal Code, section 1323, provides in part as follows:

“The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.”

[10] Numerous cases in this jurisdiction have held that it is proper for the prosecution to point out to the jury that the defendant has failed or refused to take the witness stand and that he has failed to explain or deny incriminating facts which have been produced against him, and especially in cases where the facts concern matters which are peculiarly within the knowledge of the defendant, as in the present case. Such comments by the court or the district attorney do not violate any constitutional rights of the defendant, and the provisions of the above-cited constitutional provision and statute have been held not to violate any provision of the United States Constitution. *Adamson v. People of the State of California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903. Numerous cases have upheld the right of the district attorney to so comment. See, for example: *People v. Cuevas*, 148 Cal. App.2d 331, 306 P.2d 510; *People v. Williams*, 141 Cal.App.2d 849, 297 P.2d 759; *People v. Dozier*, 35 Cal.App.2d 49, 94 P.2d 598; *People v. Zirbes*, 6 Cal.2d 425, 57 P.2d 1319; *People v. Perry*, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123.

[11] Appellant contends further that the prosecuting attorney made a number of other remarks which constituted prejudicial misconduct in his argument to the jury. The record shows that no objection was made to such remarks at the time, nor was the court requested to instruct

the jury to disregard them. The general rule is that in the absence of any objection the point may not be raised for the first time on appeal. *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3. Furthermore, we have read the remarks complained of and do not believe that they exceeded the bounds of legitimate argument.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



163 Cal.App.2d 685

Arthur MORTON, Plaintiff and Respondent,  
v.

CALIFORNIA SPORTS CAR CLUB, a  
California corporation, Defendant  
and Appellant.

Civ. 23192.

District Court of Appeal, Second District,  
Division 2, California.  
Sept. 22, 1958.

Action by spectator at sports car races for personal injuries suffered when hand was struck by wheel which came loose from sports car and crashed through snow fence barrier. The Superior Court of Los Angeles County, John F. Aiso, J., entered judgment for spectator and track operator appealed. The District Court of Appeal, Fox, P. J., held that where spectator was familiar with sports car races and voluntarily chose not to sit in grandstand but to stand opposite turn in track which had as its only protection a snow fence barrier, spectator assumed risk of injury.

Reversed with directions.

#### 1. Automobiles ¶168(11)

Where spectator was thoroughly familiar with sports car races and voluntarily

chose not to sit in grandstand but to stand opposite turn having a snow fence barrier as the only protection, spectator voluntarily assumed risk of injury which occurred when wheel came loose from sports car and crashed through barrier and struck spectator.

#### 2. Evidence ¶5(2)

It is common knowledge that sports car racing is a dangerous sport, that accidents during such races are not uncommon, and that each year a number of people, both drivers and spectators, are killed or injured as the result of such accidents.

#### 3. Evidence ¶5(2)

It is well known fact that most of the accidents at sports car races occur on turns because additional stresses and strains on car caused by centrifugal force being exerted against it increase likelihood that car will spin out of control or lose some of its parts, and therefore it is obvious that one of the most dangerous places from which a spectator may view a race is on a turn.

#### 4. Negligence ¶105

Defense of assumption of risk is available when there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, has been made with knowledge and appreciation of risk.

#### 5. Negligence ¶105

Where facts are such that plaintiff must have had knowledge of hazard, situation is equivalent to actual knowledge and may be an assumption of risk.

#### 6. Negligence ¶105

One may assume risk even though dangerous condition is caused by the negligence of others.

#### 7. Appeal and Error ¶1176(3)

Since trial court should have directed verdict for defendant in personal injury action District Court of Appeal was authorized to order that judgment be entered for defendant. West's Ann.Code Civ.Proc. § 629.

John R. Allport, Los Angeles, for appellant.

Royal M. Galvin, Beverly Hills, for respondent.

FOX, Presiding Justice.

This is an action to recover damages for personal injuries suffered by the plaintiff while attending a sports car race in Kern County. Defendant has appealed from the adverse judgment and from the order denying its motion for judgment notwithstanding the verdict.

Plaintiff has been a member of defendant club for many years and has attended several sports car races. He also has attended several dinner meetings of the club where films of sports car races were shown. Although he had never driven in any races, he had "assisted a little bit at the races" by keeping lap charts and picking up debris left around the course after a race. Plaintiff owned a sports car, and this was one of the reasons for his interest in sports car races.

On the day of the accident plaintiff was a member of a party of four who drove to Bakersfield to witness a race which was being sponsored by defendant club. The members of his party drove their cars onto the grounds, paid an admission fee and parked. Although the grandstand was not filled, plaintiff and his party chose to view the races from various vantage points around the course. At the time of the accident plaintiff and his companions were located on one of the turns of the course about 150 feet from the track itself. Plaintiff enjoyed walking around the track during the races because he was in a better position to observe the skill of the various drivers as they negotiated the turns. The only barrier between the spectators and the track was a "snow fence" (somewhat similar to a picket fence) less than four feet high. However, there were some hay bales about 150 feet from where plaintiff was standing. Plaintiff had chosen his vantage point voluntarily. It was within the area where spectators were permitted to

stand, and a great many spectators were nearby.

As one of the sports cars entered the turn on the track near plaintiff, it went into a spin and one of its wheels came off and bounded along at great speed. The wheel crashed through the snow fence and struck plaintiff's hand, thereby injuring him. There was no evidence as to what caused the wheel to come off. Defendant always took precautions to see that the vehicles which raced were in good condition and that their drivers were in good health.

At the trial defendant moved for a directed verdict after plaintiff rested his case. The trial court denied the motion and submitted the case to the jury. The jury returned a verdict in favor of the plaintiff in the sum of \$2,000. Defendant then made a motion for judgment notwithstanding the verdict and a motion for new trial, and they too were denied by the trial court. Judgment was entered, and defendant thereafter prosecuted this appeal.

[1-3] Defendant's principal contention is that the evidence established as a matter of law that plaintiff assumed the risk of being injured. We have determined that this contention must be sustained. The uncontradicted facts show that plaintiff was thoroughly familiar with sports car racing. Plaintiff did not choose to sit in the grandstand; nor did he choose to take a position behind any of the hay bales that were scattered around the course; his own testimony showed that there were hay bales not more than 50 yards from where he was standing. He chose instead to watch the races from a point on one of the turns where he could best observe the cars as they negotiated the turn. It was obvious to any one that the "snow fence," which was the only barrier between plaintiff and the race track, would provide little or no protection if a sports car or a part thereof should leave the track and travel toward the spectators. From his previous experience in connection with sports car races, plaintiff was aware of the fact that the cars travel at high rates of speed. It is



common knowledge that sports car racing is a dangerous "sport," that accidents during such races are not uncommon, and that each year a number of people, both drivers and spectators, are killed or injured as a result of such accidents. It is a well known fact that most of the accidents at sports car races occur on the turns because the additional stresses and strains on the car caused by the centrifugal force being exerted against it increase the likelihood that the car will spin out of control or lose one of its parts. It is therefore obvious that one of the most dangerous places from which a spectator may view a race is on a turn.

[4-6] We hold that plaintiff assumed the risk of any injury that he might receive as a result of being struck by a car, or a part of a car, participating in the races. The defense of assumption of risk is available when there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 235, 282 P.2d 69; *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 161-162, 265 P.2d 904. "Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk. \* \* \*" *Austin v. Riverside Portland Cement Co.*, supra, 44 Cal.2d at page 235, 282 P.2d at page 75; *Prescott v. Ralph's Grocery Co.*, supra, 42 Cal.2d at page 162, 265 P.2d at page 906. In the instant case the evidence discloses that plaintiff must have had knowledge of the hazard to which he was subjecting himself by taking the position he did on the race course. He ignored this hazard in his desire to observe the races

from the best (rather than safest) location. The fact that defendant may have been negligent in failing to provide sufficient protection around the course for all spectators is of no consequence since one may assume a risk even though the dangerous condition is caused by the negligence of others. *Rogers v. Los Angeles Transit Lines*, 45 Cal.2d 414, 419, 289 P.2d 226; *Prescott v. Ralph's Grocery Co.*, supra, 42 Cal.2d at page 162, 265 P.2d at page 906. "Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another." *Prescott v. Ralph's Grocery Co.*, supra, 42 Cal.2d at page 162, 265 P.2d at page 906. Of course, plaintiff could not be held to have assumed the risk that defendant created a dangerous condition by negligently permitting a defective car to race on the course since one could have no knowledge of such a risk. However, there is no allegation or proof that defendant was negligent in that regard; there is no evidence that any act or omission on defendant's part was the cause of the wheel coming off, and there is affirmative evidence that defendant took precautions to see that the vehicles which raced were in good condition and that their drivers were in good health.

It should be noted that while the baseball cases in this state have usually applied the doctrine of assumption of the risk as a matter of law<sup>1</sup> (*Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144; *Brown v. San Francisco Ball Club*, 99 Cal.App.2d 484, 222 P.2d 19), the ice hockey cases have treated the question as one of fact (*Shurman v. Fresno Ice Rink*, 91 Cal.App.2d 469, 205 P.2d 77; *Thurman v. Ice Palace*, 36 Cal.App.2d 364, 97 P.2d 999). But it is not necessary for us to determine in this case

1. In *Ratcliff v. San Diego Baseball Club*, 27 Cal.App.2d 733, 81 P.2d 625, the court refused to apply the doctrine of assumption of risk. But the case is distinguishable from the ordinary baseball case in that plaintiff was injured by a bat which slipped from a batter's hands, traveled in the air some eighty feet into the stands along the first base line and struck her as she walked along an unscreened

passageway toward her seat in the screened area. The court apparently felt that the occurrence of a flying bat was not of such common knowledge as to bring into play the theory of assumption of risk which is usually applied in baseball cases, especially where the injured person had purchased a seat in the screened area.

whether the question of assumption of risk is one of law or of fact as applied to sports car races in general. Even if we assume that the question would ordinarily be one of fact, the evidence in the instant case so clearly establishes the defense of assumption of risk that reasonable minds could not differ and the question should not, therefore, have been submitted to the jury. The court should have granted defendant's motion for directed verdict or, having failed to do this, should have granted the motion for judgment notwithstanding the verdict. The situation here is similar to that in *Bolar v. Maxwell Hardware Co.*, 205 Cal. 396, 271 P. 97, 60 A.L.R. 429. In the *Bolar* case, an action based on negligence, the trial court denied defendant's motion for directed verdict. The jury rendered a verdict for plaintiff and defendant appealed. The Supreme Court held that the facts conclusively established a defense to the plaintiff's action, that reasonable minds could not differ on the question, and that the trial court should therefore have granted defendant's motion for a directed verdict.

The cases relied upon by plaintiff, *Atlantic Rural Exposition, Inc., v. Fagan*, 195 Va. 13, 77 S.E.2d 368, 37 A.L.R.2d 378, and *Saari v. State*, 203 Misc. 859, 119 N.Y.S.2d 507, do not control the instant case. In the *Fagan* case the plaintiff was sitting in the grandstand when a wheel came off one of the racing cars, struck the 18-inch metal guard at the outer edge of the track, bounded into the air over a 42-inch wire fence, struck the ground on the spectator side of the fence, and bounded high into the grandstand and struck him. The court rejected the defense of assumption of risk on the ground that there was no evidence indicating that the plaintiff had any knowledge of the hazard of wheels breaking off the cars and bounding over the protective barriers into the stands; moreover, there was nothing to suggest to plaintiff that the grandstand was not a safe place for him to sit. In the case at bar plaintiff did not seek the apparent protection of the grandstand or the hay bales around the course; rather, he

took an unprotected position on a turn in spite of the obvious danger it entailed.

In the *Saari* case there were no barriers or signs to indicate to spectators where they should stand to watch the races or how far from the track they should be. The claimants took a position near the track just beyond the end of a straightaway and on the outside of the entrance to a curve. They had been directed to that position by a National Guardsman, who appeared to be on police duty. One of the racing cars somehow left the track and crashed into them. The court rejected the defense of assumption of risk, pointing out that none of the claimants had ever actually witnessed an automobile race before and that they were directed to their vantage point by a National Guardsman (which thus indicated to them that they were watching the races from a proper place). Although the court's decision is somewhat questionable in light of the fact that some danger must have been apparent to the claimants, the case is distinguishable from the present situation because none of the claimants was familiar with auto racing whereas here plaintiff was thoroughly familiar with sports car racing and its attendant hazards. Moreover, the court in the *Saari* case did concede that "spectators or patrons assume the obvious dangers arising from the normal operation or conduct of the sport or amusement in question." *Saari v. State*, *supra*, 119 N.Y.S.2d at page 521.

In view of the foregoing, it is unnecessary to discuss the other points raised in the briefs.

[7] Since the trial court should have directed a verdict for defendant, we are authorized under the provisions of Code of Civil Procedure, section 629, to order that judgment be entered for defendant. *Jordan v. Guerra*, 23 Cal.2d 469, 472, 144 P.2d 349; *Bolar v. Maxwell Hardware Co.*, *supra*, 205 Cal. at page 402, 271 P. at page 100.

The judgment and order are reversed with directions to enter judgment for defendant.

ASHBURN and HERNDON, JJ., concur.



163 Cal.App.2d 595

Arthur GLOBE, Plaintiff and Respondent,  
v.

COUNTY OF LOS ANGELES, Board of Supervisors, Los Angeles County, Burton W. Chace, Chairman thereof, Herbert C. Legg, Kenneth Hahn, John Anson Ford and Roger W. Jessup, Members thereof; and William A. Barr, Superintendent of Charities, Department of Charities, County of Los Angeles, Defendants and Appellants.

Civ. 22775.

District Court of Appeal, Second District,  
Division 1, California.

Sept. 18, 1958.

Hearing Denied Nov. 12, 1958.

Mandamus proceeding by discharged temporary Los Angeles County social worker seeking reinstatement as county employee and reimbursement for loss of compensation. The Superior Court of Los Angeles County, John J. Ford, J., granted peremptory writ of mandate and county appealed. The District Court of Appeal, Lillie, J., held that Los Angeles County Civil Service Commission was not required to hold a hearing on discharge of temporary county employee for violation of statute imposing on any public employee who might be subpoenaed by duly authorized committee of Congress to appear and answer under oath questions relating to membership in Communist Party or as to past knowing membership in party.

Reversed.

#### 1. Officers ⇨26(1)

Rules of Civil Service Commission have the same force and effect as Los Angeles County charter provisions as long as the rules and regulations are applied in the scope contemplated by the charter.

#### 2. Counties ⇨67

Loyalty on part of county employees is essential to order and peaceful operation of government and therefore government employee may be required to disclose certain information relative to fitness and loyalty as a reasonable condition for retaining public employment, even though the disclosures may in some instances constitute self-incrimination. U.S.C.A.Const. Amends. 1, 5; West's Ann.Gov.Code, § 1028.1.

#### 3. Officers ⇨72(1)

Los Angeles County Civil Service Commission was not required to hold hearing on discharge of temporary county employee for violation of statute rendering employee guilty of insubordination if after being subpoenaed by authorized committee of Congress such employee refuses to answer questions relating to present membership of employee in Communist Party or as to past membership, and by refusing such employee a hearing no right was taken from him which he would otherwise have had or been entitled to. West's Ann.Gov. Code, § 1028.1; U.S.C.A.Const. Amends. 1, 5, 14.

#### 4. Counties ⇨66, 67

Temporary county employee may quit at any time and county also has the right to discharge him since where there are no restrictive provisions power of appointment carries with it power of removal. West's Ann.Gov.Code, § 1028.1; West's Ann. Const. art. 1, § 13.

#### 5. Officers ⇨72(1)

Temporary county civil service employee had no basic right either to a hearing or to county employment and whatever his rights were must be measured by the county charter and civil service rules adopted thereunder.



Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Fred R. Metheny, Deputy County Counsel, Los Angeles, for appellants.

A. L. Wirin, Fred Okrand, Los Angeles, William T. Pillsbury, Long Beach, for respondent.

LILLIE, Justice.

This is an appeal by the county of Los Angeles, the Board of Supervisors and the Superintendent of Charities from a judgment in a mandamus proceeding ordering them to grant petitioner Arthur Globe, a temporary county employee, a full hearing in respect to his discharge from county employment.

On March 28, 1955, Arthur Globe was employed on a "non-eligible temporary" basis as a social worker in the Department of Charities. On May 1, 1955, he became a "temporary, eligible" employee in the same position continuing as such until May 2, 1956, the date of his discharge from county service. On April 20, 1956, petitioner, having been duly subpoenaed, appeared before a Subcommittee on Un-American Activities of the United States House of Representatives, and after having been sworn refused to answer certain questions relating to past and present knowing membership in the Communist Party, his familiarity with and membership in a certain "John Reid Club of the Communist Party," his acquaintance with the activities of any persons known to him to be members of that club and whether during his service in the armed forces he had been, or was then, a member of the Communist Party. Petitioner refused to answer such questions, basing his refusal on the First Amendment of the United States Constitution and on a claim of privilege against self-incrimination under the Fifth Amendment.

Shortly thereafter petitioner was summarily discharged from county employment, his conduct in refusing to answer such questions being deemed insubordination and a violation of section 1028.1 of the Government code of the State of Califor-

nia. This section provides in part as follows:

"It shall be the duty of any public employee who may be subpoenaed or ordered by the governing body of the state or local agency by which such employee is employed, to appear before such governing body, or a committee or subcommittee thereof, or by a duly authorized committee of the Congress of the United States or of the Legislature of this State, or any subcommittee of any such committee, to appear before such committee or subcommittee, and to answer under oath a question or questions propounded by such governing body, committee or subcommittee, or a member or counsel thereof, relating to:

\* \* \* \* \*

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.

"Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of *insubordination* and guilty of *violating* this section and shall be suspended and dismissed from his employment *in the manner provided by law.*" (Emphasis added.)

Petitioner requested a hearing before the Los Angeles County Civil Service Commission concerning his discharge and appeared before it on May 29, 1956. The commission ruled that petitioner was a temporary employee and therefore, pursuant to sections 19.07 and 19.09 of the county civil service rules was not entitled to such a hearing as a matter of right.

Thereafter petitioner instituted the present mandamus proceeding seeking reinstatement as a county employee and reimbursement for loss of compensation. The trial court found that regardless of his temporary status he was entitled to a hear-

ing before the commission to explain his reasons for refusing to answer the questions propounded and that appellants' refusal to give him a full hearing constituted a denial of due process. The trial court granted a peremptory writ of mandate directing that a hearing be granted on petitioner's discharge.

The issue before us is whether the county Civil Service Commission is required to hold a hearing on the discharge of a temporary county employee for a violation of section 1028.1 of the Government Code.

Appellants contend that in petitioner's discharge from county employment without a hearing there was no arbitrary act or discrimination which denied him due process. With this position we agree.

[1] Authority to prescribe regulations for the admission of persons into civil service and their discharge from employment has been vested by the Charter of the County of Los Angeles in the Civil Service Commission. The rules of the commission have the same force and effect as charter provisions as long as they are applied in the scope contemplated by the charter. *Campbell v. City of Los Angeles*, 47 Cal.App.2d 310, 117 P.2d 901; *Bruce v. Civil Service Board*, 6 Cal.App.2d 633, 45 P.2d 419.

Section 34 of Article IX of the Charter of the County of Los Angeles provides in pertinent part as follows:

"The Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law; \* \* \*.

"The rules shall provide \* \* \*.

"(7) For a period of probation not to exceed six months before appointment or promotion is made complete, during which period a probationer may be discharged or reduced with the consent of the Commission. \* \* \*

"(9) For temporary employment of persons on the eligible list. \* \* \*"

Section 19.07 of the civil service rules provides:

"An employee who has not yet completed his first probationary period may be discharged or reduced in accordance with Rule 19.09 by the appointing power by written notice, served on the employee and a copy filed with the Commission, specifying the grounds and the particular facts on which the discharge or reduction is based. Such an employee shall be entitled to answer, explain, or deny, the charges in writing within ten business days *but shall not be entitled to a hearing, except in case of fraud or of discrimination because of political or religious opinions*, racial extraction, or organized labor membership." (Emphasis added.)

Section 19.09 states in pertinent part:

"If the Commission has consented prior to the filing of an answer by the employee and such answer alleges fraud, or discrimination as above stated, and requests a hearing, the Commission shall immediately set aside its consent. The hearing shall be limited to the question of fraud or discrimination. After such hearing the Commission may consent to the discharge or may order such employee reinstated, and unless such order otherwise provides, it shall be effective as of the date of the discharge or reduction.

"No consent need be secured to the discharged or reduction of a temporary or recurrent employee."

It is undisputed that petitioner Globe had "not yet completed his first probationary period" and was employed only on a temporary, eligible basis. The record discloses that a written notice was served upon him specifying the reason for his discharge—insubordination and a violation of section 1028.1 of the Government Code.

[1] The right to discharge a public employee for refusal to testify under the circumstances here involved, the fact that his refusal constituted insubordination, and the conclusion that either disloyalty or insubordination establishes unfitness have been determined by prior judicial decisions.

Board of Education, etc. v. Mass, 47 Cal.2d 494, 304 P.2d 1015; Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617. Petitioner at no time has denied that he refused to testify before the House Subcommittee on Un-American Activities and answer questions relating to his past or present knowing membership in the Communist Party. At no time has the cause of petitioner's discharge been alleged to be anything but insubordination and a violation of section 1028.1, nor indeed under the record before us could it be. No question of opinion or political belief was involved. Under these circumstances no hearing on discharge was provided or permitted a temporary employee under the civil service rules, nor was the consent of the commission necessary. The Los Angeles County Charter (§ 34, Art. IX) and the rules of the Los Angeles County Civil Service Commission (§§ 19.07 and 19.09) control on the issue whether a hearing had to be granted on discharge of an employee in petitioner's class. They require none. On the applicability of the charter and rules the court stated in Cronin v. Civil Service Comm., 71 Cal.App. 633, at pages 641-642, 236 P. 339, at page 342: "For this court now to hold that a hearing should be had by the commission before a principal could discharge a deputy when none had been provided for in the charter would be for this court to usurp the functions of the freeholders and to change their work in a material respect. This it has neither the right nor the inclination to do. We must accept the charter as framed by the freeholders and not attempt to enlarge its scope under the guise of judicial interpretation. Neither subdivision 13 of said section 34 of the charter nor rule 11, as prescribed by the commission, provides for any hearing upon the charges preferred against a deputy before the principal may discharge him. All that is required by the charter and the rules of the commission is that the officer discharging the deputy shall serve upon him, a reasonable time before his discharge, and file with the commission,

a statement of the reasons for the discharge."

[2,3] Section 1028.1 of the Government Code, and similar legislation, providing that a public employee who fails or refuses on any ground whatsoever to answer questions propounded to him by a legislative committee relating to past and present knowing membership in the Communist Party shall be guilty of insubordination and of violating the section and shall be "dismissed from his employment in the manner provided by law," have been held constitutional. Board of Education, etc. v. Mass, 47 Cal.2d 494, 304 P.2d 1015; Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617. Both the Legislature and the courts have declared that the Communist Party is a continuing conspiracy against our Government (sec. 1027.5, Gov.Code; sec. 12600, Educ.Code; Black v. Cutter Laboratories, 43 Cal.2d 788, 278 P.2d 905), and without doubt the state has the power and authority to require county employees to testify on such subjects as a condition to continued employment. Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. Loyalty on the part of county employees is essential to the order and peaceful operation of government and is relative to fitness for such employment. Therefore a government employee may be required to disclose certain information relative to fitness and loyalty as a reasonable condition for retaining public employment even though the disclosures may in some cases constitute self-incrimination. Board of Education, etc. v. Mass, supra, 47 Cal.2d 494, 304 P.2d 1015; Steinmetz v. California State Board of Education, supra, 44 Cal.2d 816, 285 P.2d 617. Although by the terms of section 1028.1 of the Government Code petitioner must be discharged "in the manner provided by law," under the authority (charter and civil service rules) by which he was hired and held his employment, he as a temporary employee was not entitled to a hearing upon discharge. Therefore, as applied to him



section 1028.1 does not require a hearing and a county temporary employee who is summarily discharged is discharged in the "manner provided by law." By refusing him a hearing it is clear that no right was taken from petitioner which he otherwise would have had, or been entitled to.

[4] In demanding a hearing regardless of his employment status, petitioner is in effect asking the court to equalize the rights of all civil service employees whether they be temporary, probationary or permanent. To do so would lose sight of the entire philosophy of civil service in government and destroy the distinction between the various classifications. The basic reasoning behind the "stepladder" classifications in civil service is the necessity for a trial period for both employee and employer. It is during this time the employer formulates its opinion of the suitability, capability, ability to work with others, stability and loyalty of the employee, and determines whether he will make a satisfactory permanent worker. During this period the employee, too, has the opportunity to determine whether he likes the work involved, conditions, personnel, etc., and wishes to remain. He may quit at any time. The employer also has the right to discharge him. As stated in *Parsons v. County of Los Angeles*, 37 Cal.App.2d 666, at page 672, 99 P.2d 1079, at page 1082: "It is a well-settled rule of law that where there are no restrictive provisions the power of the appointment carries with it the power of removal. *Fee v. Fitts*, supra [108 Cal. App. 551, 291 P. 889]. The legislature has ample authority to determine the manner in which city employees may be removed and it has undertaken to fix the procedure to be followed. Subject to the limitations expressly imposed, the proper executive officers may discharge." See also *Neuwald v. Brock*, 12 Cal.2d 662, 86 P.2d 1047; *Snelling v. Civil Service Board*, 90 Cal. App.2d 865, 204 P.2d 358. It is only after the employee has completed his probationary period and remains to become "permanent" that certain employment rights become available to him.

To hold on the one hand that under ordinary circumstances a temporary employee can be constitutionally validly discharged without a hearing and on the other that, if he is discharged for insubordination and a violation of section 1028.1, he must be given a full hearing is to allow privilege and destroy equality. To grant him a hearing because of his refusal to answer questions with reference to his membership in a communist organization is to grant him a status which the ordinary employee in this same classification does not have. Petitioner can demand no greater degree of privilege than any other temporary county civil service employee regardless of any implied question of loyalty or disloyalty.

Petitioner contends that appellants make the same argument rejected in *Housing Authority of City of Los Angeles v. Cordova*, 130 Cal.App.2d Supp. 883, 279 P.2d 215. The Housing authority contended that because the lease provided it could terminate a tenancy upon ten days' notice it needed to give no reason for termination and could terminate if tenants refused to sign the "Housing Loyalty Oath." There the court simply held that the right to public housing could not be based on the signing of a loyalty oath and a statutory right to public housing having been created this right could not be taken away without due process of law. This is quite another situation than the one at bar in which no statutory right exists in any event. It seems to this court that housing subversives does not present the same serious problem as hiring them.

Petitioner, defending the judgment of the lower court, relies heavily on *Slochow v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and *Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015, urging that under these authorities he is entitled to a full and complete hearing and a determination of whether his reasons for invoking the privilege are sufficient.

The petitioner, a temporary employee, does not fall within the framework of due

process laid down in either of these two cases. In *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, Professor Slochower, a permanent employee entitled to tenure under the state law, was summarily discharged by the board under a New York City charter provision. A New York statute gave a procedural right to a hearing before discharge to persons in the class of Slochower. The Supreme Court concluded there was a violation of due process in summarily dismissing him. However, the court also held that one does not have a constitutional right to government employment and "he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." *Slochower v. Board of Higher Education of City of New York*, supra, 350 U.S. at page 555, 76 S.Ct. at page 639.

Thereafter, the case of *Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015, involving the constitutionality of section 12604 of the Education Code was decided. Mass, an instructor at City College in San Francisco, had appeared before a subcommittee of the House of Representatives and refused to answer questions asked of him regarding his membership in the Communist Party. He was later suspended without a hearing before the board of education for his refusal to testify. The court held that Mass was entitled to a hearing. Here again the employee enjoyed a specific statutory right to a hearing before discharge.

[5] An analysis of both opinions discloses that the court determined the rights of employment and discharge under conditions of tenure, or permanency, wherein by statute the employee was entitled to a hearing as compared with the temporary status of petitioner herein and his total lack of any right of hearing under the charter and civil service rules. The rights involved under the Slochower and Mass cases were of statutory origin and in each the statutory safeguards had been built into certain rights of tenure which required there could be no discharge in the manner provided

by law until such time as a full and complete hearing had been granted. In the instant case there is no statutory right for a hearing prior to the discharge of petitioner, a temporary employee. Holding a temporary status only he had no basic right to either a hearing or to county employment and whatever his rights were must be measured by the county charter and the civil service rules adopted thereunder. The temporary status enjoyed by him distinguishes him from the permanency in the Slochower and Mass cases.

Petitioner contends that he was discharged for invoking his constitutional privilege and that the implication of guilt it carries was responsible for his discharge. Actually he was discharged because he was guilty of insubordination and of violating section 1028.1 of the Government Code. Whatever implication he wishes to attach to his having invoked the privilege is immaterial here. Section 1028.1 heretofore held constitutional defines the refusal to answer as "insubordination" which authorizes dismissal.

Petitioner also claims that all he did was to exercise a constitutional privilege in refusing to answer the questions and that his discharge without a hearing therefore was a violation of due process.

At the outset a temporary employee has no vested right to county employment and may therefore be discharged summarily. *Bailey v. Richardson*, 86 U.S.App.D.C. 248, 182 F.2d 46, affirmed by an equally divided court 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352; *Friedman v. Schwellenbach*, 81 U.S.App.D.C. 365, 159 F.2d 22, certiorari denied 330 U.S. 838, 67 S.Ct. 979, 91 L.Ed. 1285. Although involving federal civil service, these cases are persuasive here. The court in the Bailey case recognized that Congress had provided the President of the United States with authority to prescribe regulations for the admission of persons into civil service and for their discharge. The court held that a summary discharge of a probational appointee was proper and without constitutional objection. At page 58 of 182 F.2d,

it stated: "Due process of law is not applicable unless one is being deprived of something to which he has a right." The holding in the Friedman case is similar to that in the Bailey case. The facts therein relative to status are practically identical with those in the instant case. The dismissal without a hearing was upheld. In the case of *Parker v. Lester*, 9 Cir., 227 F.2d 708, at page 716, on the issue of due process the court stated: "When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard."

We fail to see what it is to which petitioner "has a right" for which a hearing must be given. Because of his temporary employment status he is, at the most, only an applicant for a permanent position. Of interest in this connection is the analogous situation expressed in *Bailey v. Richardson*, supra, 182 F.2d 46, at page 55: "If her status was merely that of an applicant for appointment, as we think it was, her non-appointment involved no procedural constitutional rights. Obviously, an applicant for office has no constitutional right to a hearing or a specification of the reasons why he is not appointed."

Furthermore, due process does not always require a hearing even where vested rights are involved. Defining "due process" the United States Supreme Court, speaking through Mr. Justice Frankfurter, stated in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, at page 163, 71 S.Ct. 624, at page 644, 95 L.Ed. 817: "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. \* \* \* The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in

another. \* \* \* Whether the ex parte procedure to which the petitioners were subjected duly observed 'the rudiments of fair play,' (citing cases) cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this is done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." We are satisfied petitioner in the case at bar has been treated fairly at all stages of his employment and dismissal.

As to the applicability of the Fourteenth Amendment of the United States Constitution, or Art. I, sec. 13 of the California Constitution, the court in *Bailey v. Richardson*, supra, said at page 57 of 182 F.2d: "The due process clause provides: 'No person shall \* \* \* be deprived of life, liberty, or property, without due process of law; \* \* \*' It has been held repeatedly and consistently that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office." Referring to the First and Sixth Amendment infringements, the court stated at page 60 of 182 F.2d: "The situation of the Government employee is not different in this respect from that of private employees. A newspaper editor has a constitutional right to speak and write as he pleases. But the Constitution does not guarantee him a place in the columns of a publisher with whose political views he does not agree," and again at page 61 of 182 F.2d: "No one denies Miss Bailey the right to any political activity or affiliation she may choose. What is denied her is Government employ. The argument upon



the clear and present danger rule, therefore, must be that Miss Bailey has a right to Government employ unless her presence there would constitute a clear and present danger. There simply is no such right. To state the proposition is to demonstrate its untenability."

In the instant case it is clear that the controlling provision of the charter and civil service rules permit no hearing prior to discharge of those in Globe's class. There is no reason why petitioner should be permitted to claim and secure any extraordinary rights merely because he was insubordinate and refused to answer questions about his communist affiliations. He had no basic right to county employment in the first instance. No hearing as a matter of either constitutional or statutory right had to be granted an employee in Globe's position.

Untenable is petitioner's contention that the Congressional Committee was not a duly authorized committee for the reason that the authorizing resolution was too broad and vague in its terminology which empowered the committee to investigate un-American and subversive activities and all other questions in relation thereto, without adequately or at all limiting or defining such terms. This point is predicated upon the case of *Watkins v. United States*, 354 U.S. 178, 201, 77 S.Ct. 1173, 1 L.Ed.2d 1273, in which the court commented upon the indefinite nature of the authorization but did not hold the authorizing resolution unconstitutional. The facts in the *Watkins* case and in the instant controversy are entirely dissimilar, for in the *Watkins* case appellant was prosecuted for contempt after refusing to answer certain questions as to past Communist Party membership of other persons. *Watkins* had offered to answer any such questions pertaining to himself. In the present situation, certainly, there was no vagueness in reference to the subject matter of the inquiry or its relation to the investigative powers of the committee;—the employee was asked directly

in regard to his own communistic activities and refused to answer such inquiries.

For the foregoing reasons, judgment is reversed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



163 Cal.App.2d 607

Thomas W. NELSON, Petitioner and  
Appellant,

v.

COUNTY OF LOS ANGELES, Board of Supervisors, Los Angeles County, Burton W. Chace, Chairman thereof, Herbert C. Legg, Kenneth Hahn, John Anson Ford and Roger W. Jessup, Members thereof; Civil Service Commission of Los Angeles County, Harry Albert, President thereof, and Hayden F. Jones and Winston W. Crouch, Members thereof, Defendants and Respondents.

Civ. 22680.

District Court of Appeal, Second District,  
Division 1, California.

Sept. 18, 1958.

Hearing Denied Nov. 13, 1958.

Mandamus proceeding by discharged permanent civil service employee of Los Angeles County seeking reinstatement. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment denying writ and discharged employee appealed. The District Court of Appeal, Lillie, J., held that where permanent civil service employee upon being subpoenaed before Congressional committee refused to answer questions pertaining to political opinions and associations and knowing membership in Communist Party in violation of statute making civil service employee so refusing to answer such questions guilty of insubordination, and employee was granted a full hearing by Civil Service Commission but

refused to present any testimony explaining reasons for refusal to testify, employee was afforded due process.

Affirmed.

### 1. Constitutional Law ☞277(2)

Where permanent Los Angeles County civil service employee appeared pursuant to subpoena before Congressional committee and refused to answer questions concerning his political opinions and associations and knowing membership in the Communist Party, in violation of statute making it duty of government employees to answer such questions and providing that refusal constituted insubordination for which employee would be discharged, and employee received a full hearing before Civil Service Commission but declined to testify or offer any evidence concerning reasons, if any, for refusing to testify, discharge of employee was in accordance with due process of law. U.S.C.A.Const. Amends. 1, 5; West's Ann. Gov.Code, § 1028.1.

### 2. Officers ☞72(1)

Civil Service Commission has a discretion which may be exercised if it deems civil service employee's reason for refusal to answer questions before specified bodies as to knowing membership in Communist Party sufficient, notwithstanding statute making all employees refusing to answer such questions guilty of insubordination and subject to discharge from employment in manner provided by law. West's Ann.Gov. Code, § 1028.1.

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A. L. Wirin, Fred Okrand, William T. Pillsbury, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Fred R. Metheny, Deputy County Counsel, Los Angeles, for respondents.

LILLIE, Justice.

By stipulation this appeal was consolidated for oral argument with the companion case of *Globe v. County of Los Angeles*,

Cal.App., 329 P.2d 971, involving similar and related facts and questions of law.

On June 16, 1953, Thomas W. Nelson became a permanent civil service employee of the county of Los Angeles in the capacity of a medical social worker. On April 20, 1956, he was summoned to appear before a subcommittee on un-American activities of the United States House of Representatives and after being sworn refused to answer a series of questions pertaining to his political opinions, associations and knowing membership in the communist party. He based his refusal on the First Amendment of the United States Constitution and on a claim of privilege against self-incrimination under the Fifth Amendment. Petitioner was discharged from county employment on May 2, 1956, on the ground that he had been guilty of insubordination and a violation of section 1028.1 of the Government Code. Thereafter, he appealed to the Civil Service Commission and was granted a hearing before that body. Pursuant thereto, he personally appeared before it on June 11, 1956. On August 9, 1956, the commission filed its findings and conclusions. It found that petitioner refused to answer certain questions under oath as a witness before the United States House of Representatives Committee on Un-American Activities and concluded that he was guilty of insubordination and a violation of section 1028.1 of the Government Code and subject to discharge from employment.

Petitioner filed a petition for writ of mandate in the superior court seeking reinstatement. The trial court found that at the hearing before the Civil Service Commission petitioner failed to offer any evidence as to his reasons for refusing to answer questions before the subcommittee, or to give explanation as to other matters germane thereto; and concluded that petitioner had been accorded a full and fair hearing on his discharge, at which he was given the opportunity to explain the reasons for his refusal to testify, and that he was discharged "in the manner provided by

law." The petition for writ of mandate was denied and petitioner appeals from that judgment.

[1] Unlike the companion case of *Globe v. County of Los Angeles*, Cal.App., 329 P.2d 971, petitioner herein, a permanent employee, upon his request, was accorded a hearing before the Civil Service Commission. In the opinion of the trial court, as of the reviewing court in the present appeal, appellant was afforded the opportunity for a full hearing which due process requires under the cases of *Slochow v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and *Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015.

The record in the instant case discloses that at the hearing before the Civil Service Commission petitioner appeared with counsel. The county of Los Angeles, after having offered, by way of stipulation, certain facts concerning petitioner's employment with the county of Los Angeles, his appearance before the United States House of Representatives Committee on Un-American Activities, his failure to answer certain questions, and a transcript of the hearing before the committee covering the testimony of petitioner, rested its case. The chairman then suggested that all witnesses be sworn and asked, "Is anybody going to testify in this case?" to which the petitioner's counsel answered: "Perhaps Mr. Nelson will testify." Petitioner then offered his entire personnel file in evidence, together with a copy of the introductory statement made by Congressman Moulder as to the scope and purpose of the hearings before the House Committee on Un-American Activities. Before resting his case, counsel for petitioner stated, "The employee does not care to offer any evidence or testimony at this time. He merely wishes to make a statement through counsel as to his position in regard to his discharge." The chairman of the commission asked counsel if that meant he was ready to rest his case. Counsel answered in the affirmative and the chairman followed it up with the further

question, "Now you just want to argue?" to which counsel replied, "That is all." The petitioner did not take the stand, offered no testimony and no witnesses. Counsel's argument was essentially an attack upon the constitutionality of section 1028.1 of the Government Code as applied to him.

Petitioner, although given a clear opportunity to do so, declined to testify at the hearing before the commission or offer any evidence concerning his reasons, if any, for refusing to testify before the House subcommittee or matters germane thereto.

Both parties rely upon *Slochow v. Board of Higher Education of City of New York*, supra, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and *Board of Education, etc. v. Mass*, supra, 47 Cal.2d 494, 304 P.2d 1015.

Any point raised by petitioner that the statutory requirements of section 1028.1 bar or prohibit his privilege of self-incrimination has heretofore been decided by the Supreme Court in the case of *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617. The court said, at page 824 of 44 Cal.2d, at page 621, of 285 P.2d: "Moreover, a person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under some circumstances, may amount to self-incrimination. (Citations.) A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment." A like holding is found in the case of *Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015, relative to section 12604 of the Education Code, which contains substantially the same language found in section 1028.1, here under consideration. At page 498 of 47 Cal.2d, at page 1018 of 304 P.2d, the court stated: "A teacher may properly be required to disclose information relative to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure under some cir-



cumstances may amount to self-incrimination. See *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 824, 285 P.2d 617; *Pockman v. Leonard*, 39 Cal.2d 676, 687, 249 P.2d 267; *Christal v. Police Comm.*, 33 Cal.App.2d 564, 567 et seq., 92 P.2d 416."

Although the Supreme Court has previously held that under section 1028.1 of the Government Code and similar legislation providing for the dismissal of a public employee who fails or refuses to answer questions propounded by a legislative committee relating to past or present membership in the Communist party, an employee shall be deemed guilty of insubordination and dismissed in a manner provided by law (*Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015; *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617; *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517), petitioner herein urges that section 1028.1 of the Government Code is unconstitutional as applied to him. He argues that to have explained his reasons for invoking the privilege at the hearing before the commission would have been meaningless under the statute because it flatly provides that any employee who refuses to answer on any ground whatsoever shall be guilty of insubordination and a violation of the section and shall be dismissed "in the manner provided by law."

[2] The California Supreme Court does not accept this strict interpretation. *Board of Education, etc. v. Mass*, 47 Cal.2d 494, 304 P.2d 1015. It recognizes a discretion on the part of the employer which may be exercised if it deems the employee's reasons for refusing to answer sufficient. In discussing *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, holding that summary dismissal violated the constitutional requirements of due process because no consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exer-

cise of the privilege or whether the plea resulted from mistake, inadvertence, or legal advice conscientiously given, either wisely or unwisely, our Supreme Court in the *Mass* case made it clear that it understood that the *Slochower* case held that a public employee may be dismissed for invoking the privilege against self-incrimination only if "after a full hearing in which he is afforded an opportunity to explain his reasons for claiming the privilege, it is determined that his refusal to answer is sufficient under the circumstances to warrant dismissal." 47 Cal.2d at page 499, 304 P.2d at page 1019. A full hearing under section 1028.1 of the Government Code is guaranteed to a public employee by the use of the language "in the manner provided by law." The court in the *Mass* case so interpreted this language, and at page 499 of 47 Cal.2d, at page 1019 of 304 P.2d stated: "Section 12604, as we have seen, provides for the dismissal of an employee 'in the manner provided by law,' and we construe these words to mean that, before an employee may be found guilty of insubordination or dismissed for refusing to answer under the claim of privilege against self-incrimination, there must be a full hearing and a determination that his reasons for invoking the privilege are not sufficient." Factors of the type mentioned in the *Slochower* decision should, of course, govern the determination as to the sufficiency of the employee's reasons. For what purpose would the Supreme Court insist on a full hearing to give the employee an opportunity to explain his reasons if the statute required a dismissal regardless of his explanation for refusing to answer?

If the scope of inquiry in the instant case was limited to a determination of whether he refused to answer the questions put to him by the committee, petitioner himself limited it. He was given the type of full hearing contemplated by the *Slochower* and *Mass* cases and section 1028.1 of the Government Code. Petitioner elected to remain silent.

Appellant argues that section 1028.1 of the Government Code, in its terms, by the

use of the language: "on any ground whatsoever" does not permit a reason or justification for a refusal to answer questions, and that it requires a dismissal if petitioner refuses to answer on any ground whatsoever. Counsel confuses the *ground* upon which petitioner refused to testify, in effect the basis of his refusal, with the *reason* why he refused to answer on that ground. Our Supreme Court has held that the terms of the statute do permit a reason or justification for refusing to answer and require a hearing for the purpose of permitting the employee to give it, and a determination of the employer that he was or was not justified.

Any argument that the county should have questioned petitioner about his reasons for invoking the privilege is specious. The record discloses that he was given every opportunity to explain if he wished to do so and "an opportunity to explain" does not imply that the county must elicit the information from the employee. Whether his explanation comes through query of the employer or the employee's own counsel would seem immaterial as long as the employee is given a full hearing in which he is afforded an opportunity to explain his reasons. The hearing is for the purpose of giving him the opportunity to explain. If he chooses to remain silent and not do so he cannot now be heard to say he has been denied due process. If petitioner's hearing was limited in any way, it was limited by his own voluntary choice to remain silent. It is clear that petitioner was afforded the hearing which due process requires under the pronouncements of the United States and California Supreme Courts in the Slochower and Mass cases and there is no basis for setting aside his dismissal.

As to whether the congressional committee was a duly authorized committee, petitioner cites *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273, claiming that the authorizing resolution in the instant case was too broad in its terminology empowering the committee to investigate un-American and subversive activi-

ties. Although the court in the *Watkins* case commented upon the indefinite nature of the authorization it did not hold it unconstitutional. In any event the factual situation in the *Watkins* case and in the one at bar are not similar for in the *Watkins* case appellant was prosecuted for contempt after refusing to answer certain questions as to past communist party membership of other persons. *Watkins* had offered to answer such questions pertaining to himself. In the present situation there was no vagueness in reference to the subject matter of the inquiry or its relation to the investigative powers of the committee. Petitioner was asked directly in regard to his own communistic activities and refused to answer such inquiries.

Petitioner contends that he was discharged for invoking the privilege and that the implication of guilt it carries was responsible for his dismissal. As a matter of fact, petitioner was discharged because he "was guilty of insubordination and guilty of violating section 1028.1 of the Government Code of the State of California." Whatever implication petitioner wishes to attach to his having invoked the privilege is immaterial here. The statute heretofore held constitutional defines the refusal to answer as "insubordination," which authorizes a dismissal in the manner provided by law. It has been long established by the United States Supreme Court and the California Supreme Court that there is a correlation between loyalty and fitness and public employment. In *Board of Education, etc. v. Mass*, supra, at page 498 of 47 Cal.2d, at page 1018 of 304 P.2d, the court stated: "Loyalty on the part of public employees is essential to orderly and dependable government and is therefore relevant to fitness for such employment." *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617; *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 267; *Christal v. Police Commission*, 33 Cal. App.2d 564, 565, 92 P.2d 416. Section 1028.1 of the Government Code demands disclosure of information relative to such fitness as a reasonable condition for retain-

ing employment even though the disclosure may constitute self-incrimination in some cases. It is clear that both insubordination and disloyalty are factors of fitness. The unquestioned basis for petitioner's dismissal was insubordination—a lack of cooperation. There appears in the record ample evidence of unfitness for county employment and a legal basis for discharge.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



163 Cal.App.2d 795

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,  
v.

**James D. MATHEWS, Defendant and**  
Appellant.  
Cr. 2860.

District Court of Appeal, Third District,  
California.  
Sept. 29, 1958.

Defendant was convicted in the Superior Court, El Dorado County, Robert E. Roberts, J., for assault with a deadly weapon with intent to commit murder, and he appealed. The Third District Court of Appeal, Schottky, J., held that since witness, who had first testified that he had never been convicted of a felony, thereafter had given testimony clearly indicating that he had been convicted of some military offense but that he was uncertain as to whether it constituted a "felony," no prejudice to defendant could have resulted.

Affirmed.

#### 1. Homicide Ⓒ270

Weight to be accorded to evidence of intoxication, and whether such intoxication precluded accused from forming specific

intent to kill, are matters essentially for determination of trier of facts in prosecution for assault with intent to commit murder.

#### 2. Homicide Ⓒ238

In prosecution for assault with a deadly weapon with intent to commit murder, evidence would not sustain defendant's claim that he had been so intoxicated at time of commission of crime as to be incapable of forming specific intent to commit murder.

#### 3. Homicide Ⓒ244(1)

In prosecution for assault with a deadly weapon with intent to commit murder, evidence would not sustain defendant's claim that he had acted in self-defense.

#### 4. Stipulations Ⓒ14(7)

Attorney may stipulate as to evidence which may be received; and where counsel who had represented defendant at trial had stipulated that exhibit could be admitted in evidence, defendant could not, on appeal, raise question as to its admissibility.

#### 5. Criminal Law Ⓒ808½

Court is only required to state elements necessary to constitute crime charged, and need not instruct in language of code.

#### 6. Criminal Law Ⓒ822(1, 6)

Instructions must be considered in their entirety; and, so construed, instructions given, in prosecution for assault with a deadly weapon with intent to commit murder, did, in effect, tell jury that defendant must have acted with unlawful intent to kill with malice aforethought before he could be convicted of offense charged. West's Ann.Pen.Code, §§ 187, 188.

#### 7. Criminal Law Ⓒ781(4)

In prosecution for assault with a deadly weapon with intent to commit murder, instructions given properly defined terms "confession" and "admission".

#### 8. Criminal Law Ⓒ763(19, 20)

Where trial court fully and clearly instructs jury as to distinction between confessions and admissions and leaves to jury question whether confession has been made



and, if so, whether it is true, court has not invaded province of jury.

**9. Criminal Law** ☞1088(1)

Photostatic copy of witness' "rap sheet," inserted in defendant's brief, was not part of record on appeal.

**10. Criminal Law** ☞1170½(1)

Where witness who had first testified that he had never been convicted of a felony, thereafter gave testimony clearly indicating that he had been convicted of some military offense but that he was uncertain as to whether it constituted a "felony," no prejudice to defendant could have resulted.

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John W. Ross, Jr., Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Defendant above named was found guilty by a jury of the crime of assault with a deadly weapon with intent to commit murder. His motion for a new trial was denied and judgment was pronounced. He has appealed from the judgment and from the order denying his motion for a new trial.

Appellant urges a number of grounds for the reversal of the judgment and order, but before discussing them we shall give a brief summary of the evidence as shown by the record.

At the time of the alleged assault, Mathews, a resident of Nevada, was an unemployed "pit boss" and an unpaid deputy sheriff in certain counties in Nevada. On December 15, 1957, he was returning from Sacramento to his home in Reno. He stopped in Placerville where he had some drinks. At Lindy's Bar about 4 p. m. he began a conversation about narcotics with William Grissom. After about an hour, and after the bartender refused the two men further service, they visited another bar and then, in Mathews' car, drove about 8 miles before stopping at the Eight Mile House where

each had one drink. After they were refused further service they again drove a short distance and stopped at a restaurant where they ate. They then drove to Pollock Pines where they stopped the car in front of the Fifty Grand Bar about 9 p. m. Before entering the bar Mathews removed a 38-caliber revolver from the glove compartment of his car and placed the revolver in a holster attached to his belt.

During the time Grissom and Mathews were together they had one argument over Mathews' money which he had been flashing in the various bars. On one occasion Mathews accused Grissom of taking his money.

The two men entered the Fifty Grand Bar and sat down at the bar. Mathews testified that Grissom got off of the stool on which he had been sitting and at the same time grabbed Mathews' keys and said, "You are a stool pigeon." "I'll show you what we do to stool pigeons. I'm going to take your car and your money and scatter your brains down the highway." Mathews also testified that Grissom grabbed the keys, came off the bar stool, wrestled with him, and hit him on the left side with something. Mathews said that he was in fear of his life so he reached for his gun and fired twice. He also testified that he had no intent to kill.

In response to a radio message that a man was flashing a badge and waving a gun, Officer Allen of the California Highway Patrol proceeded to the Fifty Grand Bar. Upon his arrival he looked through a circular window about six or eight inches in diameter and saw two men, one of whom was seated at the bar and the other standing behind and slightly to the right of the seated one. There were about four or five feet between the two. The officer testified that he had a good view of both men though the body of the one seated was partially obscured. The officer then entered the bar. He walked toward the men and when he was within three or four feet of them he heard two loud reports, and the man seated at the bar fell over to the left and off the stool. The man standing turned

to the right and the officer saw a 38 revolver in his hand. Officer Allen then struck him on the back of the head with his flashlight and knocked him to the floor.

A deputy sheriff arrived at the bar shortly after the shooting and while examining Mathews detected the odor of alcohol on his breath. The physician who attended Grissom testified that he suffered two gunshot wounds; that two bullets had entered his back and had come out the front of his body; that one bullet made three holes in the splenic flexure of the colon, and the other entered just below the diaphragm and went through a portion of the lung and hit a rib as it came out.

Appellant's first contention is that the evidence is insufficient to support the judgment.

Appellant contends that the evidence produced at the trial was insufficient to establish one of the essential elements of the crime of assault with a deadly weapon with intent to commit murder, namely, the specific intent to commit murder. In this regard appellant argues that the evidence established the fact that he was so intoxicated at the time of commission of the crime that he was incapable of forming a specific intent to commit murder. The appellant argues further that the evidence establishes self-defense.

However, appellant's testimony at the trial indicates that he had a clear recollection of the events that occurred prior to the shooting which would tend to show that he was not so intoxicated as to render him incapable of forming a criminal intent. *People v. Sellas*, 114 Cal.App. 367, 300 P. 150.

[1] It is well established that the weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intent to kill and murder are matters essentially for the determination of the trier of fact. *People v. Dement*, 48 Cal.2d 600, 311 P.2d 505; *People v. Cheary*, 48 Cal.2d 301, 309 P.2d 431; *People v. Owens*, 3 Cal.App. 750, 86 P. 980.

[2] The court in the instant case gave the jury the standard approved instructions on intoxication from California Jury Instructions, Criminal, CALJIC 607, 607-A, 78-B. While in this case there is evidence of the intoxication of appellant before and after the commission of the assault, there is ample proof that he was not so drunk that he was incapable of committing the crime charged, namely, assault with a deadly weapon with intent to commit murder. *People v. Dement*, supra; *People v. Owens*, supra. As stated in *People v. Isby*, 30 Cal. 2d 879, 890, 186 P.2d 405, 415:

"In the light of such record, it was for the jury to determine, under proper instructions, which the court gave, whether defendants, by reason of their voluntary intoxication, were incapable of forming the specific criminal intent essential to sustain their conviction; and it cannot be said from the evidence that the jury was not justified in deciding the question against defendants."

[3] Appellant's further contention that the evidence establishes that he shot the victim, William Grissom, in self-defense is not borne out by the record. Officer Allen of the California Highway Patrol, who was within four feet of appellant when he shot Grissom in the back, testified that at the time of the shooting Grissom had his back to appellant, was sitting on a bar stool with his feet on the rungs of said stool, his elbows on the bar and in a slumped-over position. Although the two men had on one occasion had an argument over appellant's money, Officer Allen testified that they were not arguing when he entered the bar; in fact, neither party had spoken. The examining physician testified that Grissom had been shot twice in the back. The evidence fully sustains the implied finding of the jury that the shooting was not in self-defense.

Appellant contends that the trial court committed error in permitting his counsel to enter into a stipulation for the introduc-

tion into evidence of People's Exhibit No. 8. This exhibit was a statement made by appellant shortly after the shooting and his subsequent arrest. In this connection, appellant contends that People's Exhibit No. 8 contained a non-accusatory statement made by Officer Allen to appellant which was inadmissible hearsay. This was the first of two statements made by the appellant to the police. The second statement was introduced by the prosecution as part of its case in chief. While cross-examining the appellant, the prosecution attempted to impeach him by showing through the use of Exhibit 8 that the appellant had made prior inconsistent statements. This statement contained a statement by Officer Allen telling appellant how the shooting occurred. The exhibit had originally been offered by defense counsel but the prosecution refused the offer. When the prosecution offered it defense counsel objected to a part of it. The trial judge ruled that unless both parties agreed to its admission in its entirety the court would not permit it to be introduced. It was then stipulated that the entire statement could go in and the exhibit was introduced in evidence. Appellant contends that if the officer's statement was admissible at all it was admissible as part of the prosecution's case in chief and not in rebuttal, and, secondly, the statement of the officer was not an accusation.

[4] In view of the fact that the counsel who represented appellant at the trial stipulated that Exhibit 8 in its entirety could be admitted in evidence, we do not believe that appellant may now raise the question of its admissibility. The counsel who represents appellant upon this appeal states: "Now counsel for appellant herein has not overlooked the fact that this statement in its entirety, People's Exhibit No. 8 was stipulated to be admitted into evidence by both the prosecuting attorney and the defense attorney, but this poses the question of how far may an attorney in a criminal case go in stipulating away the rights of his client." However, it is well settled that an attorney may stipulate as to evidence which may be received. *Morgan v. Morgan*, 139 Cal.App.

2d 704, 294 P.2d 45. And as stated in *People v. Ah Ton*, 53 Cal. 741, "it is competent for a defendant on trial for a felony to consent to the introduction of evidence to which he might otherwise have well objected." Furthermore, in fairness to the counsel who defended appellant at the trial, the reporter's transcript of 516 pages shows that appellant was vigorously and ably defended.

Appellant next challenges the instruction on specific intent. The court instructed the jury: "In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed. Thus, in the crime of assault with intent to commit murder a necessary element is the existence in the mind of the perpetrator of the specific preconceived intent to kill a human being and unless such intent so exists, that crime is not committed." Appellant contends that the instruction is erroneous because it tells the jury that if appellant had a preconceived intent to kill, a crime had been committed. It is contended that since all killings are not unlawful a specific intent to murder must be found and since the jury was not told a specific intent to murder must exist the instruction was prejudicial.

[5] Appellant also urges that the court erred in not specifically defining murder. However, the court did instruct the jury that in order for them to return a verdict of guilty they must find the existence of facts which as a matter of law amounted to an assault with intent to commit murder. The court need not instruct in the language of the code. *People v. Hayes*, 161 Cal.App. 2d 129, 326 P.2d 169. The court is only required to state the elements necessary to constitute the crime charged. *People v. Ortiz*, 63 Cal.App. 662, 219 P. 1024.

[6] The court in its instructions to the jury defined an assault and also defined a deadly weapon. The court further instructed the jury that in order to find the appellant guilty it was necessary that there ex-



isted in the mind of the accused the "specific, preconceived intent to kill a human being." The court also told the jury that in the crime of assault with a deadly weapon with intent to commit murder the specific intent to murder is a necessary element of the crime, and that the defendant could not be found guilty unless he had the specific intent to murder Grissom. The instructions must be considered in their entirety and the court did in effect instruct the jury that before the accused could be guilty of the offense charged they must find that he acted with the unlawful intent to kill with malice aforethought.

Similar contentions were made in the recent case of *People v. Hayes*, supra. In the *Hayes* case the defendant was charged with and convicted of the offense of assault with a deadly weapon with intent to commit murder. On appeal the defendant raised the issue that the trial court erred in failing to instruct the jury on the definition of murder as found in section 187 of the Penal Code and malice as found in section 188 of the Penal Code. The following quotation from the opinion of this court in *People v. Hayes* [161 Cal.App.2d 134, 326 P.2d 172] is applicable to the instant case:

"In instructing on the crime here charged it is proper to define murder since the element of intent to commit murder is definitely involved. *People v. Whitlow*, 24 Cal.App. 1, 6, 139 P. 826. However, we think that essentially the court did this. The court told the jury that an assault was an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. The court defined a deadly weapon as any object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing and is likely to produce death or great bodily injury. Coming now to the specific intent which the statute requires, that is, the intent to commit murder, the court told the jury that this intent must be proved and was

an element of the offense charged. Then the court told the jury: 'In the crime of assault with intent to commit murder, there must exist in the mind of the perpetrator the specific, preconceived intent to kill a human being.'

"We have in the instructions given an adequate explanation of what is meant by charging an intent to commit murder, for the jury has been told that appellant must have acted with a specific preconceived intent to unlawfully kill a human being, which is to say that he must have acted with the intent unlawfully to kill with malice aforethought. Of course, it is never necessary to instruct in the exact language of a statute."

[7] Appellant also challenges the instruction on confessions and admissions. One instruction that was given began: "Evidence has been received in this case tending to show that on an occasion other than this trial the defendant himself made a statement tending to prove his guilt of the alleged crime for which he is on trial." Another instruction contained the following: "\* \* \* although the court has admitted evidence tending to show defendant made a confession \* \* \*" Appellant contends that by the instructions the court told the jury that appellant had confessed the crime and all the jury need do was to find that the confession was voluntary in order to convict. This contention cannot be sustained. The court in its instruction to the jury properly defined the terms confession and admission (CAL JIC 29; *People v. Ferdinand*, 194 Cal. 555, 229 P. 341; *People v. Gardner*, 147 Cal. App.2d 530, 305 P.2d 614; *People v. Crowl*, 28 Cal.App.2d 299, 82 P.2d 507), and further instructed the jury that it was within their province to determine whether a confession had been made and if so, whether it was true and voluntary (CALJIC 29, 29-A; *People v. Cryder*, 90 Cal.App.2d 194, 202 P.2d 765).

[8] Where the trial court fully and clearly instructs the jury as to the distinction between confessions and admissions

and leaves the jury the question whether a confession has been made and, if so, whether it is true, the court has not invaded the province of the jury. *People v. Lucas*, 160 Cal.App.2d 305, 324 P.2d 933; see also *People v. Gardner*, supra.

Appellant also contends that the district attorney was guilty of prejudicial misconduct. The first alleged instance of misconduct concerns a remark the district attorney made in his closing argument to the jury when he speculated on the kind of case the jury would have before it if the victim had succumbed as the district attorney alleged he would have done except for the skill of the attending doctor. The district attorney said, "Does anyone question but what we would have had a murder case on our hands?" An objection was made and the court told the district attorney to refrain from speculation and that the remark of the district attorney appeared to border on speculation. No request was made that the court admonish the jury to disregard the remark, but the statement of the court was in effect such an admonition.

Appellant contends further that the district attorney committed misconduct in withholding *People's Exhibit No. 8* until the close of appellant's case and introducing it on rebuttal instead of presenting it in his case in chief. This contention is without merit because, as hereinbefore stated, both appellant's counsel and counsel for the people stipulated that said exhibit be introduced in evidence.

[9] The final claim of misconduct is that the district attorney permitted Grissom to perjure himself. On cross-examination Grissom testified that he had never been convicted of a felony. Then Grissom was shown something to refresh his memory. Again he was asked the question and he replied that he did not know. Apparently, Grissom, while in the army, was convicted of a violation of the articles of war. In an insertion in his brief appellant has provided a photostatic copy of a "rap sheet" showing Grissom was con-

victed of desertion and sentenced to the disciplinary barracks at Fort Leavenworth. This, however, is not a part of the record on appeal. There is a division of authority as to whether or not the fact of a conviction of a military crime can be used to impeach a witness. In *Henderson v. United States*, 6 Cir., 202 F.2d 400, the court held that it was error for the government to ask questions about court martial convictions for AWOL in order to impeach. In *United States v. Tomaiolo*, 2 Cir., 249 F.2d 683, it was said that a breach of military discipline was neither a felony nor a misdemeanor involving moral turpitude and, therefore, it was error to cross-examine the defendant on such matters. See also *Midkiff v. State*, 29 Ariz. 523, 243 P. 601. The following cases have held desertion in time of war was a crime involving moral turpitude and therefore it was permissible to use the fact of conviction to impeach: *Nelson v. State*, 35 Ala. App. 179, 44 So.2d 802; *Jordan v. State*, 141 Ark. 504, 217 S.W. 788.

[10] In view of the fact that there is a division of authority in other jurisdictions as to whether a military conviction of desertion can be used to impeach a witness, and no California case has passed upon the question, we do not believe it can be held that the district attorney was guilty of any misconduct in the instant case. It is clear from the testimony of Grissom that he did not know whether or not he had been convicted of a felony, as is evident from the following:

"Q. \* \* \* Have you ever been convicted of a felony? A. Well, if you are referring to the one in the Army that is the only thing I can think of.

"Q. I am asking you again, have you ever been convicted of a felony, and remember, when you answer that, I might admonish you that you are under oath? A. I know that. Q. All right. Have you ever been convicted of a felony? A. It depends.

"Mr. Winkler: Your Honor—

"The Court: Answer it yes or no, if you can.

"Mr. Winkler: I object—

"By The Witness: I don't know."

In any event it is clear that the jury would gather from Grissom's answer that he had been convicted of some military offense. We think no possible prejudice could have resulted to appellant.

In conclusion we are convinced from a study of the entire record that appellant received a fair trial, that the jury was fully and fairly instructed, that the evidence was sufficient to support the judgment, and that no prejudicial error was committed.

The judgment and the order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



163 Cal.App.2d 821

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Grover HERMAN, aka Grover Harmon,**  
Defendant and Appellant.

Cr. 3534.

District Court of Appeal, First District,  
Division 1, California.

Oct. 1, 1958.

Hearing Denied Nov. 26, 1958.

Prosecution for possession of heroin. The Superior Court, San Francisco County, Raymond J. Arata, J., entered judgment upon verdict of guilty and accused appealed. The District Court of Appeal, Peters, P. J., held that where police officer had known informant for over three years and had found him to be reliable, and informant told officer that accused would make delivery of narcotics at specified time and place and accused was seen, at that

time and place, perform acts consistent with inference that he was about to make a delivery, officers had reasonable grounds to believe accused was about to make illegal delivery of narcotics and arrest was justified.

Judgment affirmed.

#### 1. Arrest $\S$ 63(4)

Where police officer had known informant for over three years and had found him to be reliable, and informant told officer that accused would make delivery of narcotics at specified time and place and accused was seen at that time and place performing certain acts consistent with inference that he was about to make a delivery, officers had reasonable grounds to believe accused was about to make illegal delivery of narcotics and arrest was justified. West's Ann.Pen.Code,  $\S$  841.

#### 2. Arrest $\S$ 63(4), 71

Information secured from reliable informant may justify arrest and search without warrant without production of informant as witness.

#### 3. Arrest $\S$ 68

Where accused was actually engaged in commission of felony and officers had reasonable grounds to believe that this was so, fact that arresting officers did not inform him of cause of arrest did not make arrest illegal. West's Ann.Pen.Code,  $\S$  841.

#### 4. Criminal Law $\S$ 1169(1)

Introduction of illegally secured evidence does not per se require reversal, but it depends upon whether such evidence was prejudicial.

#### 5. Criminal Law $\S$ 1169(1)

In prosecution for possession of heroin, admission of evidence obtained by search of residence of accused without his permission, but with permission of one who was at residence and who said that he stayed there from "time to time", was not prejudicial, in view of fact that evidence that large quantity of heroin was found on accused was uncontradicted and overwhelming.



Walter H. Duane, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant, Grover Herman, also known as Harmon, was charged with unlawful possession of heroin, and with four prior felony convictions. He admitted three of the priors, and the fourth was dismissed on motion of the prosecutor. The case was tried before the court without a jury, and defendant was found guilty. On this appeal he urges that his arrest, the search of his person, and the search of his home were illegal.

The sole witness was Officer Logan of the San Francisco Police Department. He testified that for about a month prior to October 11, 1957, the police had defendant's residence on Green Street in San Francisco under surveillance. During this period persons were seen to enter and to leave the premises who were known to the police as narcotic addicts. About 7 p. m. on October 11, 1957, an informant, who had been known to Officer Logan for 3½ years, told Logan that defendant was going to make a delivery of heroin that night near Union and Columbus Streets at about 10 p. m., and that defendant usually carried the narcotics in his pocket. During the period Logan had known this informant the latter had supplied the officer with quite a bit of information which had always been found to be reliable. On the faith of such information several arrests were made and a considerable amount of narcotics discovered.

Logan and several other officers, after receiving this information, proceeded to defendant's residence and kept it under surveillance. At about 10 p. m. defendant entered his residence and in about five minutes came out and started to walk west on Green Street. He stopped and talked with a man who got out of an automobile parked on Green Street, and then proceeded

towards Powell Street. When he reached that area the officers stopped him. The officers identified themselves as such and Logan placed the defendant under arrest. Logan did not tell defendant the cause for the arrest. The officers then searched defendant. In one of his pockets two small Manila envelopes were found. It was stipulated that one envelope contained 90 grains of heroin, and the other 47 grains.

Logan and another officer then proceeded back to defendant's residence, defendant in the custody of a third officer, following them. As they approached the door, a man—the man to whom defendant had talked a short time before—arrived with a package of beer. As the officers arrived at the door of defendant's house it was opened by a man who identified himself as one Marchesi. Marchesi was told that Herman had been arrested. Logan asked Marchesi if he lived with Herman. Marchesi replied that he did not, but "I stay here from time to time." Logan then said that defendant would arrive in a minute and that the officers wanted to come in and look around. Marchesi then stated "Help yourself." The two officers entered. At that time defendant was outside on the sidewalk in the custody of an officer. No request was made of defendant for permission to enter.

Logan then searched the premises. In a paper tissue box he found four packets. It was stipulated that these contained a total of 255 grains of heroin. About this time defendant was brought into the premises. He admitted that the packets in the tissue box belonged to him. Thus, it will be noted, the police found 137 grains of heroin in defendant's physical possession, and 255 grains at his residence, a total of 392 grains.

The first contention of appellant is that his arrest and the search of his person were illegal under the rule announced in *People v. Harvey*, 142 Cal.App.2d 728, 299 P.2d 310, and 156 Cal.App.2d 516, 319 P.2d 689, 690. On both appeals in that case the arrest and search of the defendant were held

to be illegal, and the evidence so discovered inadmissible. The case was undoubtedly correctly decided. On the first trial the evidence was that the arresting officers were told that defendant had been under surveillance for some time, that it was believed that he dealt in narcotics, and that if the officers believed that "something was wrong" they should arrest him. The officers saw defendant drive up near his residence, talk to a person who drove up in a coupe and then enter his residence. Shortly thereafter defendant came outside, looked up and down the street, crossed the street, again looked up and down, and was then arrested and searched. The appellate court properly reversed the conviction, holding the arrest and search to be illegal. The court pointed out that so far as the officers knew defendant was engaged only in "innocent actions that any law-abiding citizen should be able to engage in without fear of search or arrest." 142 Cal.App.2d at page 731, 299 P.2d at page 312. There was no reasonable ground for the arrest and search.

On the second trial, the arresting officer testified that a superior officer had told him that an informant was to make a buy that night from the defendant at about nine o'clock, and that defendant's mode of operation was to talk to the buyer outside his residence, pick up the marijuana at his residence, and then meet the buyer outside. All of the justices agreed that the arrest and search were still illegal because the arresting officer did not have reasonable grounds to believe that defendant was then violating the law. 156 Cal.App.2d 516, 319 P.2d 689. It is significant that on the second appeal Justices Dooling and Draper joined in a special concurring opinion in which they stated (156 Cal.App.2d at page 523, 319 P.2d at page 693): "We are satisfied that if Aiello [the arresting officer] had received this information directly from a reliable informer, including the description of appellant's customary method of selling marijuana, and had observed thereafter appellant talk to a man in a blue

coupe, go into his house, reappear and stand looking up and down the street, under those circumstances and with that information Aiello could reasonably believe that appellant had marijuana in his possession and was waiting for the return of the blue coupe to deliver it. Under those circumstances we would hold that Aiello had reasonable grounds for arresting the appellant." However, the information possessed by the arresting officer had been received from a superior officer, who was dead at the time of trial. The search was clearly illegal because there was no evidence at all of the reliability of the informant or that an emergency existed.

[1] The instant case is not similar to the facts of the Harvey case, but is very similar to the hypothetical case posed in the concurring opinion as an example where the arrest would have been justified. In the instant case Officer Logan testified that he had known the informant for 3½ years, during which time he had found the informant to be reliable. The informant told Logan that defendant would make a delivery of narcotics at a specified time and place. At that time and place the defendant was observed to perform certain acts, all consistent with the inference that he was about to make a delivery. If all that was observed and known was what was observed outside defendant's residence, then the arrest and search without a warrant would have been unwarranted under the rule of the Harvey case. All of the actions observed would have been consistent with innocence. But when those activities were observed after receiving the information above set forth from a known reliable informant, those activities became highly suspicious and gave the officers reasonable grounds to believe that defendant was about to make an illegal delivery of narcotics.

[2] Of course, the fact the non-participating informant was not produced at the trial is immaterial. Information secured from a reliable informant may justify an

arrest and search without a warrant without production of the informant as a witness. *Lorenzen v. Superior Court*, 150 Cal. App.2d 506, 310 P.2d 180; *People v. Dean*, 151 Cal.App.2d 165, 311 P.2d 85; *People v. Moore*, 154 Cal.App.2d 43, 315 P.2d 357. It should be noted that, although the name of the informant was not divulged by the prosecution, no request for the name was made by defendant or his counsel.

[3] Some complaint is made of the fact that the arresting officer admittedly did not inform the defendant of the nature of the charge at the time of his arrest, it being contended that this rendered the arrest illegal under the provisions of section 841 of the Penal Code. That section requires the arresting officer to inform the person to be arrested of the cause of his arrest "except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense." In the instant case the defendant was actually engaged in the commission of a felony and the officers had reasonable grounds to believe that this was so. Thus, the case falls within the exception. *People v. Beard*, 46 Cal.2d 278, 294 P.2d 29.

[4, 5] Appellant also challenges the validity of the search of his residence. There is some confusion in the cases as to when a search of a residence is permissible where the defendant has been arrested some distance away. Compare *Hernandez v. Superior Court*, 143 Cal.App.2d 20, 299 P.2d 678, relying on *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, cited with approval in *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469, with such cases as *People v. Montes*, 146 Cal.App.2d 530, 303 P.2d 1064, and *People v. Alaniz*, 149 Cal.App.2d 560, 309 P.2d 71. In the instant case the house had been under police surveillance for about a month. Known narcotic addicts were seen to go in and out. On the night of the arrest defendant was seen to

go into his house and come out under circumstances where it is reasonable to infer that he went into the house to secure narcotics. He was then lawfully arrested a short distance from the residence and narcotics found in his possession. Then, at the house, Marchesi answered the bell, and invited the officers to enter. Although Marchesi told the officers that he did not live with Herman, he did say "I stay here from time to time." The fact that he was in the house alone supports the reasonable inference that this was one of the times that he was staying with Herman, was in joint possession, and was not simply a casual guest. See generally *People v. Silva*, 140 Cal.App.2d 791, 295 P.2d 942; *People v. Stewart*, 144 Cal.App.2d 555, 301 P.2d 301. Under these circumstances the search of the residence was probably reasonable. In any event, even if the search of the residence was improper, the error in admitting the evidence secured in that search was harmless. Appellant was charged with one count of possession of heroin. The evidence that a large quantity of heroin was found on his person is uncontradicted and overwhelming. Once the validity of the arrest and search of appellant is established there can be no doubt at all that appellant is guilty of the offense charged. Thus, even if the evidence secured in the house was improperly admitted its admission could not have been prejudicial. The introduction of illegally secured evidence does not *per se* require a reversal—it depends upon whether such evidence was prejudicial. *People v. Valenti*, 49 Cal.2d 199, 316 P.2d 633; *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505; *People v. Felli*, 156 Cal.App.2d 123, 318 P.2d 840. Here, even if the evidence were illegally secured, its erroneous admission into evidence could not possibly have been prejudicial.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.



163 Cal.App.2d 762

**The PEOPLE of the State of California,**  
Plaintiff and Appellant,  
v.

**Johnnie Lee CANTLEY,** Defendant and  
Respondent.  
Cr. 6203.

District Court of Appeal, Second District,  
Division 3, California.  
Sept. 26, 1958.

Defendant was charged by information with owning and having in his possession and under his custody and control a revolver capable of being concealed upon the person after defendant had been convicted of a felony in violation of West's Ann.Pen.Code, § 12021. From an order of the Superior Court of Los Angeles County, Albert E. Wheatcroft, J., setting aside the information on ground defendant had been committed without reasonable or probable cause, the People appealed. The District Court of Appeal, Vallée, J., held that evidence before committing magistrate justified conclusion that officers had reasonable cause to arrest defendant and, as an incident to arrest, were entitled to search automobile which he was driving.

Order reversed.

**1. Indictment and Information** ⇨137(4)

On motion to set aside information, court is only to determine whether magistrate acting as a man of ordinary caution or prudence could conscientiously entertain a reasonable suspicion that a public offense had been committed in which defendant participated, and question of guilt or innocence of defendant is not before court nor does issue concern quantum of evidence necessary to sustain conviction. West's Ann. Pen.Code, § 995.

**2. Indictment and Information** ⇨137(4)

On motion to set aside information, court may not substitute its judgment as to the weight of evidence for that of magistrate, and if there is some evidence to support information, court will not inquire in-

to its sufficiency. West's Ann.Pen.Code, § 995.

**3. Indictment and Information** ⇨137(4)

Under statute, information will be set aside only where there is no evidence that a crime has been committed or no evidence to connect defendant with a crime shown to have been committed. West's Ann.Pen. Code, § 995.

**4. Arrest** ⇨63(4)

Such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that defendant is guilty of a felony affords "reasonable cause" for arrest.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

**5. Arrest** ⇨63(4)

In determining whether arresting officer had probable cause to believe a person had committed a felony and therefore was justified in placing him under arrest, court looks only to the facts and circumstances presented to officer at time he was required to act.

**6. Municipal Corporations** ⇨188

Police officers had right to interrogate driver of automobile observed making a U-turn on city street at night.

**7. Criminal Law** ⇨238

Revolver found on floor on driver's side of automobile stopped at night by police officers, having reasonable cause to believe driver had committed a felony, afforded "reasonable or probable cause" for committing driver on charge that after conviction for a felony he owned or had in his possession or under his custody or control a revolver capable of being concealed upon the person. West's Ann.Pen. Code, §§ 995, 12021.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

**8. Arrest** ⇨63(4), 71

Evidence before committing magistrate justified conclusion that officers, having de-

scription of suspect in robbery and murder committed in city three days previously, had reasonable cause to arrest driver of automobile observed reaching under front seat as they forced automobile to curb at night and were entitled to search automobile as an incident to arrest. West's Ann. Pen.Code, § 995.

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Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick, and Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

VALLÉE, Justice.

Appeal by the People from an order setting aside the information on the ground defendant had been committed without reasonable or probable cause. Pen.Code, § 995.

The information charged that on November 5, 1957, defendant did unlawfully own and have in his possession and under his custody and control a .38 caliber revolver capable of being concealed on the person and having a barrel less than 12 inches in length, and that defendant had theretofore, on November 15, 1940, been convicted of a felony by the United States District Court of the Western District of Arkansas in violation of section 12021 of the Penal Code.

Penal Code, section 12021, provides that any person who has been convicted of a felony under the laws of the United States "who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed, upon the person is guilty of a public offense."

Mix Lewis, a police officer of the city of Los Angeles, testified at the preliminary hearing as follows: about 10:45 p. m. on November 5, 1957, he, in company with

another police officer, saw defendant get out of his automobile in front of 1401 Santee Street in Los Angeles, enter an apartment house, stay two or three minutes, return and get into his car, make a U-turn on Santee and head north from 14th Street on Santee; he and the other officer were in a police vehicle; about 100 feet south of Pico Boulevard he had defendant pull his car over to the curb;<sup>1</sup> as defendant pulled over to the curb he "saw the defendant reach—as if reaching under the seat—front seat of the vehicle"; defendant got out of his car, walked back toward the police car, and said, "What did I do wrong, Officer?"; he asked defendant his name and where he was coming from; defendant said "his name was Cantley and that he had just been over to 14th and Santee to see a friend of his by the name of John Benson"; he asked defendant what he put underneath the front seat of his car; defendant said, "Nothing"; he had learned from a police report of a robbery and murder which occurred on November 2 at 4173 South Harvard in Los Angeles; the police report described the suspect as "Approximately five eight or nine, 170 to 180 pounds; male Negro, dark complected; wearing a dark jacket and light pants"; at the time defendant said "Nothing," he (the officer) believed defendant had committed a felony—the robbery and murder at 4173 South Harvard; he then opened the car door on the driver's side, flashed a flashlight in the car, and saw a revolver lying on the floorboard on the driver's side; he took possession of the revolver; it had six live rounds of ammunition in the cylinder; defendant said he got the gun from a John Benson about three months before, he loaned the man \$13 on the gun, he needed the money and had gone to see if he could get the money for the gun at 1402 Santee, that Benson was not at home so he was leaving.

The revolver, introduced in evidence at the preliminary hearing, was capable of being concealed on the person. Proof was

1. Pico Boulevard is between Twelfth and Fourteenth Streets.

made that defendant had been convicted of a felony on November 15, 1940, in the District Court of the United States for the Western District of Arkansas.

[1-3] "On a motion to set aside an information, the question of the guilt or innocence of the defendant is not before the court, nor does the issue concern the quantum of evidence necessary to sustain a judgment of conviction. The court is only to determine whether the magistrate, acting as a man of ordinary caution or prudence could conscientiously entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated. [Citation.] A court may not substitute its judgment as to the weight of the evidence for that of the magistrate. If there is some evidence to support the information, the courts will not inquire into its sufficiency. Under section 995 of the Penal Code, the information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed." *People v. Platt*, 124 Cal.App.2d 123, 131, 268 P.2d 529, 534.

[4,5] Reasonable cause to believe a person had committed a felony is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty of a felony. *People v. Moore*, 141 Cal.App.2d 87, 89, 296 P.2d 91. In determining whether an arresting officer had probable cause to believe a person had committed a felony and therefore was justified in placing him under arrest, the court looks only at the facts and circumstances presented to the officer at the time he was required to act. *People v. Paul*, 147 Cal.App.2d 609, 619, 305 P.2d 996.

The court in *People v. Borbon*, 146 Cal. App.2d 315, at page 319, 303 P.2d 560, at page 563, stated:

"In the instant case the arresting officers received an all-points bulletin regarding the robbery and describing

the suspect. Based on the information received, they had reasonable grounds to stop defendants' car and question them as suspects. From the observation of appellant, dressed as he was, being a Mexican of his age, fitting the description of the suspect, riding in a car fairly well described, and observing the five receipts on the front seat of the car which were taken from the victim, the arrest of the suspects and search of them and the car were justified."

Also see *People v. Romero*, 156 Cal.App.2d 48, 49, 318 P.2d 835.

In *People v. Jiminez*, 143 Cal.App.2d 671, at page 673, 300 P.2d 68, at page 70, it is said:

"The officers had a right to interrogate persons on the streets in the nighttime. *People v. Simon*, 45 Cal. 2d 645, 650, 290 P.2d 531. When, as they approached defendants to perform this lawful duty, they saw the Balazs movement, they were justified in thinking it likely that he had a weapon. If the proposition holds true that search is not justified by its results, the converse holds true that a search based on appearances is not rendered unlawful by the fact that the contraband actually on hand was not that which reasonably was thought to be present.

"The case of *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57, is very much in point. Officers saw a cab parked in front of a hotel at 3 a. m., a man and woman in the back seat. The officers ordered them out, and saw one of them withdraw his hand from the juncture of the seat and back cushion. The officer removed the seat and found three marijuana cigarettes. The furtive action of defendant was held to have given reasonable grounds for belief that he was hiding contraband. His act was similar to that of Balazs in the present case, but the present case is somewhat stronger for the



People because the ordering of the occupants out of the car in the Blodgett case was before, and in this case after, the furtive motion. It is a natural impulse on confrontation to hide immediately any contraband, and one cannot be heard to complain that he, or a companion, has betrayed the presence of illegal goods by the alacrity with which he attempted to conceal them. Likewise, as was said in *People v. Martin*, 46 Cal.2d 106, 293 P.2d 52, the officers in making the investigation had a right to protect themselves, as by ordering the men out."

In *People v. Sanson*, 156 Cal.App.2d 250, 319 P.2d 422, it was held that where police officers, who had reasonable grounds for stopping an automobile being driven "very slowly" at an early morning hour with defective lights, noticed that the defendants appeared to be hiding something under the front seat, it was proper for one officer, after the defendants got out of the car, to look under the front seat, and on discovering a dirty paper bag, to examine its contents; and that marijuana thus discovered was found as the result of a reasonable search.

[6-8] About 10.45 at night Officer Lewis and his partner saw defendant making a U-turn. They had a right to interrogate him. They drove their car alongside that of defendant and identified themselves as police officers. As defendant pulled over to the curb he was observed making a furtive movement: reaching under the front seat of the car. Prior to that time the officers had learned of a robbery and murder in which they had a description of a suspect. It could be inferred that defendant fitted the description. The magistrate saw defendant, had an opportunity to compare him with the description, and could conclude that the officers had reasonable cause at the time of the arrest to believe defendant had committed a felony. We think the magistrate was justified in concluding that the officers acted reasonably in light of the

information they had received in connection with what they observed, and that he was warranted in concluding they entertained a reasonable suspicion defendant had committed a felony, that they had reasonable cause to arrest defendant and, as an incident to the arrest, were entitled to search defendant's car.

The order is reversed.

PARKER WOOD, Acting P. J., concurs.



163 Cal.App.2d 791

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**J. R. LEON, also known as Jerome F. Moki,**  
Defendant and Appellant.

Cr. 1170.

District Court of Appeal, Fourth District,  
California.

Sept. 26, 1958.

Defendant was convicted in the Superior Court of San Bernardino County, Edward P. Fogg, J., for issuing a check without sufficient funds, and he appealed. The District Court of Appeal, Mussell, J., held that since defendant's plea of "not guilty by reason of insanity" remained undisposed of, judgment of conviction had been prematurely entered.

Judgment reversed.

#### 1. False Pretenses ⚡39

An intent to defraud is a fact which may be inferred from acts or omissions of accused, or from surrounding circumstances.

#### 2. False Pretenses ⚡42, 51

Intent to defraud is subject of evidence in same manner and to same extent,

depending upon same general rules of procedure, as any other necessary fact in case, and is a question of fact for jury or court to determine.

### 3. False Pretenses $\S$ 49(2, 3)

In prosecution for issuing a check without sufficient funds, evidence would sustain finding that defendant had written check with intent to defraud, and that he had had insufficient funds or credit with drawee bank to meet check involved at time it was presented for payment. West's Ann. Pen.Code,  $\S$  476a.

### 4. Criminal Law $\S$ 406(1), 680(1)

Order of proof was within discretion of trial judge, in prosecution for issuing a check without sufficient funds; and it was not an abuse of discretion for trial judge to admit extrajudicial statements and admissions of defendant, which were not essential to establish commission of crime charged, notwithstanding defendant's contention that prima facie case had not been established and that such extrajudicial matter should not have been admitted.

### 5. Criminal Law $\S$ 1189, 1192

Where defendant's plea of "not guilty by reason of insanity" remained undisposed of, judgment of conviction was prematurely entered; and, accordingly, reviewing court would have to reverse judgment and remand case for trial upon that issue; and if, on remand, defendant was found sane, court would have to resentence him as provided by law.

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B. H. Findlay, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with issuing a check without sufficient funds (Pen.Code, Sec. 476a). It was alleged in the information that the appellant J. R. Leon, also known as Jerome F. Moki, on or about July

25, 1956, with intent to defraud the Bank of America, Upland Branch, and the Bank of America, Sixth and "K" Branch, Sacramento, California, made, drew, uttered and delivered to Aase Gram and Bank of America, Upland Branch, a check in the sum of \$75, knowing at the time that he had neither sufficient funds in or credit with said bank for the payment of said check in full upon its presentation. Four prior felony convictions were also alleged in the information. Appellant entered pleas of "not guilty" and "not guilty by reason of insanity", admitted one of the prior convictions alleged and denied the others. Trial by jury was waived and the court found appellant guilty as charged. The three prior convictions denied were found to be true and appellant was sentenced to imprisonment in the state prison. There was no disposition made by the court of the issue raised by the plea of "not guilty by reason of insanity".

[1-3] Appellant's first contention is that the evidence was insufficient to show intent to defraud and there was no showing of a lack of sufficient funds or credit with the drawee bank to meet the check involved at the time it was presented for payment. This contention is without merit. The evidence shows that the check was presented to Aase Gram, a teller for the Bank of America, Upland Branch, on or about July 25, 1956. The check appeared to be a payroll check of "Moki's School of Jiu-jitsu". It was dated July 15, 1956, and drawn on the Bank of America, Sixth and "K" Branch, Sacramento, California, to the order of J. R. Leon. It was signed by Jerome K. Moki and endorsed by appellant in the presence of the teller, Aase Gram. She gave appellant cash in the sum of \$75, the amount of the check. "Moki's School of Jiu-jitsu" had no account in the Bank of America, Sixth and "K" Branch, on July 15, 1956, said account having been closed on July 6, 1956, at which time it was overdrawn in the sum of \$20.81.

Exemplars of appellant's handwriting were compared with the signature "Jerome

F. Moki" on the check and the endorsement "Jerry Robert Leon" on the back thereof. There was evidence that the two signatures had been written by the same person. At the trial defendant denied signing "Jerome Moki" on the face of the check. However, on cross-examination, he admitted that he had told an officer that he wrote the name "Jerome F. Moki" to the check, rather "than to drag my family in".

Appellant's defense was mainly that he had not written the check and he made no attempt at the trial to show that he had funds or credit in the bank to meet the check upon its presentation.

An intent to defraud is a fact which may be inferred from the acts or admissions of the accused, or from the surrounding circumstances. *People v. Markos*, 146 Cal. App.2d 82, 85, 303 P.2d 363. The intent to defraud is the subject of evidence in the same manner and to the same extent, depending on the same general rules of procedure, as any other necessary fact in the case, and it is a question of fact for the jury or court to determine. *People v. Oster*, 129 Cal.App.2d 688, 692, 278 P.2d 39. In *People v. Wallin*, 34 Cal.2d 777, 780, 215 P.2d 1, 3, the court said:

"The court must assume in favor of the verdict the existence of every fact which the trier of fact could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the appellate court to pass upon is whether there was evidence in the record justifying the inference of guilt. *People v. Deysher*, 2 Cal.2d 141, 40 P.2d 259; *People v. Payton*, 6 Cal.App.2d 198, 44 P.2d 376."

We conclude that the evidence and the inferences to be drawn therefrom are sufficient to support the findings of the trial court.

[4] Appellant further claims that the trial court committed prejudicial error in admitting and considering extrajudicial statements and admissions of appellant. This contention is likewise without merit. It is based on the assumption that a prima facie case was not established and that therefore the extrajudicial statements and admissions should not have been admitted. However, the admissions and statements of appellant were not essential to establish the commission of the crime charged and the order of proof was within the discretion of the trial judge. *People v. Cullen*, 37 Cal.2d 614, 624-625, 234 P.2d 1. No abuse of discretion was shown.

[5] The evidence is clearly sufficient to support the judgment of the court on appellant's plea of "not guilty". However, since the judgment was prematurely entered by reason of the failure of the trial court to pass upon appellant's plea of "not guilty by reason of insanity", the judgment is reversed and the cause remanded for trial upon the remaining issue of "not guilty by reason of insanity". If appellant is found "not guilty by reason of insanity", the court will then take proper steps in the premises. If appellant is found sane in the insanity issue, the court will resentence him as provided by law. *People v. Wilson*, 15 Cal.App.2d 172, 179, 59 P.2d 187.

Judgment reversed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem., concur.



163 Cal.App.2d 709

Veronica SIMMONS, Plaintiff and Appellant,  
v.

F. W. WOOLWORTH COMPANY, a  
corporation, Defendant and  
Respondent.

Civ. 5843.

District Court of Appeal, Fourth District,  
California.

Sept. 23, 1958.

Action for injuries sustained by customer when she fell backward while riding on escalator from basement to street floor of defendant's store. The Superior Court of San Diego County, Joe L. Shell, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal Griffin, P. J., held that trial court was justified in rejecting any inference of negligence under *res ipsa loquitur* doctrine and that evidence did not establish negligence of defendant as a matter of law.

Judgment affirmed.

#### 1. Carriers ⇨280(4)

Store proprietor in operation of escalator owed the same duty of care as a common carrier toward customer using escalator.

#### 2. Carriers ⇨280(1)

Common carriers, though not insurers of absolute safety of passengers, must exercise utmost care and diligence of very cautious persons as far as human care and foresight can go and are responsible for injuries occasioned by the slightest neglect against which human care and foresight might have guarded.

#### 3. Appeal and Error ⇨996

##### Negligence ⇨136(3)

Where the defendant was negligent or plaintiff was contributorily negligent is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented, and where two or more inferences can be reasonably deduced

from the facts, reviewing court is without power to substitute its deductions for those of trial court.

#### 4. Negligence ⇨121(2)

"*Res ipsa loquitur*" doctrine is not applicable unless it appears either as a matter of common experience or from evidence in the case that accident was of a type which probably would not happen unless some one was negligent and that defendant had sufficient control or connection with accident that it can be said that he was more probably than not the person responsible for plaintiff's injury.

See publication Words and Phrases, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

#### 5. Negligence ⇨121(2)

Plaintiff may properly rely on *res ipsa loquitur* doctrine even though he participated in events leading to accident, if the evidence excludes his conduct as the responsible cause.

#### 6. Negligence ⇨121(2)

Purpose of rule that for *res ipsa loquitur* to apply, accident must not have been due to any voluntary action or contribution by plaintiff is merely to assist court in determining whether it is more probable than not that defendant was responsible for accident and the rule should not be confused with problem of contributory negligence.

#### 7. Carriers ⇨316(1)

In action for injuries sustained by customer when she fell backward while riding on escalator from basement to street floor of defendant's store, trial court was justified in rejecting any inference of negligence under "*res ipsa loquitur*" doctrine on ground that customer's conduct as responsible cause of fall could not reasonably be excluded and because plaintiff did not meet burden of showing that defendant was more probably than not the one responsible for injury to customer.

#### 8. Carriers ⇨318(1), 320(23)

In action for injuries sustained by customer when she fell backward while

riding on escalator from basement to street floor of defendant's store, failure of defendant's clerk, who was a member of safety committee, to assist customer up escalator or warn her to use stairs did not establish negligence of defendant as a matter of law or sustain plaintiff's burden of proving that injuries were due proximately to negligence of defendant, in view of evidence that customer may have lost her balance and fallen because of lack of capacity to sufficiently grip handrail or that boy accompanying her may have lost his balance and pulled customer backward.

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Benjamin Weissmann and Johnson & Johnson, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff-appellant brought this action for personal injuries against defendant-respondent company, alleging that on September 10, 1955, she descended to the basement of defendant's store by escalator to purchase various items, and after making such purchases she again made use of it to ascend to the street floor; that while so ascending she was injured due to the carelessness and negligence in the maintenance of said escalator in that it was being maintained in a dangerous, defective and unsafe condition; that plaintiff had no notice of such condition and she was using it in the ordinary and usual manner for which it was designed. She sought general damages in the sum of \$50,000 and special damages in the sum of \$3,000.

By answer defendant generally denied these allegations, admitted plaintiff did fall while ascending on said escalator, and alleges the affirmative defense of contributory negligence on her part. A trial by the court resulted in a judgment for defendant with a finding that plaintiff entered the premises and on ascending from the basement, as alleged, she fell and sustained certain injuries, incurred certain bills and lost certain income. It specifically found

that defendant was not negligent in its maintenance and operation of the escalator, and that neither the fall nor the injuries were caused by any negligent act or omission of the defendant.

It is plaintiff's claim on appeal that the evidence is contrary to the findings and insufficient to support the judgment; that it clearly indicates a failure on the part of defendant to fulfill its duty of care toward the plaintiff; and that the evidence gave rise to an inference of negligence under the doctrine of *res ipsa loquitur*.

[1,2] It was stipulated or agreed by counsel and the court that the defendant's operation of the escalator placed it in the category of a common carrier, and the duty of care for the plaintiff in the instant case was the same as that of a common carrier, citing *Hendershott v. Macy's*, 158 Cal.App.2d 324, 322 P.2d 596; and *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 P. 954, to the effect that although not insurers of the absolute safety of passengers, the common carrier is bound to the utmost care and diligence of very cautious persons as far as human care and foresight can go and are responsible for injuries occasioned by the slightest neglect against which human care and foresight might have guarded. See, also, *McBride v. Atchison, Topeka & S. F. Ry. Co.*, 44 Cal.2d 113, 119, 279 P.2d 966; and *Croom v. Chicago, M. & St. P. Ry. Co.*, 52 Minn. 296, 53 N.W. 1128, 18 L.R.A. 602.

[3] It is defendant's claim that the sole question on this appeal is whether or not there is any substantial evidence which directly or inferentially supports the court's finding, citing *Callahan v. Gray*, 44 Cal.2d 107, 111, 279 P.2d 963, 965, where the rule is stated to be that:

"Whether or not defendant was guilty of negligence \* \* \* or plaintiff was guilty of contributory negligence \* \* \* is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evi-

dence presented' \* \* \* and 'When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court \* \* \*'" (Citing cases.)

In support of her claimed cause of action plaintiff testified she had been a maid at the Mercy Hospital and had sprained her leg and had been off duty for some time, but on September 10th she was able to place her weight on her sprained leg and was about ready to go back to work; that although she did not use crutches in her home the doctor told her it was better for her to use them when she went out so she took them with her; that in company with her grandson, who had been on the escalator before that day, she safely rode the escalator to the basement, bought a little train for him, and started up the escalator carrying her package (about one foot square), crutches (because she did not need them to support her), and her handbag with one arm, and gripping the rail with her hand; that the boy had one hand on the rail and one hand was holding onto the pocket in her jacket; that the escalator was moving continuously; that there were no other passengers on it; that when she stepped on the escalator it "seemed as though" it "shook as though something heavy or something was under your feet \* \* \* it acted as though it couldn't go \* \* \* trudging \* \* \* and that is the only thing"; that she didn't have any idea of what happened; that she did not notice any change in the way the escalator was moving; that when about half way up she fell backwards and found herself at the bottom of the escalator with her head on the floor and her feet extending up on the escalator; and that she supposed the company had stopped it by that time; that she suffered considerable injuries, was taken to the hospital, and was under treatment for some time. She testified that about one year before that she had broken her hip and she had always gone on that escalator ev-

ery time she went down town because that is the only way she could get upstairs.

Thereafter plaintiff called a clerk in the curtain department in the basement of defendant's store under section 2055 of the Code of Civil Procedure. She testified that her counter was about 10 to 15 feet from the escalator; that her other duties were as a buyer and she was on the safety committee of the store; that they watched the activities of other employees, involving safety precautions and checked on the escalator, and in case of an accident they turned it off; that on the day in question she recalls seeing a woman with crutches, accompanied by a little boy; that the woman with the crutches was standing by the escalator for a few minutes as though she was deciding whether she wanted to go up or not; that she (the clerk) turned her head to wait on a customer and the next thing she heard was a scream and the lady was lying at the bottom of the escalator; and that the escalator was turned off by some one on the safety committee. She then said that on occasions if people have crutches or seem to be frightened of the escalator some member of the committee might ask them to go up on the stairway, or if they seemed as though they could not go up normally and are a little bit afraid, they have gone up on the escalator behind them so they would not fall; that she was waiting on a customer and did not ask plaintiff to take the stairs nor did she go with her up the escalator. Thereafter, plaintiff rested her case on the question of liability. Defendant moved for a nonsuit but subsequently withdrew its motion and rested its case on the question of liability. Thereafter the court made the findings indicated.

[4-6] In *Zentz v. Coca Cola Bottling Company*, 39 Cal.2d 436, 247 P.2d 344, in discussing the elements of the doctrine of *res ipsa loquitur*, the court held that for *res ipsa loquitur* to apply it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless some one was negligent,



since in the absence of such a probability there would be no basis for an inference of negligence which would serve to take the place of evidence of some negligent act or omission; that for *res ipsa loquitur* to apply it must appear that defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury; that a plaintiff may properly rely on *res ipsa loquitur* even though he has participated in the events leading to the accident, if the evidence excludes his conduct as the responsible cause; and that a statement in cases that for *res ipsa loquitur* to apply the accident must not have been due to any voluntary action or contribution on the part of the plaintiff should not be confused with the problem of contributory negligence, and its purpose, like that of control by defendant is merely to assist the court in determining whether it is more probable than not that defendant was responsible for the accident.

[7] Under the evidence related, the trial court was justified in rejecting any inference of negligence under the rule, believing it could not reasonably exclude plaintiff's conduct as the responsible cause and because plaintiff did not meet the burden of showing that defendant was more probably than not the one responsible for plaintiff's injury. See also *Worden v. Central Fireproof Building Co.*, 172 Cal. 94, 96, 155 P. 839.

[8] The claimed acts of negligence of defendant, which plaintiff claims were shown as a matter of law, involve the failure of defendant's clerk or safety committee member in not assisting plaintiff up the escalator or warning her to take the stairs. Here it appears that plaintiff was familiar with this escalator, having used it on many

previous occasions. Although she did not need her crutches and could stand on her feet without strain, she chose to carry her crutches which she did not in fact need for walking purposes. Apparently she was carrying them at the time she was about to step upon the escalator and did in fact negotiate the first step in safety without assistance and it was not until she was half way up that she fell and said she did not know the reason. Her testimony that there seemed to be strain, sluggishness or "trudging" as she first stepped on it may well have been discounted by the trial judge in view of the testimony that the escalator continued to run and she did not notice any change in the way it was running. At least the trial court could have found from plaintiff's actions in approaching the escalator and satisfactorily negotiating the first step that it was reasonable to believe she did not need the assistance of the clerk and that plaintiff could well negotiate the trip unassisted. Apparently plaintiff thought she could and it was not unreasonable for the clerk to think likewise. From the evidence produced the court may well have believed that the plaintiff properly entered the escalator and that the cause of her fall was not due to its sudden stopping or starting but from plaintiff losing her balance by reason of her lack of capacity to sufficiently grip the handrail or that the boy may have lost his balance and pulled plaintiff backwards in a fall. Under these circumstances it cannot be said that defendant was guilty of negligence as a matter of law or that plaintiff had met the burden of proving her injuries were due proximately to defendant's negligence.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, Justice pro tem., concur.

163 Cal.App.2d 615

Frederick R. GUNN, Plaintiff and  
Respondent,

v.

PRESIDENT TANK LINES, INC., a corporation, President Truck Lines, Inc., a corporation, President Freight Lines, Inc., a corporation; Does I, II, III, IV, Individually and as co-partners dba President Tank Lines, President Truck Lines, President Freight Lines; President Tank Lines, a co-partnership, President Truck Lines, a co-partnership, President Freight Lines, a co-partnership; Does V, VI, VII and VIII, Defendants,

President Tank Lines, Inc., Appellant.

Civ. 23082.

District Court of Appeal, Second District,  
Division 3, California.

Sept. 18, 1958.

Action for personal injuries sustained by plaintiff when his automobile collided at an intersection with corporate defendant's left-turning truck. The Superior Court, Los Angeles County, Stanley Mosk, J., entered an order granting plaintiff's motion for new trial and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence, including testimony that defendant's truck made a sudden left turn in front of plaintiff's approaching automobile and that truck driver had not signaled such a left turn, would support a verdict for plaintiff, and therefore order granting a new trial would be affirmed.

Order affirmed.

#### 1. New Trial ⇐68

In intersectional automobile collision case, evidence, including testimony that defendant's truck made a sudden left turn in front of plaintiff's approaching automobile and that truck driver had not signaled such a left turn, would support a verdict for plaintiff, and therefore order granting plaintiff a new trial would be affirmed. West's Ann.Vehicle Code, § 551.

1. The truck driver did not testify at the trial in person or by deposition, having

#### 2. Appeal and Error ⇐1015(1)

An order of a trial court granting a new trial will be reversed only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

#### 3. Appeal and Error ⇐843(2)

Where an order granting plaintiff in an automobile accident case a new trial was affirmed on ground there was substantial evidence to support a verdict for plaintiff, District Court of Appeal would not decide whether it was prejudicial error to give an instruction on unavoidable accident.

Hecker & Dunford and Nathan L. Schoichet, Beverly Hills, for appellant.

Oliver, Good & Sloan and Henry E. Kappler, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an order granting plaintiff's motion for a new trial.

The action is to recover damages for personal injuries sustained in a collision between a 1955 Dodge automobile driven by plaintiff and defendant's 1948 tank truck and tank pull trailer, operated by Herman Cole,<sup>1</sup> an employee of defendant. The tank truck and tank pull trailer had an overall length of 60 feet; it was empty and weighed about 33,000 pounds.

The accident occurred about 10 a. m. on May 19, 1956, at the intersection of Foothill Boulevard and Etiwanda Avenue in San Bernardino County. Foothill Boulevard was a through highway (U. S. Highway 66) with two lanes running east and two running west, each lane measuring about 10 to 11 feet. A 4½-foot painted divider separated the north and south sides of the highway, and each side had a paved shoulder about 8 feet wide. Etiwanda Avenue runs north and south, was about 49 feet wide, and had boulevard stop signs for vehicles entering Foothill in either direction. The area where the accident occurred was rural in

died about a month after the accident from unrelated causes.

character. Foothill was in a 55 mile per hour zone.

Plaintiff was traveling east on Foothill in the lane next to the dividing strip, referred to as lane E-1. Defendant's truck was approaching in a westerly direction on Foothill, also in the lane nearest the divider. The day was clear and dry. Traffic was light and there were no eastbound cars in front of plaintiff for a half mile or a mile from the intersection.

Plaintiff testified: he was traveling between 40 and 45 miles an hour and estimated that when he first saw the truck it was about 800 feet "down the road," traveling about the same speed; as he approached the intersection he slowed down slightly; he did not see the signal arm on the truck raised for a left turn or any signal of an intention to make a left turn; when he was about 75 feet west of the intersection the driver of the truck suddenly made a left turn in front of him, traveling about 15 miles an hour; he immediately applied his brakes and swerved to the right, skidding into the impact, and glancing off defendant's vehicle; he estimated he was traveling 10 to 15 miles an hour at the moment of impact. There was evidence that the truck was traveling from 2 to 6 miles an hour as it made the left turn.

Police officers who were called to the scene testified that plaintiff's car laid down about 81 feet of locked wheel skid marks on two wheels and 51 feet on the other two wheels in lane E-1, leading almost to the southerly edge of the shoulder. There were no skid marks left by the tank truck and trailer, and no evidence that the driver applied his brakes prior to the collision. The officers checked the brakes on both vehicles and found they were working satisfactorily. Plaintiff's car was damaged at the left front and side.

An expert, a graduate civil engineer and technical consultant, called by plaintiff, testified from facts encompassed in a hypothetical question that plaintiff's car was traveling approximately 44 to 46 miles an hour at the time the brakes took hold, and that plaintiff's car was only 52 feet west of

the intersection when the front of the truck was in the intersection. Another of plaintiff's expert witnesses, a police sergeant, testified he was of the opinion, based on the skid marks, plaintiff's vehicle was traveling about 41½ miles an hour when it started to lay down the skid marks.

The motion was granted on the grounds of insufficiency of the evidence to justify the verdict and error of law in the giving of an instruction on unavoidable accident.

[1] On the hearing of the motion below, counsel for defendant-appellant stated there was "a lot of testimony and a lot of conflict in the evidence"; "I feel it was a close case. Many of them are. However, I strongly feel it was a question of fact, not only as to the negligence of the truck driver, but the contributory negligence of the plaintiff." In view of this concession as to the state of the evidence in the trial court it is obvious there is evidence which would support a verdict for plaintiff and consequently that the order must be affirmed. *Brown v. Guy*, 144 Cal.App.2d 659, 661, 301 P.2d 413.

[2] The rules which govern a reviewing court in the determination of an appeal from an order granting a new trial are so well known they need not be repeated. The order of the trial court will be reversed only when it can be said as a matter of law there is no substantial evidence to support a contrary judgment. *Gibson v. Stuck*, 125 Cal. App.2d 340, 342, 270 P.2d 17. See the comprehensive statement of this court in *Marlowe v. City of Los Angeles*, 147 Cal.App.2d 680, 683, 305 P.2d 604; also, *Jensen v. Western Pioneer Ins. Co.*, 151 Cal.App.2d 570, 573, 312 P.2d 285; *Hughey v. Candoli*, 159 Cal.App.2d 231, 323 P.2d 779.

We cannot say, as a matter of law, that there was no substantial evidence to support a verdict for plaintiff. The court could have inferred that plaintiff was close to the intersection at the time the truck driver began his left turn. The court also could have inferred from the evidence that the truck was going as slow as 2 to 6 miles an hour, that the driver could easily have brought his equipment to a stop before any impact oc-



curred if he had been exercising ordinary care. And it could have concluded that the truck driver was required to yield the right of way and that he failed to do so; that his failure was negligence, and that his negligence was the sole proximate cause of the accident. At the time in question section 551 of the Vehicle Code provided:

"The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard."

[3] It is unnecessary to decide whether it was prejudicial error to give an instruction on unavoidable accident. See *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500; *Brenner v. Beardsley*, 159 Cal.App.2d 304, 323 P.2d 841.

The appeal is without merit.

The order is affirmed.

PARKER WOOD, Acting P. J., concurs.



163 Cal.App.2d 639

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Arthur BARKOFF, also known as A.**  
**Barkoff, Defendant and Appellant.**

**Cr. 3460.**

District Court of Appeal, First District,  
Division 1, California.

Sept. 19, 1958.

Hearing Denied Nov. 12, 1958.

Defendant was convicted of abortion. The Superior Court, County of Contra Costa, Homer W. Patterson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Bray, J., held that even though woman's testimony that

she had wanted a pessary for an abortion and that defendant after inserting it used a vibrator to start cramps was difficult to reconcile with any possibility that defendant could have inserted it for contraceptive purposes only, determination of defendant's intent was made upon circumstantial rather than direct evidence and instruction that to find defendant guilty on circumstantial evidence alone, the proved circumstances must be irreconcilable with any conclusion other than guilt should have been given, but failure to do so was not prejudicial where court instructed jury to give defendant benefit of any reasonable interpretation of evidence favorable to his innocence and evidence of defendant's guilt, although circumstantial, was overwhelming.

Affirmed.

#### 1. Criminal Law §814(17), 824(9)

An instruction on irreconcilability of circumstantial evidence must be given, whether requested or not, in any case where conviction rests substantially on circumstantial evidence, but instruction need not be given where conviction is based principally upon direct testimony of victim and circumstantial evidence is only incidental and corroborative.

#### 2. Criminal Law §784(1), 829(15)

In prosecution for abortion, even though woman's testimony that she had wanted a pessary for an abortion and that defendant after inserting it used a vibrator to start cramps was difficult to reconcile with any possibility that defendant could have inserted it for contraceptive purposes only, determination of defendant's intent was made upon circumstantial rather than direct evidence and instruction that to find defendant guilty on circumstantial evidence alone, the proved circumstances must be irreconcilable with any conclusion other than guilt should have been given, but failure to do so was not prejudicial where court instructed jury to give defendant benefit of any reasonable interpretation of evidence favorable to his innocence and

evidence of defendant's guilt, although circumstantial was overwhelming. West's Ann.Pen.Code, § 274.

### 3. Criminal Law § 772(5), 1172(1)

In prosecution for abortion, instruction on general criminal intent should not have been given, but where, by believing prosecution witness, jury could not escape finding requisite intent, instructions stressed necessity of specific intent, and jury, by acquitting defendant on counts relating to alleged abortions performed on two other women, demonstrated that it understood that specific instructions on intent prevailed, giving of instruction was not prejudicial. West's Ann.Pen.Code, § 274.

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Carlson, Collins, Gordon & Bold, John Ormasa, Richmond, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

On this appeal by defendant from a judgment of conviction after jury verdict, on two counts of violating section 274, Penal Code (abortion) and from denial of his motion for new trial, defendant makes but two contentions: (1) failure of the court to give on its own motion an instruction similar to CALJIC No. 27; (2) alleged error in instructions on intent.

Record.

Defendant was charged by indictment with four counts of abortion, each on a different woman. The jury acquitted him on counts II and III. Briefly, the evidence is as follows: For 20 years defendant has been a licensed chiropractor practicing in Richmond. Count I. Evangeline testified that believing herself to be pregnant, and directed by a friend, she went to defendant's office, with Joel, a friend. There, defendant instructed her to take off her underpants. He then took her to his treatment room where he requested her

to lie on a table. With a speculum he opened up her private parts and inserted a pessary. No mention of Evangeline's menstrual periods was made by either person. While inserting the pessary or immediately thereafter defendant told Evangeline that she could expect her menstrual period to start within one hour to several days; that she would have a heavy vaginal flow which would probably end with cramps and a miscarriage. She paid defendant \$35, receiving no receipt. At midnight she began having vaginal flow of blood. Three days later she removed the pessary. The next day she became ill and went to a hospital where some 11 days later she had a miscarriage and expelled a fetus.

Count II. Marian determined that she was about three months pregnant. At defendant's office she told him that she "feared being pregnant or becoming pregnant." She did not remember the specific language she used. Defendant told her he could administer a pessary for prevention, although he did not ask about her menstrual periods or physically examine her. He took her to the treatment room where he inserted a pessary. She paid him \$35, receiving no receipt. From that night (Saturday) until Wednesday there was a heavy vaginal flow. She then expelled both the pessary and an 11-inch fetus.

Count III. Lee Ila was told she was pregnant after having an appendectomy performed. Her sister took her to defendant. Defendant asked her how many months she had "been gone." Just before inserting a pessary defendant told her not to tell any one what he was doing because it would incriminate them both. After about seven days the pessary became dislodged. After about another seven days she returned to defendant, who took out the pessary, telling her to return in about a week. On returning he then inserted another pessary, saying "This one will do the job." A couple of weeks later she began to have a vaginal flow and cramps. She was taken to a hospital where she

had a miscarriage. Lee Ila's sister paid defendant \$35.

Count IV. Vernadine, discovering that she was 2 or 3 months pregnant, decided to terminate the pregnancy by getting a "button" to cause a miscarriage. She went to defendant's office and asked him for a "button." When he asked her what she wanted it for, she told him that she might be pregnant as she had missed a couple of menstrual periods. Defendant quoted a price of \$35 for a pessary. Not having the money with her she made an appointment for a later date. Returning a few days later, she told defendant that she wanted a pessary as she was pregnant. After she removed her clothing defendant put her on a guernsey and inserted the pessary. Defendant told her the pessary should come down in several days, and if nothing happened to return, and that if it became necessary for her to go to the hospital she was to be sure to remove the pessary first. He then used a vibrator on her stomach to start the cramps. She paid defendant \$35, asking defendant for a receipt. He refused to give one. Two days later she started to bleed. She entered a hospital where that night she had a miscarriage, expelling a fetus 7 or 8 inches long. It was later determined that the fetus was 4½ or 5 months old. Prior to entering the hospital she had expelled the pessary.

The prosecution produced two other women, the first of whom testified that she had gone to defendant's office, told him she was pregnant and desired the insertion of a pessary. He complied. She returned several days later and he inserted a second pessary. In a few days she had a miscarriage and passed a fetus. The other woman told him that she had missed one of her periods and desired a pessary inserted. He did so. In a few days she passed a few small clots of blood. Each woman paid him \$35.

Dr. George Loquvam, physician and pathologist and witness for the prosecution, testified that in his opinion a pessary was not an accepted medical device for

contraceptive purposes but was an abortive, as it caused an inflammatory reaction, which will cause an abortion of the very early fetus. The insertion of a pessary into a woman pregnant from 1 to 4 months would cause an abortion. The medical reports on Evangeline, Vernadine and Lee Ila were consistent with the conclusion of criminal abortion. However, he additionally stated that pessaries had been sold as contraceptives and were known among medical men as such, but in his opinion no qualified medical person used them for any purpose as they did not prevent conception.

Defendant admitted inserting the pessaries in all four women. He claimed, however, that he did it for contraceptive purposes only and not to cause miscarriages. None of the women told him that she was pregnant nor did he know that she was. Evangeline told him that she wanted a pessary for birth control purposes so that she could finish school without becoming pregnant. Lee Ila's sister told him that Lee Ila was "playing around" and wanted the pessary for birth control so that she could finish her school. Marian also said she wanted it for birth control and stated that her menses were regular. Vernadine, who was married, told him she wanted it for birth control, that she had two children and her menses were regular. Defendant testified that pessaries had been used by chiropractors and physicians for 25 years as contraceptive devices; that the Chiropractic Board inspectors knew that he was using them for that purpose and had never complained to him regarding their use; that as far as he knew there was no question of his right as a chiropractor to use pessaries as contraceptive devices. Moreover, he did not believe that a pessary could cause a miscarriage in a pregnant woman.

Dr. David Siegman, physician and pathologist and witness for the defense, testified that pessaries were known to the medical profession as a means of contraception but were not too strongly recommended although they were still being



used by older physicians. In his opinion the insertion of a pessary into a pregnant woman would not always produce a miscarriage although there was a good chance of their doing so. From the medical records, he opined that Vernadine's miscarriage was spontaneous, the kind which is seen where there is an accidental abortion. Evangeline's miscarriage resulted from an infection which resulted more likely from another source than the pessary; and Lee Ila was no more than 1½ months pregnant at the time of her miscarriage.

#### 1. Instruction on Circumstantial Evidence.

Defendant contends the court of its own motion should have given CALJIC No. 27, or a similar instruction, to the effect that to find the defendant guilty on circumstantial evidence alone the proved circumstances must be irreconcilable with any other rational conclusion than that of guilt. The court, at defendant's request, gave CALJIC No. 26, to the effect that if the evidence is susceptible of two constructions it is the duty of the jury to adopt the one favorable to defendant's innocence; if one of the conclusions is reasonable and the other unreasonable, it is the jury's duty to adhere to the reasonable deduction, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

In this case, defendant having admitted the acts of inserting the pessaries, the main issue was the intent with which he did it—was it for purposes of abortion as claimed by the prosecution, or for contraceptive purposes, as claimed by defendant? (The court instructed that defendant was authorized to use a pessary "for every lawful purpose upon the persons of the women named in the indictment.")

[1] It seems well settled in this state that an instruction on the irreconcilability of circumstantial evidence must be given,

whether requested or not, in any case where the conviction rests substantially on circumstantial evidence. *People v. Bender*, 1945, 27 Cal.2d 164, 163 P.2d 8 [conviction for murder]; *People v. Yrigoyen*, 1955, 45 Cal.2d 46, 286 P.2d 1 [conviction for issuing a check without sufficient funds and with intent to defraud]; *People v. Koenig*, 1946, 29 Cal.2d 87, 173 P.2d 1 [prosecution for robbery]; *People v. Candiotto*, 1954, 128 Cal.App.2d 347, 275 P.2d 500 [prosecution for possession of narcotics]; *People v. Crisel*, 1955, 137 Cal.App.2d 275, 290 P.2d 9 [conviction of second degree burglary]; *People v. Neel*, 1957, 151 Cal.App.2d 1, 310 P.2d 986 [conviction of grand theft of an automobile]. The instruction need not be given where the conviction is based principally upon the direct testimony of the victim and the circumstantial evidence is only incidental and corroborative. *People v. Norton*, 1956, 141 Cal.App.2d 790, 794, 297 P.2d 439. *People v. Candiotto*, supra, 128 Cal.App.2d 347, 357, 275 P.2d 500. CALJIC No. 27, which defendant contends should have been given, itself limits its application to convictions "on circumstantial evidence *alone*." (Emphasis added.) It is sometimes difficult to determine whether the principal evidence is direct or circumstantial. Let us analyze the evidence in this case. As pointed out before, the real issue was the intent with which the doctor acted.<sup>1</sup>

As to Count I, the jury rejected defendant's version and accepted that of Evangeline to the effect that without inquiry as to her menstrual periods he inserted the pessary and then told her what to expect as a result. His statement that his action would probably result in cramps and a miscarriage was completely inconsistent with his claim that he did not intend to produce that result.

As to Count IV, while defendant denied Vernadine's version of what she told him, the jury believed her testimony that she told defendant that she was pregnant,

1. Counts II and III need not be discussed, for the acquittals make discussion of possible error as to them moot.

wanted a pessary for an abortion, and that after inserting the pessary he used a vibrator on her stomach to start the cramps, something which even he would not claim was done to prevent conception.

It seems difficult to reconcile this testimony with any possibility that in view of it defendant could have inserted the pessary for contraceptive purposes only. Still the determination of his intent is made upon the circumstances rather than direct evidence. See *People v. Wales*, 1955, 136 Cal.App.2d 846, 289 P.2d 305, and *People v. Yokum*, 1956, 145 Cal.App.2d 245, 302 P.2d 406.

[2] While CALJIC No. 27 should have been given, the failure to do so under the circumstances here was not prejudicial. The court did give CALJIC No. 26 which while not as strong as CALJIC No. 27 did require the jury to give the defendant the benefit of any reasonable interpretation of the evidence favorable to his innocence. In the second place and more important, the evidence of defendant's guilt, although circumstantial, is overwhelming. It just is not reasonable to expect any reasonable person to believe under the circumstances of this case that defendant, having been told that the women were pregnant, inserted the pessaries for contraceptive purposes. It is inconceivable that had the jury been given CALJIC No. 27 in addition to CALJIC No. 26, any different result would have followed.

In the cases hereinbefore cited holding that an instruction on irreconcilability in circumstantial evidence cases must be given on the court's own motion, no instruction similar to CALJIC No. 26 given here was given, with the exception of *People v. Bender*, supra, 1945, 27 Cal.2d 164, 163 P.2d 8, and *People v. Koenig*, supra, 1946, 29 Cal.2d 87, 173 P.2d 1. In the *Bender* case the court gave the first part of CALJIC No. 26 given here, and stated that as a result the jury was not altogether uninstructed as to the law necessary to a proper consideration of the circumstantial evidence and that the failure to give CAL-

JIC No. 27, upon the facts of the case, was not reversible error. The court said that the evidence pointed irresistably to defendant's guilt. In the *Koenig* case it was held that the refusal to give CALJIC No. 27, which had been requested by defendant, was not prejudicial error in view of the fact that CALJIC No. 26 was given. Moreover, in *People v. Candiotto*, supra, 1954, 128 Cal.App.2d 347, 275 P.2d 500, although the court held that CALJIC No. 27 should have been given, it held the error not to be prejudicial. CALJIC No. 26 was given there but the court does not expressly give any weight to that fact.

In *People v. Heuss*, 1928, 95 Cal.App. 680, 273 P. 583 [forgery], the Supreme Court in denying a petition for hearing after decision by the District Court of Appeal, Second Appellate District, Division One, stated in effect that an instruction similar to CALJIC No. 27 should have been given but "In view of the state of the record, we do not feel that we would be justified in reversing the case for the error complained of, as the evidence is sufficient in all respects to have warranted the jury in returning its verdict of guilty." 95 Cal.App. at page 684, 273 P. at page 584.

An examination of the cases in which CALJIC No. 26 was given but the failure to give CALJIC No. 27 was held prejudicial demonstrates that they were all cases in which the guilt of the defendant was a close question. In *People v. Hatchett*, 63 Cal. App.2d 144, 146 P.2d 469 (conviction of manslaughter) where an instruction similar to CALJIC No. 26 was given, but the one similar to CALJIC No. 27 offered by defendant was refused, the court held prejudicial the failure to give the latter instruction coupled with error in other instructions and the refusal to give other offered instructions on other subjects. However, the court stated, 63 Cal.App.2d at page 165, 146 P.2d at page 480: "\* \* \* we are not basing a reversal upon any single error among those which we have discussed. We regard all of them as substantial, although some are considerably

more serious than others." It then said that the evidence was not sufficient to clearly establish the defendant's guilt. In this respect and in the facts of the case, there is no similarity to our case.

In *People v. Rayol*, 65 Cal.App.2d 462, 150 P.2d 812 (conviction of violation of Penal Code, § 288a) an instruction similar to CALJIC No. 26 was given but the court refused to give an instruction offered by defendant similar to Caljic No. 27. This refusal was held prejudicial error, the court saying (65 Cal.App.2d at pages 466-467, 150 P.2d at page 814): "A portion of the police officers' testimony as to what happened between these parties in the hotel room is such that the jury might reasonably have drawn the inference that the defendant was not a knowing participant in the alleged immoral act, but a mere automaton."

## 2. Instructions on Intent.

[3] The following general instructions were given on this subject:

"In every crime or public offense there must exist a union, or joint operation, of act and intent. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused, and I further instruct you that all persons are of sound mind who are neither idiots nor lunatics nor affected with insanity to such an extent as to be unable to discern right from wrong."

"The word 'wilfully,' when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage."

"The word 'knowingly,' as used in my instructions, imports only a knowledge of the existence of the facts in question, when those facts are such as bring the act or omission within the provision of the law. The word does not require in its meaning

any knowledge of the unlawfulness of such act or omission."

"Where a person voluntarily commits an act which under the law is punishable as a crime, the law implies that the act knowingly done was committed with criminal intent, even though the perpetrator did not know that the act was so punishable."

"When the evidence shows that a person voluntarily did that which the law forbids and which it declares to be a crime, he has no defense in the fact, if it be a fact, that he did not know that his act was unlawful or that he believed it to be lawful."

The specific instructions follow:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is guilty of a criminal offense."

"The provision of the law that 'to constitute the crime of abortion, it is immaterial whether the woman is pregnant or not' does not relieve the prosecution from the duty and burden of proving to a moral certainty and beyond a reasonable doubt that the defendant believed that said women, or any of them, were pregnant."

"Stated another way, the prosecution must prove the specific intent to procure the miscarriage of said women, or any of them, and no such intent could exist unless the defendant had knowledge or believed that they, or any of them, were pregnant."

"You are further instructed that the defendant, Dr. Barkoff, was authorized to use for every lawful purpose upon the persons of the women named in the indictment the appliance which has been designated as a pessary."

"An essential element of the crime of which Arthur Barkoff is accused in the indictment is his intent, the law requiring that to constitute such a crime there must



exist a union or joint operation of criminal conduct and specific criminal intent. The law requires that to be guilty of crime one must intend the conduct that fits the description of the crime, and must engage in that conduct knowingly and wilfully."

Plaintiff concedes that as the crime of abortion requires a specific intent the instructions on general criminal intent should not have been given. The authorities support the proposition that where the lawfulness of the act depends upon a specific intent, to instruct upon general as well as specific intent normally would confuse the jury and is error. See *People v. Simms*, 1956, 144 Cal.App.2d 189, 300 P.2d 898, where on charges of grand theft by false pretenses the trial court in addition to specific instructions gave the instruction on "wilfully" given in our case; *People v. Geibel*, 1949, 93 Cal.App.2d 147, 177, 208 P.2d 743, where on charges of forgery the court additionally to specific instructions gave the "wilfully" instruction and another instruction on general intent somewhat similar to the one given here; *People v. Snyder*, 1940, 15 Cal.2d 706, 104 P.2d 639, where in a prosecution for attempted murder the trial court additionally instructed that a person is presumed to intend to do that which he voluntarily did and to intend all the natural and probable consequences of his acts; *People v. Maciel*, 1925, 71 Cal.App. 213, 234 P. 877, where on a charge of assault with a deadly weapon to commit murder the trial court additionally to specific instructions on intent gave the charge contained in the first paragraph of general instructions hereinabove set forth. In all these cases the reviewing court held the errors to be prejudicial. In *People v. Simms*, supra, 144 Cal.App.2d 189, 300 P.2d 898, the defendant was indicted on five counts of grand theft (obtaining money by false pretenses) and convicted on two. The court held the giving of instructions on both specific and general intent, combined with flagrant misconduct of the prosecuting attorney, to be prejudicially erroneous. However, the court pointed out that the

case was a close one. The facts of that case and its closeness differentiate it from ours. However, in the following cases similar errors were held not to be prejudicial: *People v. Chessman*, 1950, 38 Cal.2d 166, 183, 238 P.2d 1001, where on a charge of kidnaping the trial court additionally to specific instructions on intent gave the general instruction that to constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime; *People v. Zerillo*, 1950, 36 Cal.2d 222, 223 P.2d 223, in a prosecution for offering a bribe, the trial court additionally gave the above mentioned instruction given in the Chessman case and then added that when a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive—although the case was reversed on other grounds, the reviewing court held that under the circumstances of that case the error in giving this instruction was not prejudicial; *People v. Swenson*, 1954, 127 Cal.App.2d 658, 665, 274 P.2d 229, and *People v. Guasti*, 110 Cal.App.2d 456, 466–467, 243 P.2d 59, where in prosecutions for embezzlement and perjury respectively, instructions similar to the above mentioned one in the Zerillo case were given. In the Swenson case the trial court also gave an instruction similar to the one given here to the effect that it is not a defense to the doing of an act which the law forbids that the person did not know that his act was unlawful or that he believed it to be lawful. The reviewing court pointed out that this instruction is not contradictory of instructions on specific intent as it merely states the general rule that ignorance of the law is no excuse and relates only to defendant's knowledge and not to whether or not he had requisite specific intent.

*People v. Richardson*, 1911, 161 Cal. 552, 120 P. 20, is somewhat similar to our case. There the defendant was charged with abortion. He admitted giving the

victim certain pills at her request. His defense, as is defendant's here, was that he gave them for purposes other than to cause a miscarriage. The trial court instructed additionally to the general instructions on intent that a person is presumed to intend to do that which he voluntarily and wilfully does and must be presumed to intend all the natural, probable and usual consequences of his own acts. The Supreme Court held this instruction to be erroneous but not prejudicial under the circumstances of the case.

While the instructions on general intent should not have been given, it is inconceivable that the jury could have been misled by them. In the first place, believing the prosecution witnesses in counts I and IV as it did, the jury could not escape finding the requisite intent on the part of defendant. Secondly, the instructions stressed the necessity of there being a specific intent. The court defined the crime of abortion as the administering of a substance "with intent thereby to procure the miscarriage \* \* \*" It charged that the fact it was immaterial whether or not the woman was pregnant did not relieve the prosecution of proving beyond a reasonable doubt that the woman was pregnant, and that the prosecution must "prove the specific intent to procure the miscarriage" and that "no such intent could exist unless the defendant had knowledge or believed" that there was pregnancy. It then charged that defend-

ant was authorized to use pessaries on the woman in question for every lawful purpose. Its final instruction on intent was that an essential element of the crime charged was defendant's intent and that to be guilty he must have engaged knowingly and wilfully in conduct that fitted the description of the crime. It is inconceivable that under the facts of this case, the jury could have convicted defendant without believing Evangeline and Verna-dine, and in view of that belief could possibly have found that defendant used the pessaries for any purpose other than that charged, and for what they told him they wanted the pessaries. Thirdly, the jury acquitted defendant on counts II and III. On count II Marian's testimony as to what she told defendant easily could be reconciled with defendant's claim that he was only acting to prevent conception. On count III Lee Ila appeared to be a confused and uncertain witness, and there was medical evidence that possibly she was not pregnant when she came to defendant. On both of these counts the evidence left some doubt as to whether the women told defendant they were pregnant. At any rate, the jury demonstrated in making these acquittals that it understood that the specific instructions on intent prevailed.

Judgment and order affirmed.

PETERS, P. J., and ST. CLAIR, Justice pro tem., concur.







# CALIFORNIA REPORTER

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SECOND SERIES





50 Cal.2d 802

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Robert McSHANN, Defendant and Appellant.  
Cr. 6243.

Supreme Court of California,

In Bank.

Oct. 1, 1958.

Rehearing Denied Oct. 28, 1958.

Defendant was convicted of sale and possession of narcotics and from a judgment of the Superior Court, Alameda County, Marvin Sherwin, J., the defendant appeals. The Supreme Court, Traynor, J., held that nondisclosure of the identity of the informer was prejudicial error.

Judgment reversed.

Spence, Shenk, and McComb, JJ., dissented in part.

Vacating, 321 P.2d 533, opinion.

#### 1. Witnesses ⇨216

In narcotics prosecution, where the alleged sale by defendant was to an informer, defendant was entitled to a disclosure of his identity. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 2. Criminal Law ⇨1170½(1)

In narcotics prosecution, denying defendant disclosure of identity of the informer was not nonprejudicial on the ground that defendant received telephone calls from the informer and that defendant knew the informer's identity where the very evidence was in issue in that defendant denied that he received such telephone calls or that he made a sale to the informer. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 3. Witnesses ⇨216

The common-law privilege of nondisclosure of an informer is based on public policy and to insure the informer of some protection against reprisals. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 4. Witnesses ⇨223

It is for the court to determine whether the public interest will suffer by disclosure of identity of the informer. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 5. Witnesses ⇨216

There is no privilege of nondisclosure of name of the informer if disclosure is relevant and helpful to the defense of the accused or is essential to a fair determination of the cause and disclosure is not limited to the informer who participates in the crime alleged. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 6. Witnesses ⇨216

When it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the people must either disclose his identity or incur a dismissal. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 7. Witnesses ⇨216

In prosecution for unlawful possession of narcotics, if the informer was a material witness as to the possession, a refusal to disclose his identity was error. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 8. Criminal Law ⇨1170½(1)

In narcotics prosecution, where defendant denied possession and that he received an alleged telephone call and the officers testified thereto and the informer's telephone call was persuasive evidence on possession and the prosecution chose to introduce evidence of the call substantiating the testimony of the officers and discrediting the defendant who denied receiving the call, nondisclosure of the informer's name was prejudicial error. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

Vaughns, Dixon & White and Clinton W. White, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment of conviction on two counts of violation of section 11500 of the Health and Safety Code. Count one charged a sale of heroin on November 26, 1956. Count two charged possession of heroin on November 27, 1956.

The prosecution's evidence showed that on November 26, 1956, Police Officers McBee, Hilliard, Leen, and Goodrum met a confidential informer in Oakland. Officers McBee and Hilliard searched the informer and found no narcotics on him. The informer, accompanied by the four officers, then went to the Oakland Police Department where he made an appointment by telephone for the purchase of narcotics from defendant. Officer McBee dialed the number listed for the residence of defendant, and a recording was made of the conversation. Officers McBee, Hilliard, and Goodrum were present during the telephone conversation and later listened to the recording. The recording was played before the jury, and the officers identified the voice talking to the informer as defendant's.

The officers gave the informer a \$20 bill, a \$10 bill and a \$5 bill, each dusted with fluorescent powder. They took him to the vicinity of Market and Grand Streets where he entered an automobile driven by defendant. Officer McBee followed the automobile until he lost sight of it. Ten or fifteen minutes later the informer entered Officer McBee's automobile at 21st and Market Streets and gave Officer McBee a small bindle containing a white powder later identified as heroin. Officer Goodrum saw the informer enter the automobile identified as defendant's and followed it until the informer got out and entered Officer McBee's automobile.

On November 27, 1956, the informer again made a telephone call to defendant, which was also recorded (and later played to the jury), and arranged to purchase heroin from him at a bar. Officer McBee and the informer then went to the vicinity of the bar. Later Officer Hilliard joined them, and after listening to the recorded

conversation he obtained a warrant to search defendant's residence.

On November 27th Officers Goodrum, Reppas, and Woishnis kept defendant's residence under surveillance. Officer Hilliard instructed them to follow defendant when he left his residence and arrest him at the first opportunity. Thereafter defendant left his residence in an automobile. He stopped at the intersection of Adeline and Market Streets for a traffic signal, and the officers drove their automobile in front of his and told him that he was under arrest. They told him to back his car into a gas station and to get out and place his hands on top of the car. As he got out of the car, Officer Woishnis observed a "silvery flutter" and said: "He dropped it." Officer Goodrum saw something shiny "hit off of his [defendant's] shoe and land on the ground \* \* \*." Officer Reppas picked up four tinfoil packages and asked defendant: "What about these?" Defendant said he didn't know anything about them. A smaller package wrapped in cellophane was found in defendant's pocket. All five packages contained heroin. The officers, together with Officers Hilliard and McBee, then went to defendant's residence and searched it. They found \$1,058, including a \$20 bill, a \$10 bill and a \$5 bill on which an ultraviolet light disclosed a large amount of fluorescent powder. The prosecution's evidence also showed that defendant made certain admissions after his arrest.

Defendant testified that he was not a party to the alleged telephone conversations, denied the alleged meeting with the informer, and denied that he had possession of narcotics on November 27th.

During the cross-examination of Officers McBee and Hilliard before the jury and of Officer Hilliard on the hearing on probable cause in the absence of the jury, the trial court sustained on the ground of privilege (Code Civ.Proc. § 1881, subd. 5) the prosecution's objections to questions by the defense seeking to obtain the name of the informer. Defendant contends that the

trial court committed prejudicial error in sustaining these objections.<sup>1</sup>

Count One: The Sale of Heroin on  
November 26, 1956

[1,2] Since the alleged sale by the defendant was to the informer, defendant was clearly entitled to disclosure of his identity. *Roviaro v. United States*, 353 U.S. 53, 58, 77 S.Ct. 623, 1 L.Ed.2d 639; *People v. Alvarez*, 154 Cal.App.2d 694, 696, 316 P.2d 1006; *People v. Castiel*, 153 Cal.App.2d 653, 656-659, 315 P.2d 79; *People v. Lawrence*, 149 Cal.App.2d 435, 451, 308 P.2d 821. The People contend, however, that defendant was not prejudiced invoking the evidence that defendant received two telephone calls from the informer and that he made a sale to the informer to establish that the defendant knew the informer's identity. That very evidence was in issue, however, for defendant denied that he received such calls or that he made such a sale. There was no finding that the defendant knew the informer and it cannot be assumed that he did. Such an assumption would in effect assume his guilt. See *Roviaro v. United States*, supra, 353 U.S. at page 60, 77 S.Ct. at page 627.

Count Two: The Possession of Heroin  
on November 27, 1956

The People seek to uphold the conviction on count two on the grounds that the informer's identity has no bearing on that charge and that in any event there is a privilege of nondisclosure of informers.

[3] The common-law privilege of nondisclosure is based on public policy. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro v. United States*, supra, 353 U.S. at

page 59, 77 S.Ct. at page 627. The informer is thus assured of some protection against reprisals. The use of informers is particularly effective in the enforcement of sumptuary laws such as those directed against gambling, prostitution, or the sale and use of liquor and narcotics. Disclosure of the informer's identity ordinarily destroys his usefulness in obtaining information thereafter. See *Donnelly*, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091, 1093; 1 U.C.L.A.L.Rev. 405, 512.

[4] Section 1881, subd. 5 of the Code of Civil Procedure encompasses the privilege of nondisclosure of informers: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." There is a divergence of opinion as to whether the common-law privilege covers only the identity of the informer or also includes the contents of the communication. See *McCormick*, Evidence (1954), pp. 309-311; *Donnelly*, supra, 60 Yale L.J. at 1094-1095; 98 U. of Pa.L.Rev. 719, 730. Since the reason for the privilege relate primarily to the identity of the informer, some authorities take the position that the privilege does not extend to the communications unless the contents would disclose or tend to disclose the identity of the informer. See *Wigmore*, Evidence, 3d Ed., vol. 8, p. 755; *McCormick*, supra, p. 310. Under section 1881, subd. 5, it extends to the communications "when the public interest would suffer by the disclosure."

It is for the court to determine whether the public interest will suffer by disclosure. See *Dwelly v. McReynolds*, 6 Cal.2d 128, 131, 56 P.2d 1232; *Wigmore*, supra, vol. 8 at 798-801; 22 Cal.L.Rev. 667, 676. At common law the privilege could not be invoked if the identity of the informer was known to those who had cause to resent the communication. See *Roviaro v. United*

1. Defendant does not contend that the recorded telephone conversations were an unlawful interception and therefore in-

admissible. See *People v. Malotte*, 46 Cal.2d 59, 64, 292 P.2d 517.



States, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639. Under section 1881, subd. 5, the test is whether the public interest would suffer by the disclosure. Conceivably, even when the informer may be known to persons who have cause to resent the communication, disclosure in open court might still be against the public interest. A defendant who knows the identity of the informer, however, will ordinarily not be prejudiced by a refusal to disclose that identity.

[5] There is general agreement that there is no privilege of nondisclosure if disclosure "is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause \* \* \*." *Roviaro v. United States*, supra, 353 U.S. at pages 60-61, 77 S.Ct. at page 628, see *People v. Castiel*, supra, 153 Cal.App.2d at page 659, 315 P.2d at page 82; *People v. Lawrence*, supra, 149 Cal.App.2d at page 451, 308 P.2d at page 830; *Portomene v. United States*, 5 Cir., 221 F.2d 582, 583-584; *United States v. Conforti*, 7 Cir., 200 F.2d 365, 367; *Sorrentino v. United States*, 9 Cir., 163 F.2d 627, 628-629; *United States v. Li Fat Tong*, 2 Cir., 152 F.2d 650, 651-652; *Wilson v. United States*, 3 Cir., 59 F.2d 390, 392; *Marks v. Beyfus*, L.R. 25 Q.B.D. 494, 498; *Centoamore v. State*, 105 Neb. 452, 181 N.W. 182, 183; *McCormick*, supra, p. 310; *Morgan*, *Basic Problems of Evidence* (1954), p. 119; *Wharton*, *Criminal Evidence*, 12th Ed., vol. 3, pp. 136-137; *Wigmore*, supra, vol. 8, p. 756; *Underhill*, *Criminal Evidence*, vol. 2, pp. 820-821; 22 Cal. L.Rev. 667, 670; 98 U. of Pa.L.Rev. 719, 730-731; 1945 Wisc.L.Rev. 239, 244-245; *Uniform Rules of Evidence*, Rule 36.

Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" even though the informer was not a participant. For example, the testimony of an eyewitness-nonparticipant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant

and helpful to the defense of the accused and essential to a fair determination of the cause.

[6] Disclosure is frequently a problem in such cases as the present one involving violations of the narcotics laws, when the so-called informer is also a material witness on the issue of guilt. A mere informer has a limited role. "When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged." *People v. Lawrence*, supra, 149 Cal.App.2d at page 450, 308 P.2d at page 830. His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial. Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal. See *Roviaro v. United States*, supra, 353 U.S. at page 61, 77 S.Ct. at page 628. Any implications to the contrary in *People v. Cox*, 156 Cal.App.2d 472, 319 P.2d 681, and *People v. Gonzales*, 136 Cal.App.2d 437, 440-441, 288 P.2d 588, are disapproved.

*Jencks v. United States*, 353 U.S. 657, 671-672, 77 S.Ct. 1007, 1014, 1 L.Ed.2d 1103, involved a comparable situation wherein the defendant sought the production of F.B.I. reports made by the two principal witnesses against him on a charge that he falsely swore in an affidavit that he was not a member of the Communist party. The court stated:

"It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's pos-

session. \* \* \* The Attorney General has adopted regulations \* \* \* declaring all Justice Department records confidential and that no disclosure, including disclosure in response to a subpoena, may be made without his permission.

"But this Court has noticed, in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, the holdings of the Court of Appeals for the Second Circuit that, in criminal causes ' \* \* the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense \* \* \*.' 345 U.S. at page 12, 73 S.Ct. at page 534."

[7] Likewise, if the informer in the present case was a material witness as to the possession charged in count two, the refusal to disclose his identity was prejudicial error as to that count.

[8] Defendant denied that he had heroin in his possession and denied that he received the alleged telephone call. Officer McBee and Officer Hilliard testified to the telephone call, and a recording thereof cut by Officer Hilliard was played before the jury. The informer's telephone call was persuasive evidence on possession, for it indicated that defendant was en route to make a sale of heroin when he was arrested and therefore knowingly had possession at that time. As the originator of the telephone call the informer was a material witness on the issue of possession. The prosecution made him such a witness by introducing evidence of his telephone call to make a purchase of heroin and by playing a recording of the telephone conversation before the jury.

The prosecution could have relied solely on the testimony of the officers as to defendant's possession of heroin and as to his admissions without reference to the telephone call. They chose instead also to introduce evidence of the telephone call, which substantiated the testimony of Officers Goodrum and Reppas and discredited defendant's. Defendant denied receiving the call. He had no fair opportunity to substantiate his denial and impeach the testimony of the officers without disclosure of the informer's identity. Had there been disclosure, the informer might have testified that no such telephone call was made, that it was not defendant who received the call, that someone else was called, or that there was an entrapment.

The cross-examination of Officers McBee and Hilliard as to the telephone call and the identity of its originator dealt with an alleged telephone call to the defendant setting up a sale and the identity of the person making that call. It did not deal with communications made to them "in confidence" (Code Civ.Proc. § 1881, subd. 5) or with the identity of a person making communications "in confidence."

There are strong parallels between the instant case and *Roviaro v. United States*, supra, 353 U.S. at pages 58-59, 77 S.Ct. at page 627, wherein defendant was charged with a sale of heroin (count one) and with "illegal transportation of narcotics" (count two). A conviction under count two was proper "when the Government has proved that the accused possessed narcotics, unless the accused explains or justifies such possession." 353 U.S. at page 63, 77 S.Ct. at page 629. The Government sought to uphold the conviction on count two on the ground that the identity of the informer (John Doe) had no bearing on that charge and was therefore privileged. The Government had introduced evidence that John Doe had a conversation in his car with defendant as he drove him to a place where defendant got out of the car, walked to a nearby tree, picked up a small package, returned and deposited the package in Doe's

car and left in another car. An officer secreted in the trunk of Doe's car testified to the conversation between Doe and the defendant, and both he and another officer testified that they saw the defendant pick up the small package and return to Doe's car. The package contained an opium derivative. The Court held that under the circumstances, "John Doe's possible testimony was highly relevant and might have been helpful to the defense. \* \* \*

The informer was the only witness [other than the accused] in a position to amplify or contradict the testimony of government witnesses." 353 U.S. at pages 63-64, 77 S. Ct. at page 629.

Although the informer in the present case was not an eye witness to the crime, as John Doe was in the Roviario case, the prosecution's own election to introduce evidence of the telephone conversation made it imperative that it disclose the identity of the informer, for he alone could amplify or contradict the testimony of the officers. As in the Roviario case nondisclosure was prejudicial error.

The judgment is reversed as to both counts.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur in the reversal as to count one but dissent from the reversal as to count two. In my opinion, the case of *Roviario v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed.2d 639, is not authority for the majority's reversal as to both counts, but on the contrary, clearly indicates that the judgment of conviction on the second count should be affirmed.

In the *Roviario* case, the two charges were (1) sale of narcotics and (2) illegal transportation of narcotics. Both charges arose out of a single transaction occurring on August 12, 1954. The Government did not "defend the nondisclosure of Doe's identity with respect to Count 1, which charged a sale of heroin to John Doe," but it sought

"to sustain the judgment on the basis of the conviction on Count 2, charging illegal transportation of narcotics." 353 U.S. at pages 58-59, 77 S.Ct. at page 627. The court there held that, under the circumstances, it was reversible error as to both counts for the trial court to deny disclosure of the identity of the informer.

In so holding with respect to the second count, the court, after stating that "no fixed rule with respect to disclosure is justifiable" (353 U.S. at page 62, 77 S.Ct. at page 628), was careful to point out that the second count there did not "charge mere possession" (353 U.S. at page 63, 77 S.Ct. at page 629); that the informer had "been present with the accused at the occurrence of the alleged crime" of illegal transportation (353 U.S. at page 55, 77 S.Ct. at page 625); and that "the Government's informer was the sole participant, other than the accused, in the transaction charged" (353 U.S. at page 64, 77 S.Ct. at page 630). In the present case, count two did charge "mere possession"; the informer was not "present with the accused at the occurrence of the alleged crime" charged in count two; and the informer was not a participant in the offense of "mere possession" on November 27, 1956, as distinguished from the prior offense of sale on November 26, 1956.

If, as declared in the *Roviario* case, the problem is one of "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense"; and if the question of error in refusing disclosure depends "on the particular circumstances of each case" (353 U.S. at page 62, 77 S.Ct. at page 628), I am of the view that the balance here is clearly in favor of the public interest. The compelling reasons for preventing disclosure of the identity of informers, except where the interests of justice demand it, are forcefully stated in the dissent of Mr. Justice Clark in the *Roviario* case. Here, however, we have only to follow the implications of the majority opinion in that case in order to sustain the judgment of conviction as to count two.



I would therefore reverse as to count one but affirm as to count two.

SHENK, J., concurs.

McCOMB, Justice (concurring and dissenting).

I concur in the reversal of the judgment as to count one, but dissent from the reversal of the judgment as to count two.

Rehearing denied; SHENK, SPENCE and McCOMB, JJ., dissenting.



50 Cal.2d 812

Clyde M. PRIESTLY, Petitioner,

v.

The SUPERIOR COURT OF CITY AND  
COUNTY OF SAN FRANCISCO,  
Respondent.

S. F. 19111.

Supreme Court of California,  
In Bank.

Oct. 1, 1958.

Rehearing Denied Oct. 28, 1958.

Prosecution against defendant charging violations of the Health and Safety Code. Defendant's motion to set aside the information on the ground that evidence against him was obtained by an illegal search and seizure was denied and he seeks a writ of prohibition to prevent his trial. The Supreme Court, Traynor, J., held that where the prosecution sought to show reasonable cause for the search and relied on testimony as to communications from an informer, either the identity of the informer should have been disclosed when the defendant sought disclosure or such testimony should have been struck on proper motion of the defendant and that such disclosure may be required at the preliminary hearing in view of proper objections by the defendant.

Peremptory writ of prohibition issued.

Spence, Shenk, and McComb, JJ., dissented.

Vacating, 319 P.2d 796, opinion.

# 1. Criminal Law 238

Indictment and Information 137(5)

Prohibition 5(4)

A defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence and in such case the trial court should grant a motion to set aside the information and if it does not do so a peremptory writ of prohibition will issue to prevent further proceedings. West's Ann.Pen.Code, §§ 995, 999a.

# 2. Criminal Law 238

The proof authorizing a magistrate to hold an accused for trial must consist of legal competent evidence and no other type of evidence may be considered.

# 3. Criminal Law 394.5(4)

Defendant made a prima facie case that evidence was illegally obtained by showing that his arrest and search of his person and apartment were made without a warrant and the burden was then on the prosecution to show proper justification.

# 4. Witnesses 216

If testimony of communications from a confidential informer is necessary to establish the legality of a search, defendant must be given a fair opportunity to rebut that testimony and must be permitted to ascertain the identity of the informer. West's Ann.Code Civ.Proc. § 1881, subd. 5.

# 5. Witnesses 216

When the prosecution relies on communications from an informer to show reasonable cause for search and has elicited testimony as to those communications on direct examination, it is essential to a fair trial that defendant have the right to cross-examine as to the source of such communications, and if the prosecution refuses to disclose the identity of the informer the court should not order disclosure, but on proper motion should strike the testimony as to communications from the informer. West's Ann.Code Civ.Proc. § 1881, subd. 5.

# 6. Witnesses 216

In narcotics prosecution, where defendant made a prima facie case of illegal

search by showing that his arrest and search of his person and apartment were made without a warrant and the prosecution claimed that they met the burden to show justification by an officer's testimony of communications from two informers, defendant was entitled to disclosure of the informer's identity. West's Ann.Code Civ. Proc. § 1881, subd. 5.

#### 7. Witnesses ⇨216

Where defendant at preliminary hearing made a prima facie case of illegal search by showing that his arrest and search of his person and apartment were made without a warrant, defendant was entitled to disclosure of identity of the informers on whose testimony the prosecution sought to justify the search or to striking on proper motion of the testimony of the officer as to the communications of the informers as against claim that such disclosure should not be required at a preliminary hearing. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 8. Criminal Law ⇨1028, 1044

A defendant cannot raise the problem of nondisclosure of identity of informers in the appellate court when he did not seek disclosure at the trial or preliminary hearing or did not move to strike the testimony on a refusal to disclose. West's Ann. Code Civ.Proc. § 1881, subd. 5.

#### 9. Criminal Law ⇨394.4(4)

##### Searches and Seizures ⇨3(1)

On failure of defendant to object to nondisclosure of identity of the informer, evidence of information from a reliable informer is unobjectionable and may be sufficient to sustain a finding the search was made with reasonable cause. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 10. Witnesses ⇨216

In narcotics prosecution, where defendant objected to officer's testimony on direct examination as to legality of search and demanded disclosure of informers' identities and moved that testimony be struck and indicated during direct examination of officer that defense would demand disclosure on cross-examination, trial court

should have required disclosure of identities of informers on direct examination or should have excluded or struck the testimony. West's Ann.Code Civ.Proc. § 1881, subd. 5.

#### 11. Criminal Law ⇨394.5(1)

In narcotics prosecution, where defendant made a prima facie case as to the illegality of search of his person and apartment where narcotics were found, narcotics seized in the search were not admissible and should have been excluded from evidence on defendant's motion to set aside the information. West's Ann.Health & Safety Code, § 11500.

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Arthur D. Klang, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

#### TRAYNOR, Justice.

Two counts of an information charged defendant with possessing narcotics in violation of Health and Safety Code, section 11500. His motion to set aside the information on the ground that the evidence against him was obtained by an illegal search and seizure was denied, and he now seeks a writ of prohibition to prevent his trial.

The evidence at the preliminary hearing showed that at approximately 3 p. m. on April 18, 1957, Officer McKinley of the San Francisco Police Department received information from an informer that defendant had heroin in his apartment and that the informer had been there previously and obtained narcotics from defendant. The informer also said that there were narcotics in an apartment occupied by Cecil Thomas. At about 3:30 p. m. Officer McKinley and another officer went to the apartment occupied by Cecil Thomas, arrested him there, and found narcotics in his apartment. At that time, the officers received information from a second informer that defendant possessed narcotics.

Acting solely on the information from the two informers, Officer McKinley and the other officer went to defendant's apartment and knocked on the door. After about ten minutes defendant opened it, and they then placed him under arrest and searched his person and the apartment. They found heroin on his person and dolophine, a narcotic, in a dresser drawer. The arrest and search were made without a warrant.

[1] It is settled that "a 'defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence', and accordingly, in such a case the trial court should grant a motion to set aside the information, Penal Code, § 995, and if it does not do so, a peremptory writ of prohibition will issue to prohibit further proceedings. Penal Code, § 999a." *Badillo v. Superior Court*, 46 Cal.2d 269, 271, 294 P.2d 23, 24; *People v. Valenti*, 49 Cal.2d 199, 203, 316 P.2d 633; *Willson v. Superior Court*, 46 Cal.2d 291, 292, 294 P.2d 36; *Rogers v. Superior Court*, 46 Cal.2d 3, 7, 291 P.2d 929; *People v. Jablon*, 153 Cal. App.2d 456, 459, 314 P.2d 824; see, *People v. Schuber*, 71 Cal.App.2d 773, 775, 163 P.2d 498; *In re Martinez*, 36 Cal.App.2d 687, 689, 98 P.2d 528.

[2] The narcotics, introduced over defendant's objections constituted essential evidence of defendant's guilt. If illegally obtained, it was not competent to show reasonable cause to believe the defendant guilty of a public offense, for "(t)he proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the 'production of legal evidence' and the exclusion of 'whatever is not legal' \* \*." *Rogers v. Superior Court*, supra, 46 Cal.2d at page 8, 291 P.2d at page 932; *People v. Schuber*, supra, 71 Cal.App.2d at page 775, 163 P.2d at page 499. Accordingly, if the only evidence of guilt was illegally obtained, defendant is held without reasonable or probable cause, and a peremptory

writ of prohibition should issue to prohibit further proceedings. Pen.Code, § 999a.

[3] Defendant made a prima facie case by showing that his arrest and the search of his person and apartment were made without a warrant. The burden was then on the prosecution to show proper justification. *Badillo v. Superior Court*, supra, 46 Cal.2d at page 272, 294 P.2d at page 25. The People contend that they met that burden by the officer's testimony of the communications from the two informers. Defendant contends that this testimony is not competent since he objected to it, demanding that the identity of the informers be disclosed or the officer's testimony be struck.

The People contend that defendant was not entitled to the disclosure of the informers' identities invoking section 1881, subd. 5 of the Code of Civil Procedure: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." In *People v. McShann*, Cal. Sup., 330 P.2d 33, the informer was a material witness on the facts relating directly to the question of guilt. The policy conflict there involved was between the encouragement of the free flow of information to law enforcement officials and the right of the defendant to make a full and fair defense on the issue of guilt. In the present case the communications of the informers are material to the issue of reasonable cause to make the arrest and search, and the policy conflict is between the encouragement of the free flow of information to law enforcement officers and the policy to discourage lawless enforcement of the law. See *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 50 A.L.R.2d 513.

The federal rule under such circumstances is set forth in *Roviaro v. United States*, 353 U.S. 53, 61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639: "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are



claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." <sup>1</sup>

[4-6] The foregoing rule requiring disclosure of the identity of an informer whose communications are relied upon to establish

probable cause to make a search is sound and workable. See *People v. Wasco*, 153 Cal.App.2d 485, 488, 314 P.2d 558; *People v. Lundy*, 151 Cal.App.2d 244, 249, 311 P.2d 601; *People v. Dewson*, 150 Cal.App.2d 119, 136, 310 P.2d 162; *People v. Alaniz* (dis-sent), 149 Cal.App.2d 560, 570, 309 P.2d 71; *Wilson v. United States*, 3 Cir., 59 F.2d 390, 392; *Hill v. State*, 151 Miss. 518, 118 So.

1. The reasons supporting this rule are stated in the following federal cases cited with approval in the *Roviaro* case:

*Scher v. United States*, 305 U.S. 251, 254, 59 S.Ct. 174, 176, 83 L.Ed. 151: In this case the officers had sufficient independent evidence to justify the arrest and search without relying on information from an informer: "In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information as in *United States v. Blich*, D.C., 45 F.2d 627."

*United States v. Blich*, D.C., 45 F.2d 627, 629: "The court has no quarrel with the Prohibition Department in its policy of guarding and keeping secret the name of an informant, with the idea of being thereby better enabled to enforce the Prohibition Law. The only question here is as to whether or not, when the matter is presented to a court for the purpose of seeking a determination of whether, under all the circumstances, there was probable cause, this element of those circumstances may remain undisclosed. It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief. A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information which he may have received. It is simply requiring the witness to sustain his motives and his beliefs by all the evidence at his command."

*United States v. Keown*, D.C., 19 F. Supp. 639, 645-646: "If the information

of the informer was unreliable or he was unworthy of belief, the officer did not have probable cause to make either the search or the arrest. It follows that the court must have all the facts before it can properly determine whether the officer acted on reasonable grounds. If an officer should stop a peaceful, law-abiding citizen on the highway and search his car, subjecting him to humiliation and ridicule, and the offended citizen should seek redress by a suit for damages, surely no court would say the officer would be relieved of responsibility by an answer that he was informed by a reliable person that the citizen was engaged in the illicit liquor traffic, but he could not and would not disclose the name of his informer, thus preventing a fair and impartial investigation of his conduct. The certainty of the law is one of its greatest attributes. We cannot have one law applicable to an identical state of facts for the innocent and another for the guilty. The guilty may sometime escape under such a rule, but this need not follow if the officer be diligent, and likewise the secrets of state may be kept inviolate. The officer may use the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information. \* \* \*

"When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material to his offense in a criminal prosecution, and sometimes the departments of government will be put to a choice of either foregoing a criminal prosecution or disclosing the source of material information necessary to the conduct of orderly judicial procedure."

539, 540; *Smith v. State*, 169 Tenn. 633, 90 S.W.2d 523, 524; 13 N.Y.U.Intra.L.Rev. 141, 147-152; 83 L.Ed. 155, 157. If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause. When the prosecution relies instead on communications from an informer to show reasonable cause and has itself elicited testimony as to those communications on direct examination, it is essential to a fair trial that the defendant have the right to cross-examine as to the source of those communications. If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer.

In sum, when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant. Any holdings or implications to the contrary in *People v. Johnson*, 157 Cal.App.2d 555, 321 P.2d 35; *People v. Salcido*, 154 Cal.App.2d 520, 522, 316 P.2d 639; *People v. Moore*, 154 Cal.App.2d 43, 46-47, 315 P.2d 357; *People v. Merino*, 151 Cal.App.2d 594, 597, 312 P.2d 48; *People v. Alaniz*, 149 Cal.App.2d 560, 567, 309 P.2d 71; and *People v. Gonzales*, 141 Cal.App.2d 604, 606-607, 297 P.2d 50, are disapproved.

[7] The People contend that even if disclosure is required at the trial, it should not be required at the preliminary hearing. Since the purpose of the preliminary hearing, however, is to determine whether there is competent evidence to commit the defendant for trial, disclosure at that time is necessary to determine whether the evidence acquired by the search is competent. The defendant may not be committed for trial when there is no competent evidence to support a belief that he is guilty of a public offense. Moreover, disclosure at the preliminary hearing will ordinarily obviate the necessity of a continuance during the trial to permit the defendant to locate and interview the informer. Defendant was therefore entitled either to disclosure of the informers' identities or to the striking on proper motion of the testimony of the officer as to the communications of the informer offered to establish the legality of the search.

[8-11] The question remains whether the officer's testimony was incompetent in this case. A defendant cannot raise the problem of non-disclosure in the appellate courts when he did not seek disclosure at the trial or preliminary hearing or did not move to strike the testimony on a refusal to disclose. *People v. Johnson*, supra, 157 Cal. App.2d at page 559, 321 P.2d at page 37; *People v. Gorg*, 157 Cal.App.2d 515, 321

P.2d 143; *People v. Lundy*, 151 Cal.App.2d 244, 249, 311 P.2d 601. Upon his failure to do either at that time, evidence of information from a reliable informer is thereafter unobjectionable and may be sufficient to sustain a finding that the search was made with reasonable cause. *Willson v. Superior Court*, supra, 46 Cal.2d at page 294-295, 294 P.2d at page 38-39; *People v. Dupee*, 151 Cal.App.2d 364, 367, 311 P.2d 568; *People v. Dean*, 151 Cal.App.2d 165, 167, 311 P.2d 85; *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 513, 310 P.2d 180. In the present case defendant objected to the officer's testimony on direct examination and demanded disclosure of the informers' identities; he moved that the testimony be struck; and he indicated during the direct examination of the officer that the defense would demand disclosure on cross-examination. Under such circumstances, the trial court should have required disclosure on direct examination or should have excluded or struck the testimony. Since there was no other competent evidence to justify the search and defendant made a prima facie case as to its illegality, it follows that the narcotics seized in the search were not admissible and should have been excluded.

Let the peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and SCHAUER, J., concur.

CARTER, Justice (concurring).

I concur in the views expressed in the opinion prepared by Mr. Justice TRAYNOR but wish to add some additional views which are pertinent to the issue here involved.

The issue presented is whether there is any competent evidence of probable cause on which to hold defendant to answer. If there is no such evidence, the writ of prohibition must issue. *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929; *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23; *People v. Valenti*, 49 Cal.2d 199, 316 P.2d 633. Narcotics seized during the arrest and subsequent search of defendant's person and premises was the sole evidence offered to

show probable cause. This evidence is admissible only if the arrest and search by the police officers was legal. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. Defendant challenged the legality of the arrest and seizure, pointing out that there was no warrant, and contending that the police officers acted without probable cause. In these circumstances the burden is on the prosecution to justify the officers' conduct. *Badillo v. Superior Court*, supra, 46 Cal.2d at page 272, 294 P.2d at page 25. Thus, whether defendant can be held to answer, as well as the issuance or denial of the writ of prohibition, hinges on proof of the same fact, namely did the police officers act with probable cause.

The police officers testified that they had received information from two reliable informants that defendant was in possession of narcotics. This was the only evidence offered to establish that the police officers had probable cause, and thus it forms the sole basis on which the arrest and search can be justified. On cross-examination defendant sought to elicit the names of the informants. The magistrate denied defendant the right to cross-examine on such matter, ruling that the identity of the informants was confidential and privileged.

Conceding that this testimony is sufficient to establish probable cause to make an arrest and search, nevertheless the denial of defendant's right to cross-examine the prosecution witnesses regarding the identity of informants renders it incompetent. The result being that the search and seizure is illegal, which renders the evidence seized inadmissible under the exclusionary rule, and leaves the court without any competent evidence of probable cause to hold defendant to answer.

The People contend that the magistrate properly refused to disclose the identity of the informants for the reason that such matter is privileged under section 1881, subdivision 5, of the Code of Civil Procedure. This section provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."



It is argued that if the identity of informants must be disclosed this flow of information to police officers will break an important link in law enforcement, causing the public to suffer.

For the reasons stated below I have concluded that the privilege asserted by the People must yield in the present circumstances to the greater interest of protecting an accused's constitutional right to a fair hearing.

"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." *Jaffe v. Stone*, 18 Cal.2d 146, 150, 114 P.2d 335, 338, 135 A.L.R. 775. To accomplish this purpose the Legislature has prescribed the procedure to be followed. In essence this procedure is a carbon copy of the minimum requirements and safeguards which are required to be used in criminal trials pursuant to Article I, section 13 of the California Constitution. An accused at a preliminary hearing is entitled to counsel (Pen.Code, § 859), examination and cross-examination of witnesses (Pen.Code, §§ 866, 865) and the traditional rights of an accused at a criminal trial (Pen. Code, § 866.5). To state the obvious, orderly procedures based on the concept of fair play provide the means by which the purpose of a preliminary hearing is to be accomplished. See *People v. Brooks*, 72 Cal. App.2d 657, 661, 165 P.2d 51.

The right to cross-examination, which is basic to our judicial system and has been from earliest times, is part of this fundamental right available to an accused. *People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566; see, *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; *People v. Cole*, 43 N.Y. 508, 512-513. An improper denial of the right of cross-examination constitutes a denial of due process (*Argonaut Ins. Exchange v. Industrial Accident Commission*, 120 Cal.App.2d 145, 152, 153, 260 P.2d 817; *Columbia-Geneva Steel Division, United States Steel Co. v. Industrial Accident Commission*, 115 Cal.App.2d 862, 865, 253 P.2d 45; *Langendorf United Bakeries*

*v. Industrial Accident Commission*, 87 Cal. App.2d 103, 104-105, 195 P.2d 887). Apart from historical considerations the reason cross-examination is one of the ingredients of a fair hearing is practical. In a trial or preliminary hearing there is usually a disputed factual issue. Where this occurs, cross-examination provides a major method for establishing the accuracy and reliability of direct testimony. The method of cross-examination is necessary since experience tells us that ex parte statements are too uncertain and unreliable to be considered in the investigation of controverted facts. *People v. McGowan*, 80 Cal.App. 293, 298-299, 251 P. 643; *People v. Seitz*, 100 Cal. App. 113, 119, 279 P. 1070; see *People v. Cole*, supra, 43 N.Y. at page 512-513.

A violation of these fundamental rights at a preliminary hearing results in a deprivation of due process of law. See *People v. Napthaly*, 105 Cal. 641, 644, 39 P. 29. *People v. Salas*, 80 Cal.App. 318, 250 P. 526; *People v. Miller*, 123 Cal.App. 499, 11 P.2d 884.

Not every instance in which a cross-examiner's question is disallowed will defendant's right to a fair hearing be abridged, since the matter may be too unimportant (*Naylor v. Ashton*, 20 Cal.App. 544, 130 P. 181), or there may be no prejudice (*People ex rel. Bradford v. Burch*, 46 Cal.App. 391, 189 P. 716), or the question may involve issues which can be brought up at a more appropriate time (*Mitchell v. Excelsior Water & Mining Co.*, 41 Cal.App. 240, 182 P. 326). However, where the subject of cross-examination concerns the matter at issue there can be no doubt that the refusal to permit such question results in a denial of a fair hearing. *People v. Manchetti*, 29 Cal.2d 452, 459, 175 P.2d 533; *People v. McGowan*, supra, 80 Cal.App. at pages 296-299, 251 P. at page 644; *Langendorf United Bakeries v. Industrial Accident Commission*, supra, 87 Cal.App.2d at pages 104-105, 195 P.2d at page 887; *Columbia-Geneva Steel Division, United States Steel Co. v. Industrial Accident Commission*, supra, 115 Cal.App.2d at page 865, 253 P.2d at page 47; *Argonaut Ins. Exchange v. Industrial Accident Com-*

mission, *supra*, 120 Cal.App.2d at pages 152, 153, 260 P.2d at page 821.

Such principle applies to the case at bar. As heretofore pointed out the only evidence to show probable cause that defendant had committed a felony was evidence seized by the police officers. This evidence is only admissible if the search was legal (*People v. Cahan*, *supra*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513). In an attempt to show the search was legal the prosecution witnesses testified that they were acting on the information of a reliable informant. This was the sole evidence offered by the prosecution to prove the legality of the search. Defendant can only rebut this evidence by either showing that the informant does not exist, that he is unreliable, or that the information conveyed to the police officers was otherwise than that testified to. But the opportunity to establish any one of these alternatives depends on knowledge of the informant's identity. To deny defendant this opportunity is to hold him to answer on the basis of *ex parte* statements, which we know from experience are too unreliable to be considered as evidence where factual issues are disputed.

The words of Mr. Justice Douglas dissenting in *United States v. Nugent*, 346 U.S. 1 at page 13, 73 S.Ct. 991 at page 998, 97 L.Ed. 1417, echo the unfairness of such a denial: "The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense."

Thus, the choice was with the prosecution; they could elect to claim the privilege of not disclosing the informants' identity, and have the evidence on direct examination stricken, or save this direct testimony by revealing the name of the informants. In this case they chose to rely on the privilege. Under these circumstances the testimony of the police officers, who refused to submit to

cross-examination, is to be stricken from the record. *People v. Manchetti*, *supra*, 29 Cal.2d at pages 459-462, 175 P.2d at page 538; *People v. McGowan*, *supra*, 80 Cal. App. at pages 296, 297, 251 P. at page 644; *People v. Seitz*, *supra*, 100 Cal.App. at page 119, 279 P. at page 1072, Code Civ.Proc. §§ 1846, 2048; see *People v. Ochoa*, 118 Cal. App.2d 566, 568-569, 258 P.2d 104; *McCormick on Evidence*, § 19; 5 *Wigmore on Evidence*, 3d Ed., § 1391, p. 112.

Therefore, there is no competent evidence of probable cause before the magistrate and the writ of prohibition must be granted.

SPENCE, Justice (dissenting).

This is not an appeal from a judgment of conviction following a trial. It is a proceeding to prohibit the respondent court from trying the charges against petitioner upon the theory that said court has no jurisdiction. The claim of lack of jurisdiction is based upon the theory that there was no competent evidence against petitioner at the preliminary examination, and therefore petitioner was held to answer without "reasonable or probable cause." Pen.Code, § 995. The claim that there was no competent evidence against petitioner is in turn based solely upon the theory that all the incriminating evidence introduced against petitioner at the preliminary examination became incompetent because the committing magistrate allegedly erred in denying petitioner the right to ascertain from the police officers the identity of their informers. The majority opinion sustains all of petitioner's claims and orders the issuance of a writ of prohibition. I cannot agree.

It is conceded that there was introduced at the preliminary hearing uncontradicted evidence showing that petitioner was guilty as charged of possessing narcotics in violation of section 11500 of the Health and Safety Code. At the time of his arrest, he had narcotics both on his person and in his apartment. When questioned about the black metal box which he had in his pocket and which contained narcotics, he said: "You have got me. This is mine. This is for my own use."

If the above-mentioned testimony had been introduced before a grand jury and petitioner had thereafter been charged by indictment, there would be no question concerning the jurisdiction of the superior court to proceed with the trial of petitioner. In that case, petitioner could not have complained because he had not been present when the testimony was taken before the grand jury and, of course, he would have had no opportunity to cross-examine the witnesses or to demand the disclosure of the names of any informers. But here the majority denies the existence of the jurisdiction of the superior court to proceed with a trial on the merits merely because of the claimed error on the part of the committing magistrate in refusing to compel the disclosure of the identity of the informers at the preliminary hearing. I do not believe that such error, if any, at the preliminary hearing should be dignified with jurisdictional significance in any case; and that therefore the writ of prohibition, which is strictly a jurisdictional writ (Code Civ.Proc. § 1102), should be denied.

I find no constitutional problem, and certainly no jurisdictional problem, arising from the alleged error at the preliminary hearing. Such preliminary hearings are not clothed with the formalities of a trial on the merits, and the only grounds for setting aside an indictment or information, or for issuing a writ of prohibition, are those specified in sections 995 and 999a of the Penal Code. Mere error in admitting or refusing to admit evidence at the preliminary hearing is not one of the grounds so specified. In this connection, *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L. Ed. 397, while involving a grand jury indictment, points out the distinction between proceedings on the trial and those leading up to the filing of the charges. It was there said at page 364 of 350 U.S., at page 409 of 76 S.Ct.: "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict." The court declared, however, on page 362 of 350 U.S., on page 408 of 76 S.

Ct.: "But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." With respect to other preliminary proceedings, attention may be directed to *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232; *Lem Woon v. State of Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340; *Gaines v. State of Washington*, 277 U.S. 81, 48 S.Ct. 468, 72 L.Ed. 793; *People v. Bird*, 212 Cal. 632, 300 P. 23.

In reaching the foregoing conclusion that the writ of prohibition should not issue here, I have assumed, solely for the purpose of the above discussion, that the committing magistrate may have erred in his rulings at the preliminary hearing. I now turn to the question of whether there was any such error.

In the present case, the two counts of the information charged "mere possession" by petitioner of two different types of narcotics on the day of his arrest. No informer was "present with the accused" at the time of the alleged offenses; and no informer was a "participant" in either of the offenses of "mere possession" with which petitioner was charged. Under these circumstances, the case of *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, clearly indicates that there was no error in the rulings of the committing magistrate. The opinion in the *Roviaro* case is discussed at some length in my concurring and dissenting opinion in *People v. McShann*, 330 P.2d 38, this day filed, and such discussion need not be repeated here.

In conclusion, I desire to make one further observation concerning this proceeding. The evidence hereinabove summarized showed without contradiction that petitioner had committed, and was committing, the felony of possession of narcotics at the time of his arrest. I am therefore of the opinion that his arrest was lawful, as "A peace officer may \* \* \* without a warrant, arrest a person: \* \* \* 2. When a person arrested has committed a felony, al-



though not in his presence." Pen.Code, § 836. I am further of the opinion that the search which produced the narcotics was a reasonable search as an incident of such lawful arrest. My views on this subject are set forth at some length in my dissenting opinion in *Badillo v. Superior Court*, 46 Cal.2d 269, at pages 273-278, 294 P.2d 23 at pages 25-28. I adhere to those views and believe that this court should re-examine the decision in that case. Under the circumstances before us, the question of where the arresting officer here may have obtained his information is wholly immaterial in determining that the arrest was lawful, and that the search was reasonable as an incident of such lawful arrest.

The majority express the fear that any contrary holding here "would destroy the exclusionary rule." I cannot agree. This court has committed itself to the task of establishing "workable rules" to supplement the exclusionary rule and to the avoidance of "needless refinements and distinctions" and "needless limitations on the right to conduct reasonable searches and seizures." *People v. Cahan*, 44 Cal.2d 434, 450-451, 282 P.2d at page 915, 50 A.L.R.2d 513. In my view, the majority opinions in this case and in the *Badillo* case fall short of that commitment, and on the contrary, contain within themselves the seeds of the destruction of the exclusionary rule. The rules set forth in said opinions appear to me to have the effect of defeating rather than promoting the ends of justice, and thus inviting the destruction of the exclusionary rule through legislative nullification.

In summary, and without regard to any questions of the desirability of re-examining the decision in *Badillo v. Superior Court*, *supra*, I am of the opinion that, even assuming error in the challenged rulings, no constitutional or jurisdictional question is presented here; that under the decision in *Roviaro v. United States*, *supra*, there was no error in the rulings of the committing magistrate; that there was competent, uncontradicted evidence to sustain the order holding the petitioner to answer; and that

the superior court has jurisdiction to proceed with the trial.

I would therefore deny the petition for a writ of prohibition.

SHENK and McCOMB, JJ., concur.

Rehearing denied; SHENK, SPENCE and McCOMB, JJ., dissenting.



50 Cal.2d 827

**Martha MITCHELL and Milton Flynn,**  
Petitioners,  
v.

**The SUPERIOR COURT OF CITY AND  
COUNTY OF SAN FRANCISCO,**  
Respondent.  
S. F. 19704.

Supreme Court of California,  
In Bank.  
Oct. 1, 1958.

Informations charging defendant with the possession and sale of heroin and maintenance of a place for sale of narcotics. Defendant's motion to set aside the informations were denied and they seek a writ of prohibition to prevent their trial. The Supreme Court, Traynor, J., held that where it did not appear that disclosure of names of informers was demanded to enable defendants to discredit the prosecution's evidence at the preliminary hearing or that they wished to use the informers as witnesses at that hearing and there was competent evidence to justify committing the defendants and disclosure of names of the informers could be obtained at trial, defendants were not prejudiced by the error in failing to disclose the name of the informers or deprived of any substantial right.

Alternative writ discharged and peremptory writ denied.

Opinion, 321 P.2d 106, which vacated 313 P.2d 170, vacated.

#### 1. Witnesses ⇨216

A defendant is entitled at his trial to ascertain on cross-examination the name

of an informer who is a material witness on the issue of guilt.

## 2. Witnesses ⇨216

The requirement of disclosure of the name of an informer who is a material witness on the issue of defendant's guilt requires disclosure at the preliminary hearing, since the defendant at such hearing has the right to cross-examine the prosecution's witnesses and to produce witnesses in his own behalf. West's Ann.Pen.Code, §§ 864-866.

## 3. Prohibition ⇨5(4)

Prohibition does not lie to review rulings of the magistrate on the admissibility of evidence at the preliminary hearing unless the commitment is based entirely on incompetent evidence.

## 4. Criminal Law ⇨1170½(1)

Where it did not appear that disclosure of names of informers was demanded to enable defendants to discredit the prosecution's evidence at the preliminary hearing or that they wished to use the informers as witnesses at that hearing and there was competent evidence to justify committing the defendants and disclosure of names of the informers could be obtained at trial, defendants were not prejudiced by the error in failing to disclose the names of the informers or deprived of any substantial right. West's Ann.Health & Safety Code, §§ 11500, 11557; West's Ann.Pen.Code, § 1404.

Arthur D. Klang, San Francisco, for petitioners.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett and Arlo E. Smith, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Informations charged defendants with possession of heroin, two sales of heroin and maintenance of a place for the sale of narcotics in violation of Health and Safety Code, sections 11500 and 11557. Their motions to set aside the informations on

the ground that they had not been legally committed by a magistrate (Pen.Code, § 995) were denied and they now seek a writ of prohibition to prevent their trial.

Evidence at the preliminary hearing showed that police officers received information from two informers that defendants were selling narcotics in their apartment. The officers searched the two informers and removed all articles from their clothing. Each of the informers was given \$20 in bills dusted with fluorescent powder. The serial numbers of the bills were recorded. The officers escorted the informers to defendants' apartment. The informers entered the apartment separately and in a few minutes returned separately. They were then searched. The bills were gone and each informer had a bundle of heroin. The officers waited in front of the apartment door for about 10 or 15 minutes. Defendant Mitchell opened the door and was immediately placed under arrest. She dropped a package of heroin to the floor. The officers arrested defendant Flynn in the bedroom and found four bindles of heroin on his person. The officers found the bills given to one informer behind one of the dresser drawers, but they did not find the bills given to the other informer. There was fluorescent powder on both of Mitchell's hands and on Flynn's finger-tips and shirt. On cross-examination the magistrate sustained objections to defendants' questions seeking to ascertain the names of the informers.

We have concluded that it was error to deny defendants disclosure of the names of the two informers at the preliminary hearing on their cross-examination of the officer who testified to the participation of the informers but that prohibition does not lie to restrain the trial of defendants.

[1, 2] A defendant is entitled at his trial to ascertain on cross-examination the name of an informer who is a material witness on the issue of guilt. *People v. McShann*, Cal.Sup., 330 P.2d 33; *People v. Lawrence*, 149 Cal.App.2d 435, 450-451, 308 P.2d 821. The reasons that require disclosure

at the trial also require disclosure at the preliminary hearing, for the defendant has the right at such hearing to cross-examine the prosecution's witnesses (Pen.Code, § 865) and to produce witnesses in his own behalf (Pen.Code, §§ 864, 866). The exercise of these rights at the preliminary hearing may enable the defendant to show that there is no reasonable cause to commit him for trial and thus to avoid the degradation and expense of a criminal trial.

[3,4] Prohibition does not lie to review rulings of the magistrate on the admissibility of evidence at the preliminary hearing unless the commitment is based entirely on incompetent evidence. *Rogers v. Superior Court*, 46 Cal.2d 3, 7-8, 291 P.2d 929. Defendants do not contend that as a result of the magistrate's error there is no competent evidence to support a finding of reasonable cause to commit them for trial. Cf. *Priestly v. Superior Court*, Cal.Sup., 330 P.2d 33. It is contended, however, that denial of the right of cross-examination at the preliminary hearing is not only a ruling on the admissibility of evidence but the denial of a constitutional right. It is unnecessary to resolve this contention, for there was not such an interference with the right of cross-examination in this case as to justify a writ of prohibition. It does not appear that disclosure of the names of the informers was demanded to enable defendants to discredit the prosecution's evidence at the preliminary hearing or that they wished to use the informers as witnesses at that hearing. Indeed, defendants' brief indicates otherwise: "The defendants did not present a defense other than cross-examination in the preliminary hearing. They were not required so to do and this Honorable Court is aware that not only is it rarely done, but would be a foolhardy thing to do." The value to defendants of disclosure is that it might enable them to obtain information useful in their defense at the trial. It cannot be presumed that the superior court will erroneously deny disclosure at the trial or fail to grant a continuance if it is necessary to enable

defendants to locate and interview the informers in the preparation of their defense. Although the delay incident to such a continuance would have been obviated had the magistrate ruled correctly, his erroneous ruling on the admissibility of evidence does not raise a jurisdictional issue. *Rogers v. Superior Court*, supra, 46 Cal.2d at pages 6-7, 291 P.2d at page 930. Since there was competent evidence to justify committing defendants and disclosure of the names of the informers can be obtained at the trial, defendants were not prejudiced by the error or deprived of any substantial right. See Pen.Code, § 1404.

The alternative writ is discharged and the peremptory writ is denied.

GIBSON, C. J., and SCHAUER, J., concur.

CARTER, Justice.

I concur in the views expressed in the opinion prepared by Mr. Justice TRAYNOR. In *Priestly v. Superior Court*, 330 P.2d 44, I have expressed my views somewhat at length on the right of a defendant in a criminal case to cross examine a witness on a material issue.

Defendant contends that the denial of the right of cross-examination in this case was a denial of a constitutional right. In the *Priestly* case I concluded that in the preliminary hearing the accused was denied a constitutional right of a fair hearing where the magistrate denied him the right of cross-examination on a disputed factual issue and on which the outcome of the proceedings hinged. The factual issue disputed in the *Priestly* case was the presence of probable cause for the arrest and search. In this case defendant does not dispute that there was probable cause for the arrest and seizure, but only desires to know the informants' identities to better prepare his defense at the trial. This is precisely what defendant will receive. However, it is readily apparent that the testimony of the police officers relating the information given by the informants is not crucial to the issue of whether there is any competent



evidence to hold defendant. It cannot be said, therefore, that the denial of defendant's right of cross-examination amounted to a denial of a fair hearing or to deprivation of his liberty without due process of law.

McCOMB, Justice (concurring).

I concur in the order discharging the alternative writ of prohibition and denying a peremptory writ, for the following reasons:

This is a petition for a writ of prohibition restraining the superior court from trying petitioners on a charge of violating section 11500 of the Health and Safety Code (possession of heroin) and section 11557 of the Health and Safety Code (maintaining a place for the sale of narcotics).

At the preliminary examination police officers testified to being informed by two reliable informants that petitioners were selling narcotics in their apartment. After stripping and searching the informants and removing all articles of their clothing, the officers gave each of them \$20 in bills, the serial numbers of which were recorded, and escorted the informants to petitioners' apartment.

The bills were dusted with fluorescent powder invisible to the naked eye. Separately, the informants entered the apartment and in a few minutes returned. They were then searched. The bills were gone, and each had a bundle of heroin.

The officers then waited in front of the apartment door for approximately ten or fifteen minutes. It was opened by petitioner Mitchell, who was immediately placed under arrest. She dropped a package from her hand to the floor, which package contained heroin. In the bedroom they arrested petitioner Flynn. Four bindles were found on his person. Behind one of the dresser drawers the officers found the bills given to the first informant. They did not

find those given the second informant. With a black box they observed fluorescent powder on both hands of petitioner Mitchell and on the finger tips and shirt of petitioner Flynn. On cross-examination the officers refused to divulge the names of the informant-participants.

Petitioners' sole contention is that they were illegally committed because the magistrate, during the preliminary examination, refused to allow them to ask the prosecuting witnesses the names of the two informant-participants.

Thus the question is presented: *Will a writ of prohibition lie to review the ruling of a committing magistrate upon the admission or exclusion of evidence at a preliminary examination?*

*No.* The rule is settled that the sole province of the writ of prohibition is to arrest proceedings of a tribunal or person exercising judicial functions when acting without or in excess of jurisdiction. 40 Cal.Jur.2d (1958), Prohibition, § 64, p. 226; Code Civ.Proc. § 1102;<sup>1</sup> County of Sutter v. Superior Court, 188 Cal. 292, 295 [4], 204 P. 849; Rebstock v. Superior Court, 146 Cal. 308, 310, 80 P. 65.

If the court has jurisdiction over both the crime and the person of the defendant, prohibition is not available to restrain or correct mere errors in procedure, such as rulings upon the admissibility of evidence, since such errors can be corrected on appeal. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 287, 109 P.2d 942, 132 A.L.R. 715; *McGinis v. Justice's Court*, 28 Cal.App. 680, 682, 153 P. 728; *State ex rel. Pardeeville Electric Light Co. v. Sachtjen*, 245 Wis. 26, 13 N.W.2d 538; 73 C.J.S. (1951) Prohibition § 12, p. 70.

In *Abelleira v. District Court of Appeal*, supra, a case involving the question as to the propriety of this court's issuing a writ of prohibition, it was said at page 286 of 17 Cal.2d, at page 946 of 109 P.2d:

judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person."

1. Section 1102 of the Code of Civil Procedure reads: "The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising

"1. *"Lack of jurisdiction" as a basis for writ of prohibition.*

"The first inquiry in this case must, of course, be as to the nature and meaning of "jurisdiction"; and here three possible sources of confusion must be eliminated.

\* \* \* \* \*

"Second is the nature of a writ of prohibition, which never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition. Hence, in examining the authorities, we must conclude that in those situations in which a writ of prohibition was issued, the particular action restrained was one beyond the jurisdiction of the court to take."

The foregoing statement as applicable to the instant case may be paraphrased as follows:

"A writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. The committing magistrate in the present case had power to make a correct determination of the particular issue presented to it. It clearly had power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition. Hence, we must conclude that in this case a writ of prohibition will not issue because the particular action attempted to be restrained was one within the jurisdiction of the committing magistrate."

To the same effect is the holding of the Supreme Court of Wisconsin in *State ex rel. Pardeeville Electric Light Co.*, supra, where at page 540 of 13 N.W.2d the court said: "Petitioner further contends that certain evidence which it offered on the trial before Judge Hoppmann was improperly

excluded, and that if the same testimony were offered again, before the present presiding judge, the court might admit same. *It is not the function of a writ of prohibition to determine the admissibility of evidence on the trial of an action in the circuit court.* At present we are only concerned with the question of the power and jurisdiction of the sitting judge. The merits of the litigation are not before us." (Italics added.)

The authority to hear and determine involves the power to decide incorrectly as well as correctly in a given case or controversy within the jurisdiction of the committing magistrate and does not depend upon the regularity of the exercise of that power or upon the rightfulness of the decision there made. A writ of prohibition is not employed as a means of correcting errors of an inferior tribunal on matters of procedure where, as in the instant case, such alleged errors may be reviewed on appeal from an adverse judgment.

If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ of prohibition to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to *nisi prius* tribunals.

It is clear that the committing magistrate had jurisdiction over both the crime charged and the persons of petitioners in the present case. It is likewise evident that there was substantial evidence to support the committing magistrate's finding that there was probable cause to believe that petitioners were guilty of the offenses with which they were charged.

Supporting this view is the statement in petitioners' brief: "The defendants did not present a defense other than cross-examination in the preliminary hearing. They were not required so to do and this Honorable Court is aware that not only is it rare-

ly done, but would be a foolhardy thing to do."

Since petitioners' sole contention is directed to an error in procedure, to wit, improper exclusion of evidence, which error under the rule set forth above will not be considered on a petition for a writ of prohibition, the alternative writ is properly discharged and the peremptory writ is correctly denied.

**SHENK and SPENCE, JJ.**, concur in the judgment.



163 Cal.App.2d 771

**ALFRED M. LEWIS, INC.**, a corporation,  
and **Rideout Produce Co.**, a corporation,  
Plaintiffs,  
v.

**WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 542**, an unincorporated association, et al., Defendants and Respondents.

**Alfred M. Lewis, Inc.**, a corporation,  
Appellant.  
Civ. 5830.

District Court of Appeal, Fourth District,  
California.  
Sept. 26, 1958.

Action by firms engaged in wholesale produce business against union to enjoin same from striking against employers for allegedly illegal purpose. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for union and employers appealed. The District Court of Appeal, Coughlin, J. pro tem., held that evidence sustained finding that purpose of strike was in furtherance of conspiracy between union and other wholesale produce producers to drive plaintiff employers out of business and such action was in violation of Cartwright Act and case would be remanded for further findings.

Reversed and remanded for new trial.

# 1. Appeal and Error ⇨879

Parties who have not appealed cannot attack the findings and errors affecting such parties will not be reviewed on appeal.

## 2. Appeal and Error ⇨931(1)

In determining sufficiency of evidence to sustain questioned finding, appellate court must accept as true all evidence and all inferences which reasonably may be drawn therefrom tending to support finding.

## 3. Conspiracy ⇨19

Unless one of the conspirators confesses, no direct evidence of an agreement is available and consequently as a general rule conspiracy can be established only by circumstantial evidence.

## 4. Conspiracy ⇨19

In order to prove a conspiracy it is not necessary to show that parties met and actually agreed to undertake performance of unlawful acts.

## 5. Labor Relations ⇨945

In action by plaintiff produce handlers to enjoin union from striking against plaintiffs, evidence sustained finding that strike for announced purpose of seeking some 60¢ per hour increase over prevailing wages, was in fact called pursuant to conspiracy between union and other produce dealers to render competition with such produce dealers by plaintiffs unprofitable. Labor Management Relations Act, 1947, § 1 et seq.; 29 U.S.C.A. § 141 et seq.; National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 151 et seq.; Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.; West's Ann.Bus. & Prof.Code, §§ 16720, 16726, 16750.

## 6. Monopolies ⇨12(9)

Action of union in calling a strike against two of the wholesale produce dealers for purpose of seeking increased wages in order to force produce dealers out of business, which action was result of agreement with other produce dealers, constituted violation of statute declaring unlawful any combination for purpose of creating or



carrying out restrictions in trade or commerce or to prevent competition. West's Ann.Bus. & Prof.Code, §§ 16720, 16726, 16750.

#### 7. Monopolies $\S$ 24(7), 28(1)

Violation of Cartwright Act may be basis of action to recover damages for injuries sustained as a result thereof and for injunctive relief. West's Ann.Bus. & Prof. Code, § 16720, 16726, 16750.

#### 8. Monopolies $\S$ 12(1.2), 24(7), 28(1)

Prohibited combination under act declaring unlawful any combination of capital, skill or acts by two or more persons for purpose of preventing competition, comes into being by agreement of two or more persons for purpose of restraining trade or preventing competition, and conduct used to effectuate agreement may result in actionable damages or be subject of an injunction even though conduct used to effect agreement would be lawful. West's Ann.Bus. & Prof.Code, §§ 16720, 16726, 16750.

#### 9. Labor Relations $\S$ 332, 831

Strike may be lawful or unlawful depending upon whether primary objective or purpose for calling strike is lawful or unlawful, and in those instances where primary purpose of strike is to restrain trade, even though working conditions of striking employees may be advanced as incident to accomplishment of primary purpose, strike will be enjoined as unlawful.

#### 10. Labor Relations $\S$ 948

In actions by wholesale produce dealers to enjoin union from striking as result of alleged conspiracy with other produce dealers to demand such a wage differential from plaintiff produce dealers as would drive plaintiffs out of business, question of primary purpose of strike presented an issue of fact.

#### 11. Labor Relations $\S$ 510

If Labor Management Relations Act applies state court has no jurisdiction in premises except as the facts may establish a cause of action under state law for damages based on a tort. Labor Management Relations Act, 1947, 29 U.S.C.A. § 151 et seq.

#### 12. Labor Relations $\S$ 395, 883

Where union called strike in pursuance of agreement with certain produce dealers to drive plaintiff dealers out of business, controversy in plaintiffs' action for injunction did not involve a labor dispute, unfair labor practice, or an activity of employees for purpose of mutual aid and protection.

#### 13. Labor Relations $\S$ 329

Labor Management Relations Act neither prohibits nor protects activity of union in aiding and abetting a nonlabor group to destroy its competitor. National Labor Relations Act, § 7 as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 157.

#### 14. Monopolies $\S$ 12(9)

An agreement between union and certain employers to have union call strike against certain other employers for purpose of driving such struck employers out of business, was not protected by exclusionary provisions of federal antitrust laws which applied to union engaged in labor activities, nor was union, by federal law, guaranteed right to effect purpose of that combination. Clayton Act, § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act, §§ 1, 4, 15 U.S.C.A. §§ 101, 104; Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.

#### 15. Commerce $\S$ 16

Even though a company is engaged in interstate commerce a particular activity or part of its business may be intrastate in character, not concurring or substantially affecting interstate commerce within realm of federal antitrust laws. Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.; U.S.C.A. Const. art. 1, § 8, cl. 3.

#### 16. Commerce $\S$ 8(2)

Fact that Congress has acted to prevent restraints on trade in interstate commerce of itself does not invalidate legislation by state effecting substantially the same result and fundamental inquiry in such instances is whether state legislation is in conflict with national policy. U.S.C.A. Const. art. 1, § 8, cl. 3.

## 17. Labor Relations ⇐510

Although congressional action has pre-empted jurisdiction of state court to grant equitable relief in solution of labor disputes that does not foreclose such a court from asserting jurisdiction in action for damages resulting from tortious conduct of those engaged in the dispute.

## 18. Commerce ⇐55

Cartwright Act prohibiting combinations in restraint of trade merely articulates in greater detail public policy against restraint of trade that has long been recognized at common law and is within the tradition of the usual law powers of the state and is not in conflict with federal policy. West's Ann.Bus. & Prof.Code, §§ 16720, 16726, 16750.

Hillyer & Crake and Oscar F. Irwin, San Diego, for appellant.

Donnelley, MacNulty & Butler, San Diego, for respondents John J. Satiros, et al.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent Coast Citrus Distributors, Inc.

Walter Wencke, San Diego, for respondent Members of Local No. 542.

McLaughlin & Casey and James A. McLaughlin, Los Angeles, amicus curiae in behalf of appellant.

Edmund G. Brown, Atty. Gen., and Wallace Howland, Asst. Atty. Gen., amicus curiae in behalf of state of California.

COUGHLIN, Justice pro tem.

Action for injunction and damages.

Alfred M. Lewis, Inc., and Rideout Produce Co., corporations, are produce dealers in San Diego, California. Alfred M. Lewis, Inc., is engaged in interstate business, operating grocery stores in many states.

Shortly before May 3, 1956, the Rideout company agreed to service certain produce accounts of the Lewis company. At this time the Rideout company, together with other corporations and individuals engaged

in the wholesale produce business, were members of an unincorporated association known as the San Diego Fresh Fruit and Vegetable Dealers Association (hereinafter referred to as the "Association"). Among other things, the purpose of the Association was to act as a collective bargaining unit on behalf of its members with labor organizations, including the Warehousemen, Teamsters, Chauffeurs and Helpers Local Union No. 542 (hereinafter referred to as the "Union"). This Union was an unincorporated association affiliated with the International Teamsters Brotherhood of America. As a bargaining unit, the Association concerned itself with the negotiation of contracts respecting wages and hours of persons employed by its members in order to effect a uniformity of agreements between them concerning these matters.

When the Lewis company and the Rideout company joined forces they entered into competition with the other members of the Association, who became apprehensive and, by reason thereof, the Association "entered into an understanding and arrangement with the Union and its \* \* \* officers, wherein and whereby \* \* \* Rideout Produce Co. was to be excluded from the collective bargaining arrangement theretofore existing" and the "Union was to demand from" the Lewis company and the Rideout company an "increase in wages sufficient to render competition with" the Association's "produce dealers unprofitable". Thereupon, the Rideout company was excluded from the mutual wage agreement in which it had participated with the other members of the Association and the Union demanded that it execute an agreement for the payment of higher wages. This demand was met and an agreement executed accordingly, which, with some modification, continued until April 1, 1957. In the meantime, the Rideout and Lewis companies had changed their agreement, to the end that the former rented a portion of its facilities and equipment to the latter, which also took over a number of the Rideout company's employees.

In April, 1957, in furtherance of its agreement with the Association, the Union demanded that the Lewis and Rideout companies execute contracts for wages sufficiently in excess of those paid by the Association's produce dealers as to render competition with those dealers unprofitable, and, upon refusal of this demand, declared a strike and placed a picket line around the Rideout company's place of business, which was the same place of business for the Lewis company. Thereupon, the two companies brought this action against the Union and the Association to enjoin the strike and the picketing and to recover damages allegedly sustained as a result thereof.

Joined as defendants were certain specifically named officers and agents of the Union, specifically named members of the Association, and a great number of fictitiously named individuals, partners and corporations. The complaint alleges that the Union has numerous members; that it is impracticable to bring all of said members into the action as defendants; that most of their names are unknown; and that, for these reasons, the individual members of the Union are made parties defendant and charged with defending the action for the benefit of all other members of the Union. The answers on file, together with the recitals in the findings and judgment, indicate that only those defendants specifically named in the complaint appeared in this action.

The case was tried by the court without a jury. The facts heretofore set forth appear in the findings prepared and signed by the trial judge. In addition, the court specifically found: "That the agreement and arrangement between defendant Local 542 and its defendant officers and defendant produce dealers and the acts done pursuant thereto as aforesaid, were for the purpose of intending to affect and restrict competition in the distribution of fresh fruits and produce in the city of San Diego and the immediately surrounding area."

From the facts as found the court concluded that the agreement between the de-

fendants "would be in violation of the anti-trust laws of the State of California if involving local businesses not engaged in interstate commerce or which affected interstate commerce"; that "jurisdiction of the controversies involved between the plaintiffs and the defendants is vested solely in the National Labor Relations Board"; that "under the National Labor Relations Act the right to strike is guaranteed to defendant labor union \* \* \* and the right thus made legal by the laws of the United States may not be made illegal by the anti-trust laws of the State of California"; that the agreement between the defendants "being not unlawful under the laws of the United States" does not constitute a conspiracy; and that "judgment should be rendered against the plaintiffs".

A judgment in favor of the defendants and against the plaintiffs was rendered accordingly, from which the plaintiff Alfred M. Lewis, Inc. appealed on the judgment roll alone, although after the filing of the clerk's transcript on appeal, pursuant to stipulation of all parties, a reporter's transcript was prepared and, after petition for permission to do so, was filed in this court. From a statement contained in the brief on file it appears that following entry of judgment, the plaintiff Rideout Produce Co. dismissed its action with prejudice.

Appellant contends that the trial court erred in drawing the conclusions of law heretofore noted from the facts as found.

Respondents contend that the evidence does not support the trial court's finding of an agreement between them in restraint of trade; that the trial court did not have jurisdiction over any dispute involving either of them; that the Labor Management Relations Act, the National Labor Relations Act, the Sherman Antitrust Act, and other federal legislation has pre-empted the field of law governing any of the controversies in this case; and that the trial court failed to find upon material issues presented by the pleadings.

[1] Although "It is well settled that parties who have not appealed cannot at-



tack the findings' " (*Henigson v. Bank of America*, 32 Cal.2d 240, 244, 195 P.2d 777, 779), and that errors affecting such parties will not be reviewed on appeal (*Salter v. Ulrich*, 22 Cal.2d 263, 268, 138 P.2d 7, 146 A.L.R. 1344), nevertheless, under the authority of *Mott v. Horstmann*, 36 Cal.2d 388, 393, 224 P.2d 11, the respondents urge this court to affirm the judgment on the ground that there is no evidence to sustain the finding that they entered into an agreement to force appellant out of business; that the judgment is proper because there is no valid finding to support a contrary judgment; and "that an erroneous reason should be disregarded if the decision is correct." *Mott v. Horstmann*, supra, 36 Cal.2d 388, 393, 224 P.2d 11, 14.

[2] In determining the sufficiency of the evidence to sustain a questioned finding, the appellate court must accept as true all evidence and all inferences which reasonably may be drawn therefrom tending to support that finding. *Burke v. Chrostowski*, 46 Cal.2d 444, 296 P.2d 545.

There is no direct evidence of an agreement between the Union and the Association to restrict competition, as set forth in the findings in this case.

[3,4] The courts have recognized the difficulty attendant upon proof of this kind of an agreement, which the parties in their briefs refer to as a conspiracy. *Johnstone v. Morris*, 210 Cal. 580, 590, 292 P. 970. Unless one of the conspirators confesses, no direct evidence of such an agreement is available. Consequently, "As a general rule, a conspiracy can only be established by circumstantial evidence." (*People v. Steccone*, 36 Cal.2d 234, 237-238, 223 P.2d 17, 19; *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397), and "it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts." *People v. Sampsell*, 104 Cal.App. 431, 438-439, 286 P. 434, 437; *People v. Sorrentino*, 146 Cal.App.2d 149, 159, 303 P.2d 859.

[5] The evidence in this case furnishes direct proof of facts supporting the infer-

ences drawn by the trial court respecting the existence and purpose of the agreement in question.

For a number of years the Rideout company and other members of the Association operated from places of business located in an area centering around Sixth Street in San Diego. For this reason the dealers were referred to as "The Street". In 1954 the Rideout company moved into more commodious and efficient quarters at another location. This move, however, did not change the relationship existing between this company and other members of "The Street". In 1955, as in previous years, a contract had been negotiated between the Union and the Association acting on behalf of its members, including the Rideout company. As heretofore noted, the primary purpose of the Association was to assure the same wage scale for each member, which was agreed upon by a majority vote. The 1955 contract covered a term of one year and expired April 1, 1956. At this time the members of the Association, including the Rideout company, agreed to stand together respecting a new contract, so that the wage scale applicable to each of them would be the same.

On May 3, 1956, the Rideout company commenced operations under an agreement with the Lewis company, which is a capital structure, to service the accounts of a co-operative venture known as Orange Empire, sponsored by Lewis. The stores which participated in this "co-op" are independent of the Lewis company and are not required to purchase from or through that company or the "co-op"; but if a profit is made by the "co-op" they will share therein. The Rideout company serviced the Orange Empire accounts on a percentage basis without any change in its operation; it conducted the same kind of business theretofore conducted; its agreement with the Lewis company meant only the acquisition of some additional accounts. Nevertheless, on May 5, 1956, two days after the Rideout company started its new operations, a representative of the respondent Union advised Mr. Rideout, president of the com-

pany, that because it was handling some business for the Orange Empire "co-op" it would be treated separately from other members of the Association; that it no longer could be a member of that Association; and demanded a substantial wage increase. Under threat of a strike called for May 10th and the probable loss of \$50,000 worth of fresh fruits and vegetables then on hand, the Rideout company acquiesced in the Union's demands and agreed to pay in accordance with a wage scale half way between that in effect on "The Street" and that in effect with the grocery industry of San Diego.

The Safeway stores in San Diego operated under an agreement whereby it paid its produce truck drivers according to the grocery industry scale. During the course of subsequent negotiations the Union and various members of the Association contended that the Rideout and Lewis companies had "captive accounts", such as did Safeway stores and, for this reason, should be treated differently than the dealers on "The Street". However, neither appellant Lewis company nor the Rideout company had any "captive accounts". A "captive account" is a customer which has no choice but to accept merchandise from the dealer as offered regardless of quality, amount or need. At times, stores that were members of the Orange Empire "co-op" purchased produce from dealers on "The Street" and not through the "co-op".

Shortly after his discussion with the Union representative, Mr. Rideout was advised by the president of the Association, as well as some of its members, that the matter had been discussed quite thoroughly by the members of "The Street" and the Union; that the membership was in accord with the Union because Rideout had taken on the Orange Empire produce business; and that Lewis should not have been allowed to go into the produce business.

In July, 1956, the agreement between the Rideout company and the Lewis company was changed. Instead of servicing the Orange Empire "co-op" stores, Rideout

rented part of its equipment and plant to the Lewis company, which, in turn, serviced these accounts. The Lewis company continued to employ some of the Rideout company's employees at the wages agreed upon by the latter company. On several occasions after this, Rideout had discussions with different members of the Association who stated that they would not stand behind him but would side with the Union. In January, 1957, one of the members asked Rideout if there was anything he, Rideout, could do to get Orange Empire produce out of business in San Diego and suggested that he dispose of his building to some other industry which would deprive Orange Empire of those facilities.

Some time prior to April 1, 1957, the Union and the Rideout and Lewis companies entered into negotiations concerning a wage contract for that year. Rideout had asked the Association to represent him but this request was refused, even though he was considered a member of the Association. The Union demanded that the two companies pay the same scale as Safeway stores upon the ground that both of them and Safeway stores had "captive accounts". The president of the respondent Association was in accord with the differentiation made by the Union for the same reason. The only difference between the operation of the dealers on "The Street" and that of the Rideout and Lewis companies, which was advanced as a reason for a difference in their classification for wage paying purposes, was the alleged "captive account" difference, which did not exist.

On April 1, which was the renewal date for the contracts under consideration, the dealers on "The Street" were paying \$1.80 per hour to their employees. The Union demanded \$2.39 $\frac{1}{4}$  per hour from the Rideout and Lewis companies for their employees. This demand was rejected; a strike was called and a picket line established. Although the Union representative and members of the Association had stated that a 20¢ an hour increase was being demanded from the dealers on "The Street", no new

contract was entered into by them and no strike was called.

In a conference between Mr. Lewis, president of appellant company, Mr. Glore, president of the respondent Association, and Mr. Mercurio, president of Growers Marketing Co., Inc., a member of the Association, it was suggested that Lewis buy out Growers Marketing Company; that if he did so, his troubles with the Union would be over. Lewis accused those present of putting the "tag" on him and they agreed that such was the fact. During the course of the foregoing conversation, in response to a statement by Mr. Mercurio that relations with the Union were peaceful until Lewis came into San Diego, the latter made this accusation: "You're the birds that did this. We didn't." Neither Mr. Mercurio nor Mr. Glore made any reply.

The evidence justifies the conclusion that the Rideout or Lewis companies cannot compete with respondent dealers if required to operate under the differential in wage scale demanded by the Union, which controls the labor market essential to their operations.

The foregoing facts legally sustain the trial court's conclusion that respondents entered into an agreement to restrict competition by establishing a wage differential between appellant and respondent dealers which would make it unprofitable for appellant to compete with those dealers.

[6] By this agreement, and the circumstances attendant thereupon, appellant had the choice either to accept the Union's demands made pursuant thereto, pay the higher wages and be forced out of the produce business by losses and lack of profit; or to refuse to pay the higher wages and be forced out of business by a lack of labor and other detrimental consequences resulting from the Union's strike and picketing. The agreement and the conduct of respondents pursuant thereto was in violation of the Cartwright Act which declares unlawful any "combination of capital, skill or acts by two or more persons" (including associations and corporations) for "The pur-

pose of creating or carrying out restrictions in trade or commerce" or "to prevent competition" in the "sale or purchase of merchandise, produce or any commodity." Bus. & Prof.Code, Secs. 16720, 16726; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 40-42, 172 P.2d 867; Caruso v. Abbott, 133 Cal.App.2d 304, 307, 284 P.2d 113; Alpha Beta Markets v. Amalgamated Meat Cutters, etc., 147 Cal.App.2d 343, 305 P.2d 163; Kold Kist, Inc., v. Amalgamated Meat Cutters, etc., 99 Cal.App.2d 191, 201, 221 P.2d 724.

In *People v. Sacramento Butchers' Protective Ass'n*, 12 Cal.App. 471, 481, 107 P. 712, 717, where an association of meat dealers and a meat distributing company were charged with entering into a combination to destroy competition in the retail meat business, in violation of the Cartwright Act, because they had agreed to require a named meat dealer to pay a higher price for meat than was required of members of the association, the court said:

"\* \* \* [t]he object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of 'merchandise, produce, or any commodity,' or if such combination tends to restrict trade or to prevent competition therein, such combination is against the letter and paramount object of the law."

If Lewis were forced out of the San Diego produce market, obviously any advantage in price or service which that company might offer buyers in that market would be eliminated.

[7] A violation of the Cartwright Act may be the basis of an action to recover damages for injury sustained as a result thereof and for injunctive relief. Bus. & Prof.Code, Sec. 16750; *Kold Kist, Inc., v. Amalgamated Meat Cutters, etc.*, supra, 99 Cal.App.2d 191, 221 P.2d 724; *O'Shea v. Tile Layers Union*, 155 Cal.App.2d 373, 318 P.2d 102.



The trial court determined, as expressed in its conclusions of law, that the agreement in question would have been in violation of the Cartwright Act if it involved "local businesses not engaged in interstate trade or which affected interstate commerce", but that because appellant was engaged in interstate commerce, the laws of the United States apply; that under those laws the agreement was not unlawful and, consequently, did not constitute a conspiracy. Integrant to this conclusion is the belief of the trial judge, as expressed in his summation at the conclusion of the trial, that an actionable conspiracy involves an agreement to do an unlawful act resulting in damage; that, unless the act resulting in damage is unlawful, independent of the conspiracy, no cause of action exists, even though the purpose of the conspiracy was to effect such damage; that the damage of which appellant complains resulted from the strike and the picketing invoked by the Union; that, as expressed in his conclusions of law, "under the National Labor Relations Act the right to strike is guaranteed to defendant labor union" and "the right thus made legal by the laws of the United States may not be made illegal by the antitrust laws of the State of California"; consequently, the conspiracy in question was not actionable.

Under the Cartwright Act and similar antitrust legislation, the combination for a particular purpose constitutes the unlawful act. *People v. Sacramento Butchers' Protective Ass'n*, supra, 12 Cal.App. 471, 484, 107 P. 712; *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 782, 57 L.Ed. 1232; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402, 47 S.Ct. 377, 381, 71 L.Ed. 700.

[8] The prohibited combination comes into being through an agreement of two or more persons for the purpose of restraining trade or preventing competition. Conduct used to effect such an agreement may result in actionable damages or be the subject of an injunction, even though such conduct if not used to effect the agreement would be lawful.

[9, 10] In the field of labor litigation it has been recognized that a strike may be lawful or unlawful, depending upon whether the primary objective or purpose for calling the strike is lawful or unlawful. As a consequence, in those instances where the primary purpose of a strike is to restrain trade, even though the working conditions of striking employees may be advanced as an incident to the accomplishment of the primary purpose, the strike will be enjoined as unlawful. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; *Kold Kist, Inc., v. Amalgamated Meat Cutters, etc.*, supra, 99 Cal.App.2d 191, 221 P.2d 724. "(t)he real test in a particular case is the primary purpose of the agreement or combination in question." *Schweizer v. Local Joint Executive Board, etc.*, 121 Cal.App. 2d 45, 53, 262 P.2d 568, 572. Under circumstances such as those in the case at bar, the determination of the primary purpose of such an agreement is a question of fact. The findings in this case establish that the purpose of the strike in question was to effect an agreement to destroy competition.

The Union contends that, as the trial court did not find the strike was called *only* for the purpose of effecting the agreement to destroy competition, a coincident labor purpose must be assumed because of the demand for an increase in wages. A reasonable interpretation of the findings does not justify this assumption. The court found that the agreement between respondents "and the acts done pursuant thereto as aforesaid, were for the purpose of intending to affect and restrict competition in the distribution of fresh fruits and produce in the city of San Diego." To accept respondents' contention would require a trial court to negate all facts which might limit the inclusive nature of a positive finding. This is unreasonable. "(i)f the findings of fact made by the trial court leave some issue or material fact undetermined, such issue of fact will be regarded as not proved by the party having the burden of proof" (53 Am.Jur.

796), unless such fact be implied in the findings made. *Haigler v. Donnelly*, 18 Cal.2d 674, 678, 117 P.2d 331. The contention advanced must be rejected.

The conclusions of law drawn by the trial court focus attention upon the application of federal legislation to this case. Interrelated, and equally pertinent, are inquiries concerning the jurisdiction of the state court, the legality of the transaction under consideration, whether it primarily involves a labor dispute or a restraint of trade, the interstate nature thereof, and its effect upon the Cartwright Act.

[11, 12] If the Labor Management Relations Act applies, the state court has no jurisdiction in the premises, except as the facts may establish a cause of action under state law for damages based upon a tort. *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed.2d 618; *Garmon v. San Diego Building Trades Council*, 49 Cal.2d 595, 320 P.2d 473.

The Labor Management Relations Act, which includes the National Labor Relations Act, governs labor disputes, unfair labor practices, and the concerted activity of employees for their mutual aid or protection affecting interstate commerce. Under the findings of the trial court, the controversy in this case does not involve a labor dispute, an unfair labor practice, or an activity of the employees for the purpose of mutual aid and protection. Any labor objective present was incidental to the accomplishment of respondents' primary purpose, which was to eliminate appellant's competition with other produce dealers. If the Union had agreed to forbid its members to work for appellant, in order to effect the purpose of the combination under consideration, the nonapplicability of the Labor Management Relations Act would be unquestioned. The method used to effect such purpose, by demanding a prohibitive wage rate, calling a strike, and invoking a picket line, while more subtle, although no less effective, did not change the fundamental nature of the transaction. Likewise,

if the Lewis company had acquiesced in the Union's demand, accepted the higher wage scale, determined that the venture was unprofitable, went out of business, and then sued for damages, no labor dispute, unfair labor practice, or mutual aid and protection activity would be an issue in such an action. These examples are used merely to point up the primary purpose of the conduct in question, which was to prevent competition, not to obtain a higher wage scale.

The numerous arguments advanced by respondent Union categorize the charges made against it within well defined unfair labor practices; relate facets of the negotiations and the contentions between it and the Rideout and Lewis companies to acceptable definitions of a labor dispute; advance investigative and administrative reasons for placing exclusive jurisdiction over these matters in the National Labor Relations Board; and urge that employees are given rights by section 7 of the Labor Management Relations Act which should not be taken from them in an action such as the one at law. 29 U.S.C.A. Sec. 157. In each instance, these arguments omit any consideration of the trial court's finding that the activities in question were engaged in "pursuant to" an agreement prohibited by the Cartwright Act, "in furtherance thereof", and "for the purpose" of eliminating appellant as a competitor of respondent dealers.

[13] The Labor Management Relations Act neither prohibits nor protects the activity of a union in aiding and abetting a non-labor group to destroy its competitor. See generally *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546.

[14] The combination between respondents was not protected by the exclusionary provisions of the federal antitrust laws which apply to a union engaged in labor activities; nor was the Union, by federal law, "guaranteed" the right to strike to effect the purpose of that combination. *Allen Bradley Co. v. Local Union No.*

3, etc., 325 U.S. 797, 807, 65 S.Ct. 1533, 1539, 89 L.Ed. 1939; *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788.

In *Allen Bradley Co. v. Local Union No. 3*, etc., supra, 325 U.S. 797, 808, 65 S.Ct. 1533, 1539, the court said that “\* \* Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.”

Consequently, when a union combines with a non-labor group in restraint of trade its activities are subject to the same federal antitrust laws as are those of the non-labor group, even though in so doing, its purpose is to further the interest of their members as wage earners. *Allen Bradley Co. v. Local Union No. 3*, etc., supra, 325 U.S. 797, 65 S.Ct. 1533; *United Brotherhood, etc. v. United States*, 330 U.S. 395, 400, 67 S.Ct. 775, 778, 91 L.Ed. 973; *Las Vegas Merchant Plumbers Ass'n v. United States*, 9 Cir., 210 F.2d 732, 751.

The trial court's conclusion of law that “the right to strike is guaranteed to defendant labor union” undoubtedly refers to the statutory expression of the anti-injunction policy of the federal government concerning strikes contained in the Clayton, and Norris-LaGuardia Acts (29 U.S.C.A. Secs. 52, 101, 104), or the “right which Congress had guaranteed under § 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions.” *Weber v. Anheuser-Busch, Inc.*, supra, 348 U.S. 468, 475, 75 S.Ct. 480, 485. As heretofore noted, the activity protected by this legislation does not extend to combinations between labor and non-labor groups in restraint of trade.

The National Labor Relations Act does not guarantee a right to strike. The provisions of this statute simply direct that nothing therein contained “except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” 29 U.S.C.A. Sec. 163.

It is our conclusion that the Union's conduct in question was not a subject of federal legislation; the state law governs; and the determination of the trial court to the contrary was error.

Nothing in this opinion should be taken as indicating that the trial court had jurisdiction to enjoin the respondent union from calling a strike or invoking a picket line for the primary purpose of attaining a lawful labor objective, as distinguished from calling such strike or enjoining such picket line for the primary purpose of effecting the unlawful agreement between it and respondent dealers to destroy competition. Caution must be exercised in defining the scope of any such injunction. *Park & Tilford Import Corp. v. International Brotherhood of Teamsters, etc.*, 27 Cal.2d 599, 607, 165 P.2d 891, 162 A.L.R. 1426; *O'Shea v. Tile Layers Union*, supra, 155 Cal.App. 2d 373, 378, 318 P.2d 102.

Besides contending that the case at bar is one concerning a labor activity subject to the exclusive jurisdiction of the National Labor Relations Board, it also is contended that the federal government has pre-empted the field of legislation respecting transactions involving restraints on trade in interstate commerce; that the Sherman Anti-Trust Act, 15 U.S.C.A. § 1 et seq.; Clayton Act, 15 U.S.C.A. § 12 et seq.; and Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq. are controlling; and that any relief thereunder must be sought in the federal courts or other federal agency. The federal acts in question together implement a policy against restraints on trade.

[15] The record discloses that although appellant's grocery business involved interstate commerce, consisting in the operation of grocery stores in several states, the only produce business it operated was in San Diego. Whether the activities under consideration in this case occurred in or substantially affected interstate commerce was a question of fact not covered by the general finding that appellant “is engaged in interstate commerce”. Even though a company is engaged in interstate commerce, a particular activity or part of its business



may be intrastate in character, not occurring in or substantially affecting commerce within the realm of the federal antitrust laws. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 548, 64 S.Ct. 1162, 1171, 88 L.Ed. 1440; *Chas. H. Benton, Inc., v. Painters Local Union No. 333*, 45 Cal.2d 677, 682-683, 291 P.2d 13. See also *Las Vegas Merchant Plumbers Ass'n v. United States*, supra, 9 Cir., 210 F.2d 732. However, for the purposes of this discussion it will be assumed that the activities in question are within the sphere of the commerce clause of the federal constitution, art. 1, § 8, cl. 3.

[16] The fact that Congress has acted to prevent restraints on trade in interstate commerce, of itself, does not invalidate legislation by a state effecting substantially the same result. The fundamental inquiry in such instances is whether the state legislation is in conflict with national policy. *People of State of California v. Zook*, 336 U.S. 725, 729, 69 S.Ct. 841, 843, 93 L.Ed. 1005.

In *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 49-50, 172 P.2d 867, the application of the Cartwright Act to interstate insurance transactions was sustained. The court said, 29 Cal.2d at page 51, 172 P.2d at page 877:

"The fact that the Sherman Act is applicable to such practices (i. e. restraints of competition involving boycott, coercion or intimidation) does not mean that the state law concerning restraints of commerce in the insurance trade is invalidated as to such activities and agreements involving such practices. \* \* \* Since there is no conflict between the law of this state and the Sherman Act, plaintiff may invoke the state law even if interstate commerce is involved."

The opinion in the foregoing case refers to a general rule expressed by the Supreme Court of the United States that "State laws are not invalid under the Commerce Clause unless they actually discriminate

against interstate commerce or conflict with a regulation enacted by congress.'" *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 50, 172 P.2d 867, 877.

[17] In the field of labor management relations affecting interstate commerce, although congressional action has pre-empted the jurisdiction of a state court "to grant equitable relief in the solution of labor disputes", it has not foreclosed such a court "from asserting jurisdiction in an action for damages resulting from the tortious conduct of those engaged in the dispute." *Garmon v. San Diego Building Trades Council*, supra, 49 Cal.2d 595, 602, 320 P.2d 473, 477; *San Diego Building Trades Council v. Garmon*, supra, 353 U.S. 26, 77 S.Ct. 607. In *Weber v. Anheuser-Busch, Inc.*, supra, 348 U.S. 468, 476, 75 S.Ct. 480, 486, the Supreme Court refers to a number of instances where the courts held that the federal enactments had not exclusively absorbed the authority of the State with respect to labor activities.

"In those cases where the Supreme Court has held that exclusive jurisdiction is vested in the National Labor Relations Board it appears without question that the basis of the decisions is the desirability of avoiding such a conflict between state and federal policies and procedural remedies as would result in an interference with uniform enforcement of federal act." *Garmon v. San Diego Building Trades Council*, supra, 49 Cal.2d 595, 603, 320 P.2d 473, 477. No need for federal legislation appears in order to effect uniformity of policy or enforcement thereof against restraints on trade.

The validity of a state statute regulating interstate transportation, containing provisions substantially the same as those of a federal act, was upheld by the Supreme Court of the United States, even though the conduct prohibited by such laws might be punishable as an offense against both the federal and state governments. *People of State of California v. Zook*, supra, 336 U.S. 725, 69 S.Ct. 841. The court said (336 U.S. at page 730, 69 S.Ct. at page 844):

"If State laws on commerce are identical with those of Congress, the Court may find congressional motive to exclude the States \* \* \* But the fact of identity does not mean the automatic invalidity of State measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent."

and further, (336 U.S. at page 733, 69 S.Ct. at page 845,)

"The question is whether Congress intended to override State laws identical with its own when it, through the Interstate Commerce Commission, regulated share-expense passenger automobile transportation, or whether it intended to let State laws stand. While the statute says nothing expressly on this point and we are aided by no legislative history directly in point, we know that normally congressional purpose to displace local laws must be clearly manifested. (Citing cases.)"

[18] "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, 44, 172 P.2d 867, 873. Such a legislative enactment is within the tradition of the "usual police powers" of the state, referred to in the *Zook* case as an aid in determining congressional intent. *People of State of California v. Zook*, supra, 336 U.S. 725, 734, 69 S.Ct. 841, 846. The Act is not in conflict with federal policy or law. To the contrary, in this area, the objective of each entity of government is the same. The state seeks to protect its citizens and the national government seeks to protect interstate commerce from a long recognized unlawful activity.

In *Parker v. Brown*, 317 U.S. 341, 367, 63 S.Ct. 307, 321, 87 L.Ed. 315, the validity of the California Agricultural Prorate Act was under consideration. The program sponsored by the act "was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected

the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent." The court said (317 U.S. at page 368, 63 S.Ct. at page 322):

"It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which has been the policy of Congress to aid and encourage through federal agencies \* \* \* Hence we cannot say that the effect of the state program in interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production."

Although the court was not considering a situation where similar legislation had been enacted by Congress, the principles advanced in considering the validity of the state statute, even though it affected interstate commerce, are pertinent to a consideration of the factual situation at bar.

As there is no conflict between the state and federal policies encompassed by the legislation under consideration; no conflict between the state and federal acts; no need for a single statute to effect uniformity of policy or procedure; the local law is within the tradition of "the usual police powers" of the state; and Congress has not indicated its intent to pre-empt the field, it is our opinion that the Cartwright Act may be applied to the situation at bar in the state courts.

Respondent union has made various contentions concerning the lack of findings with respect to alleged material facts. These come within the rule heretofore noted, that claims of error affecting parties who have not appealed will not be reviewed. Upon a retrial of the issues in this case the trial court may consider these contentions according to the law and the facts in the premises.

The judgment is reversed and the case is remanded for a new trial.

GRIFFIN, P. J., and MUSSELL, J., concur.

164 Cal.App.2d 9

**Petition of Ethel APPELATE to establish the fact of the death of Donald Applegate, a joint tenant.**

**Marie A. LE PLEUX (Py), Appellant,**  
v.

**Ethel APPELATE, Respondent.**  
No. 17284.

District Court of Appeal, First District,  
Division 1, California.  
Oct. 3, 1958.

Hearing Denied Nov. 26, 1958.

Proceeding to establish fact of death of joint tenant and to terminate joint tenancy, wherein judgment was entered and prior owner of property filed petition for order to show cause seeking to set aside joint tenancy on ground that property was taken from her by fraud. The Superior Court, County of Alameda, Allen G. Norris, J., discharged order to show cause, and prior owner appealed. The District Court of Appeal, Bray, J., held that if so-called order to show cause were assumed to be a request for intervention, it was properly discharged in view of fact that only function of decree was to establish fact of death and prior owner had no interest in such determination and that prior owner sought to broaden scope of proceeding.

Affirmed.

#### 1. Parties ⇨40(2)

An interest entitling a person to intervention must be an interest in the matter in litigation in suit as originally brought, and of such a present, direct and immediate character that intervenor will either gain or lose by direct effect of judgment, and an intervenor cannot be permitted to broaden scope or function of such special proceeding by urging claims or contentions which have their proper forum elsewhere.

#### 2. Parties ⇨40(2)

Where judgment establishing fact of death of joint tenant and terminating any interest he had in property was entered, if prior owner's so-called petition for order to

show cause, which alleged that property was taken from her by fraud and which asked that joint tenancy be set aside, were assumed to be a request for intervention, it was properly discharged in view of fact that the only function of decree was to establish fact of death of joint tenant and that prior owner sought to broaden scope of proceeding. West's Ann.Prob.Code, § 1170 et seq.; West's Ann.Code Civ.Proc. § 387; West's Ann.Rules on Appeal, rule 1(a).

#### 3. Appeal and Error ⇨82(1)

To be appealable, a special order after final judgment must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. West's Ann.Code Civ.Proc. § 963, subd. 2.

#### 4. Appeal and Error ⇨82(1)

Where judgment establishing fact of death of joint tenant and terminating joint tenancy was entered and prior owner of property filed petition for order to show cause seeking to set aside joint tenancy on ground that property was taken from her by fraud, trial court's order discharging order to show cause was a special order after final judgment, but was not appealable in view of fact that it did not affect decree which had as its only function the establishing fact of death. West's Ann. Prob.Code, § 1170 et seq.; West's Ann. Code Civ.Proc. § 963, subd. 2.

Marie A. LePleux (Py), in pro. per.

Russell P. Studebaker, Oakland, for respondent.

BRAY, Justice.

This is an appeal by Marie A. LePleux (Py) from an order discharging an order to show cause to set aside a joint tenancy.

The appellant obtained title to the subject property on the death of her mother in 1938. She failed to make payments on a promissory note secured by a deed of trust which was on the property. As a result,



the property was sold by a foreclosure or trustee's sale on July 28, 1943. Subsequently, the appellant sought to set aside the sale. Judgment against her was affirmed in *Py v. Pleitner*, 1945, 70 Cal.App.2d 576, 161 P.2d 393.

Sometime later the Applegates (Donald and Ethel) became owners of the property or a portion of it in joint tenancy. Upon the death of Mr. Applegate, a proceeding was instituted by Mrs. Applegate, in June of 1954, to establish the fact of death and to terminate the joint tenancy under Probate Code, § 1170 et seq. A judgment in that proceeding establishing the fact of death of Donald Applegate and terminating any interest he had in the property was entered on June 11, 1954. On August 5, 1954, appellant filed an "Order on Motion & Order on Motion to Argue and Show Cause Joint Tenancy deed." That document alleges title in appellant; that the property was taken from her by fraud, by collusive action of a great number of people, and asks that the joint tenancy be set aside and the property be vacated and the proceeding transferred to the United States Supreme Court.

Mrs. Applegate filed a motion, on September 8, 1954, to dismiss the "petition to set aside joint tenancy and decree" on the ground that the petition was in the nature of a proceeding to try title, for which the probate court does not have jurisdiction.

There were subsequent pleadings filed, all referring to the proceeding to establish death, which are unintelligible. At any rate, on March 23, 1956, the order to show cause was heard. The minute order of that date states: "Plaintiff orally moves the Court to re-open the matter of transferral of the matter to the United States Supreme Court \* \* \* The matter is submitted, and the Court orders that the Order to Show Cause and Notice to set matter for trial be and the same is hereby discharged." Appellant has apparently filed a notice of appeal from that order. Under the liberal rules of construction, the

notice of appeal is probably sufficient. Rule 1(a), Rules on Appeal; 3 Cal.Jur.2d §§ 181, 182, pp. 667-669.

The order discharging the order to show cause should be sustained. "A judgment establishing the fact of death in a proceeding under sections 1170 and 1175 of the Probate Code is not an adjudication of title. Under section 1174 it is only prima facie evidence of the fact of the death. It is not a judgment from which an appeal may be taken under section 1240 of the Probate Code." In re Estate of Basso, 1945, 68 Cal.App.2d 294, 299, 156 P.2d 476, 478. Moreover, no appeal was taken from the decree establishing death.

[1, 2] If the so-called order to show cause is assumed to be a request for intervention (Code Civ.Proc. § 387), the determination of the trial court was correct. An interest entitling a person to intervention must be an interest in the matter in litigation in the suit as originally brought, and of such a present, direct and immediate character that the intervener will either gain or lose by the direct effect of the judgment. An intervener cannot be permitted to broaden the scope or function of such special proceeding by urging claims or contentions which have their proper forum elsewhere. *Bernheimer v. Bernheimer*, 1948, 87 Cal.App.2d 242, 196 P.2d 813.

[3,4] The order made by the trial court technically is a special order after final judgment. Code Civ.Proc. § 963, subd. 2. However, an appeal from it does not lie, for to be appealable under the code such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. *Hixson v. Hixson*, 1956, 146 Cal.App.2d 204, 206, 303 P.2d 607. It is obvious that the order here does not and could not affect the decree whose only function was to establish the fact of death.

The appeal is dismissed.

PETERS, P. J., and ST. CLAIR, J. pro tem., concur.

163 Cal.App.2d 833

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Nolan WASHINGTON, Defendant and**  
Appellant.

Cr. 3499.

District Court of Appeal, First District,  
Division 1, California.

Oct. 2, 1958.

Rehearing Denied Oct. 17, 1958.

Defendant was convicted in the Superior Court, Alameda County, Marvin Sherwin, J., for unlawful possession of marijuana, and he appealed. The District Court of Appeal, St. Clair, J. pro tem, held that it had been error to refuse to grant continuance necessary to give defense an opportunity to meet prosecution's case by allowing defense chemist to examine alleged marijuana that People had put in on rebuttal, and held that such error had not been cured by permitting defense chemist to give, on motion for new trial, evidence which cast doubt upon People's chemist's positive identification of scrapings taken from defendant's pocket; and held that since all of evidence, except that of defendant's companion and the scrapings, was as consistent with such companion's having had possession of cigarette found near defendant's automobile as with defendant's having had such possession, error would require reversal.

Judgment reversed for new trial.

#### 1. Arrest $\S$ 63(4)

Under circumstances disclosed, in prosecution for unlawful possession of marijuana and for unlawfully furnishing marijuana to a minor, there was reasonable cause for arrest of defendant. West's Ann. Pen.Code,  $\S$  836.

#### 2. Searches and Seizures $\S$ 1

To merely observe that which is patent and open is not to "search."

#### 3. Criminal Law $\S$ 698(1)

Where no objection was made, in prosecution for unlawful possession of mari-

juana, to admission of cardboard crutch (used to prolong utility of marijuana cigarette) and contents thereof on ground that they were products of an illegal search and seizure, any objection on that ground was waived.

#### 4. Searches and Seizures $\S$ 7(27)

Question of consent is one of fact; and on conflicting evidence presented, in prosecution for unlawful possession of marijuana and for furnishing narcotic to minor, trial court properly found that minor had consented to search of her purse which produced match cover from which paper crutch (used to prolong utility of marijuana cigarette), had been made. West's Ann.Pen.Code,  $\S$  836.

#### 5. Criminal Law $\S$ 680(1), 698(1)

Order of proof is matter for discretion of trial court, and where no objection to admission of scrapings from defendant's trouser pocket, on ground that such evidence was not proper rebuttal, was made, in prosecution for unlawful possession of marijuana, any objection on that ground was waived.

#### 6. Criminal Law $\S$ 649(2), 1166½(1)

In prosecution for unlawful possession of marijuana, it was error to refuse to grant continuance necessary to give defense an opportunity to meet prosecution's case by allowing defense chemist to examine alleged marijuana that People had put in on rebuttal, and such error was not cured by permitting defense chemist to give, on motion for new trial, evidence which cast doubt upon People's chemist's positive identification of scrapings taken from defendant's pocket; and since all of evidence, except that of defendant's companion and the scrapings, was as consistent with her having had possession of cigarette found near defendant's automobile as with defendant's having had such possession, error would require reversal. West's Ann.Health & Safety Code,  $\S\S$  11500, 11714.

#### 7. Criminal Law $\S$ 1162

In considering whether or not error was prejudicial, rule is that it must be reasonably probable that result more favorable

to appealing party would have been reached in absence of error.

Thomas Francis Lyons, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

ST. CLAIR, Justice pro tem.

Appellant was charged in the first count, with violating section 11500 of the Health and Safety Code, possession of marijuana; and in the second count with violating section 11714 of the same code, unlawfully offering to sell, furnish and give a narcotic to a minor. The complaint set out four prior narcotic convictions, all misdemeanors, and a felony forgery conviction. All prior convictions were admitted. The jury found the appellant guilty on the first count and not guilty on the second count.

The nature of the points raised by appellant on appeal is such as to require a rather detailed statement of the facts. The points are:

I. There was no reasonable or probable cause for the original arrest of the appellant.

II. There was no reasonable or probable cause for the search of the appellant's automobile, or there was no reasonable relationship between the arrest and the search.

III. It was error for the trial court to admit certain evidence seized in violation of the rights of a third party.

IV. The People committed error in introducing, in rebuttal, evidence linking the appellant to possession of the very marijuana which was the basis of the proof of the violation proved in the case in chief.

V. The court erred in denying a motion for a continuance or other extension of time to permit the appellant to submit the rebuttal evidence to his own chemist for analysis.

VI. The errors were prejudicial.

#### Statement of Facts

At 2:00 a. m. on August 20, 1957, a police officer approached a car parked in the vicinity of DeFremery Park in Oakland, California. The appellant and a 17 year old girl named Mrs. Charissetta Cross were sitting in the car. The officer could see both of their heads. As he approached the car, he saw the appellant make an arm motion in or towards the back seat. The officer approached the car on the passenger side where Mrs. Cross was seated. The officer asked the girl if everything was all right, to which she replied in the affirmative.

The officer asked for and was shown appellant's driver's license and then checked the registration. Appellant having stated the car was his, a discrepancy arose as the car was registered to another Washington. In addition, the appellant's license carried a notation that he was not permitted to own a car. The officer ordered the appellant to descend from the car, which he did. As he descended the officer recognized the appellant as an ex-convict but could not remember the crime of which he had been convicted.

The officer requested the appellant to turn his back so that he, the officer, "could pat him down for weapons." The appellant was also requested to place his hands on the automobile so that the officer could determine whether or not he was armed. Appellant refused to co-operate in either way. Thereupon the officer handcuffed the appellant and radioed for help.

One of the answering officers found the remains of a marijuana cigarette wrapped in a cardboard "crutch" next to the car. (The theory of a "crutch" apparently being that by wrapping it around a cigarette one could smoke it down to a shorter length than otherwise.) The crutch matched and came from a torn matchbook discovered in the girl's purse.

The torn matchbook had been discovered in the girl's purse under circumstances which the appellant claimed shows that she was coerced into showing the contents



to the police. At the trial admission of the matchbook was challenged on various grounds, including illegal search. After examination on voir dire by appellant's counsel and by the court, the court made a finding that the showing of the contents of the purse was voluntary on the part of the girl.

The girl's testimony definitely linked the appellant to the marijuana and to the crutch and its use by him.

Mrs. Cross testified that she had joined the appellant at about 9:30 on the evening of the 19th. After a series of excursions to a hamburger place, to Union Street near her house, to a restaurant and bar, and to some "projects," they arrived at DeFre-mery Park. While they were parked and conversing, appellant asked her "did [she] want to get loaded," holding up a brown cigarette. She declined. Appellant lit the cigarette with a match borrowed from Mrs. Cross and smoked it. Later appellant asked for the matchbook again. He wrapped the cigarette in part of the matchbook. The police arrived shortly thereafter. The matchbook had been placed on the dashboard and Mrs. Cross put it in her purse.

The police minutely searched the automobile but found no contraband, nor did they at any time find any on the appellant.

At the start of the trial the court ordered "the marijuana evidence that will be introduced" to be made available that same day to a defense chemist to be appointed by the court. The material found in the crutch alongside of the car was turned over to the defense chemist. At the trial the prosecution's chemist testified that the material in the crutch was marijuana. The defense chemist did not testify. By stipulation his report went into evidence and was read or exhibited to the jury. The defense chemist agreed that the contents of the crutch were marijuana and further stated that colored stains on the brown paper surrounding the marijuana were lipstick. The girl had testified that neither she nor the appellant had on any lipstick on the night in question.

Appellant went on the stand. On cross-examination the People examined him at length concerning the trousers that he had on the night of his arrest. He identified them and denied that he had ever carried any marijuana in these trousers. On rebuttal, the People produced evidence to the effect that 14 days before the trial a police officer had scraped the dust and lint out of each pocket in the clothes of the appellant and had turned the scrapings over to the prosecution chemist. The prosecution chemist testified that by microscopic examination he could come to the conclusion that the tracings contained marijuana. Photographs were introduced of the alleged tracings of the scrapings in the pocket.

The appellant's counsel claimed surprise but did not object on the grounds of illegal search. He did request that the tracings be submitted to the defense chemist. On the alleged grounds of pressure of time the court denied this motion. The case was sent to the jury and before the verdict the jury came back in and requested that they have read to them certain testimony concerning the trousers. The jury found the appellant guilty of the possession of marijuana as charged in the first count but not guilty of giving marijuana to a minor, as was alleged in the second count.

On the motion for a new trial the defense chemist testified that the tracings from the pocket had been made available to him, that there was not sufficient quantity to make a determination by microscopic examination, that the photographs could be that of either marijuana or other vegetable material and that with such a small amount the only positive test would be a chemical test. The court denied a motion for a new trial.

# I

*Was there reasonable or probable cause for the arrest of the appellant?*

The appellant relies on California Penal Code, section 836, which lays down the rule for officers making an arrest without a warrant. The section reads as follows:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Appellant cites and relies on *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531, holding that arrest and search is not justified merely because appellant was parked in an automobile with a woman at late and unusual hours, and *People v. Sanders*, 46 Cal.2d 247, 294 P.2d 10, holding that the fact that a person is a past offender is not probable cause to arrest him. Also, *People v. Gale*, 46 Cal.2d 253, 294 P.2d 13, where the original stopping of the defendant who was driving an automobile was proper and when the questions of the officer brought replies consistent with innocence, no probable cause was established to arrest the defendant and search his car.

The vice of the appellant's position is that he ignores the sequence of events. The original answers of the appellant to the officer's first question developed inconsistencies, as did the fact that appellant's claimed ownership of the car was not consistent with the registration card in the car. The officer asked the appellant to step out of the car which he did, apparently voluntarily.

On brief, the respondent refers to the appellant's actions as "the appellant resisted arrest"; "resistance by the appellant"; and "the appellant became argumentative to a degree so as to necessitate handcuffing him." Appellant, on brief, states, "The defendant was arrested \* \* \* He was handcuffed. \* \* \*"

It is not clear whether the parties considered the order to descend from the car as the arrest or whether it was the handcuffing. Both appear to agree that the arrest was completed upon the handcuffing.

There have been many cases construing section 836 of the Penal Code. In *People v. Jaurequi*, 142 Cal.App.2d 555, at pages 559-560, 298 P.2d 896, at page 899, the following language, quoted and approved in *People v. West*, 144 Cal.App.2d 214, 300 P.2d 729, was used: "'The term, reasonable or probable cause, has been defined: 'By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.'" In *re McCarty*, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.'" Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77.' *People v. Novell*, 54 Cal.App.2d 621, 623-624, 129 P.2d 453, 454.

"It was stated in *People v. Brite*, 9 Cal.2d 666, at page 687, 72 P.2d 122, 133: "'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" (Citing cases.) Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. (Citing cases.)'

"There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374."

The officer testified as follows: "As I got him out of the car I recognized him as a past offender. I didn't remember exactly what his offense was, but I asked him to turn around so I could pat him down for weapons, at which time he refused to turn around. I took him away

from the car door of his car and took him to the rear of my car, again asked him to put his hands on the rear deck of the car so I could pat him down for a weapon. He refused. He kept turning around. So I put the handcuffs on him, at which time I put him in the rear of my car, hit the radio and asked for assistance."

The appellant's testimony was substantially the same except his version of the events after he got out of the car was that he did turn around and the officer did pat him down, i. e. feel him for weapons.

[1] There would seem to have been sufficient grounds for the actual arrest, under the circumstances.

## II

*Was there reasonable and probable cause for the search of the appellant's automobile?*

Preliminarily it should be noted that the search of the car and the appellant's person did not turn up any marijuana.

[2] To observe that which is patent and open is not a search. *People v. Jaurequi*, 142 Cal.App.2d 555, 298 P.2d 896, supra; *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855.

[3] The search of the automobile was not occasioned by the facts surrounding the actual arrest of appellant but by the discovery of the crutch and the marijuana alongside of the car, still warm. The first officer to approach the car had also seen the motion of the appellant's arm; the torn matchbook cover that fitted the crutch was found in Mrs. Cross' purse before the search. No objection was made to the admission of the crutch and the contents thereof on the ground that they were the products of an illegal search and seizure; hence any objection on that ground has been waived.

We hold that under the circumstances in question the original arrest of the appellant and the subsequent search were reasonable and proper under the circumstances.

## III

*Was it error for the trial court to admit the torn matchbook cover found in Mrs. Cross' purse?*

The appellant objected to its admission on the ground of an illegal search and seizure. The People relied upon Mrs. Cross' consent. During Mrs. Cross' cross-examination about the emptying of her purse on the seat of the car, she was asked if this was at the officer's request and whether it was done voluntarily. She answered yes to both questions. An objection was made to the second question on the ground that it was asking for an opinion and conclusion. This was overruled. Mrs. Cross was then asked whether Exhibit 2 was similar to the matchbook she gave the appellant that night. Defense counsel then stated he would ask her questions "as to whether or not she did give her consent to the search." The court then stated that Mrs. Cross was the one to make the objection as to the legality of the search.

Defense counsel stated he thought there was authority for his position. A 20-minute recess was taken and after the recess defense counsel cited *People v. Mills*, 148 Cal.App.2d 392, 409, 306 P.2d 1005, to the court, to which the court responded, "Yes. You might add *People versus Martin* [45 Cal.2d 755, 290 P.2d 855] to your list."

After a witness was called out of order, defense counsel examined Mrs. Cross on voir dire. At the conclusion of this examination, the court asked, "In other words, you didn't have anything in your purse that you objected to showing him? A. I didn't think so."

Shortly thereafter, defense counsel made the objection to the introduction of the match cover, which the court overruled.

Although the court's initial ruling was that defendant was not the proper person to object to an illegal search of Mrs. Cross, after authority was produced, the court agreed with defense counsel, even supplying a citation to a Supreme Court case in point, *People v. Martin*, 45 Cal.



2d 755, 290 P.2d 855. Defense counsel was allowed to conduct the voir dire examination. From the court's own questions, it is apparent that the issue of consent was considered by the court.

[4] The question of consent being one of fact (*People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469), we hold that the trial court, on conflicting evidence, properly held that Mrs. Cross consented.

#### IV

[5] *Was it error, or abuse of discretion for the trial court to permit the admission of the scrapings from appellant's trouser pocket to be put in evidence on rebuttal?*

The tracings were linked to the watch pocket of the trousers that appellant wore the night of his arrest. It would appear that they were offered as part of the proof of the possession of marijuana. It is difficult to understand in the light of the value of this evidence why the People did not make it available to the appellant under the original order of the court.

It is certainly true that the order of proof is well within the discretion of the trial court. Appellant relies on *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665; *People v. Avery*, 35 Cal.2d 487, 218 P.2d 527, and *People v. Cunha*, 107 Cal.App.2d 382, 237 P.2d 12, for the rule that an abuse of discretion may well result from allowing a district attorney by way of rebuttal to bring in evidence that should have been in the prosecution's case in chief. When the trousers were first inquired about during appellant's cross-examination, an objection of immateriality was made. This was overruled, and there do not appear to be any further objections to the introduction of the scrapings or testimony concerning their character on the ground that the evidence was not proper rebuttal. Appellant's briefs do not point out such an objection. It would appear that the appellant has waived any objection on this ground.

#### V

*Was it error for the court to refuse the defendant a continuance so his chemist*

*could examine the alleged marijuana that the People put in on rebuttal?*

The appellant when confronted with the testimony concerning the scrapings from the pocket made a timely motion for the tracings to be made available to him for turning over to the defense chemist for analysis. This was denied.

The importance of the testimony concerning the scrapings is shown by the fact that the jury came back in and requested the reading to them of certain testimony concerning the trousers. It should be noted here that these scrapings were the only evidence outside of the girl's testimony that squarely connected the appellant with the marijuana. The only evidence concerning the second count, to wit, the offering of the marijuana to a minor, was in the girl's testimony, which testimony was repudiated by the jury in finding the appellant not guilty thereof. At the time that defense counsel asked that the court-appointed chemist be allowed to examine the scrapings, the court inquired whether otherwise the case could go to the jury in the afternoon, and upon being assured that it could, the court denied the motion, saying: "Well, I think I'll make the same determination as I did in the Bradford case; namely, that in the event of an adverse verdict as far as the defendant is concerned, and he wants to renew his motion, the Court will have the testimony of Mr. Thiesen [the prosecution chemist] verified by Mr. Bradford [the defense chemist] on motion for new trial, so that if there is any reason for doubting the testimony of Mr. Thiesen, why, the Court would be in the position of a 13th juror in passing upon that question. But our calendar is in a condition that the defendants are waiting to be tried, and they're entitled to be tried within 60 days, and I don't like to delay this case an extra day."

On the motion for new trial, Mr. Bradford testified that if the material subjected to examination contained enough of the component parts of the marijuana plant to get an over-all picture, identification could be made microscopically, but if less than

this was available, it was necessary to make a test known as the Dukuenois Reaction, since the appearance of small portions of the plant is similar to that of certain other plants. In his experience, an initial identification of tracings under the microscope had proved incorrect. He testified that the photograph of the tracings was consistent with the presence of marijuana but the sample was too small to determine conclusively whether it was marijuana by microscopic test alone.

The court denied the motion for the new trial, on the ground that the result would not "have been a bit different if Mr. Bradford had testified during the trial, instead of testifying here the other day."

Mr. Bradford's testimony at least throws some doubt upon Mr. Thiesen's positive identification of the scrapings as containing at least three particles of marijuana in view of his further testimony that he subjected the material only to a microscopic examination. Clearly if Mr. Bradford's testimony had been offered and rejected at the trial, this would have been error. It would seem to be as much error to refuse the defense an opportunity to meet the prosecution's case by allowing examination of the scrapings as it would to refuse the actual testimony. There was a time pressure present, but this was produced by allowing the prosecution to introduce the evidence at the close of the trial, and the request was rejected.

As indicated above, the learned trial judge stated that at the motion for a new trial he would sit as the 13th juror. The Supreme Court, in *People v. Robarge*, 41 Cal.2d 628, 262 P.2d 14, 17, has referred to the sometimes unfortunate use of that phrase. Citing *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934 (a 13th juror case) and *People v. Cesena*, 18 Cal.App.2d 727, 64 P.2d 732; at page 633, 262 P.2d 714, at page 17, the court said: "It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial."

It is obvious that the appellant did not have the advantage referred to in the last quotation, inasmuch as the jury never heard Mr. Bradford's testimony. Whatever effect this may have had on the verdict, a reading of the proceedings on the motion for a new trial conclusively shows that the trial judge did not do as he described, to wit, sit as a 13th juror. To the contrary, he did just what the court in the *Robarge* case said he should do (and was not done in the *Robarge* case) when, at page 634 of 41 Cal.2d, at page 17 of 262 P.2d, it said: "As we have seen, it is the province of the trial judge to see that the jury intelligently and justly performs its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict."

[6,7] It would appear to be error now to permit the defendant to bring before the jury the evidence casting doubt on the nature of the scrapings found in his pocket and to allow him only to submit it to the judge on the motion for a new trial.

## VI

### *Was the error prejudicial?*

In considering whether or not the above error constituted prejudicial error, the rule is that it must be reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243. In *People v. Avery*, 35 Cal.2d 487, 218 P.2d 527, *supra*, it should be noted on the rebuttal point that the court refused to reverse on the ground that the defendant had been given an opportunity to meet the surprise rebuttal testimony. Several other cases which follow the *Avery* case take the same position that the error is cured when the defendant is given an opportunity to meet the surprise rebuttal. Here, the defendant was not given such an opportunity.

The question of prejudice is a difficult one. The result could have been different had Mr. Bradford's evidence gone before the jury. The scrapings were the only

evidence linking defendant to the possession of the marijuana cigarette not dependent upon the testimony of Mrs. Cross. That the jury did not put full credence in her testimony is indicated by defendant's acquittal on the second count of the information. She herself testified that she had smoked marijuana cigarettes, "more than four or five," as lately as April, 1957, seven months before the trial. The defendant testified that she left the car and joined some people in another car while they were at DeFremery Park. The marijuana cigarette contained traces of lipstick. Defendant testified that the car of the other people was in the place where he later parked, and even the girl testified that a car had pulled out of that same parking place before they moved in. This is consistent with her testimony that she asked him to go by the place to see if her friend was still there. All the evidence, except that of Mrs. Cross and the scrapings, is as consistent with her having had possession of the cigarette as defendant's having had such possession. In this situation, it cannot be said that impeachment of the prosecution chemist's conclusion concerning the scrapings could not have influenced the result in the case.

The failure to permit the appellant's chemist to have access to the tracings and have his findings before the jury was clearly error. The permitting of the using of the tracings in rebuttal may or may not have been error, inasmuch as no timely objection was made on that ground. However, that ruling was an integral part of the refusal to permit the appellant to have access to the tracings, as was the refusal by respondent to comply with the court's original order and make the scrapings available to appellant at the start of the trial.

The trial court's otherwise proper review of the evidence on the motion for new trial could not cure the fact that the jury was not permitted to hear testimony vital to the defendant's defense.

The conviction depends basically on weighing the evidence of the witness Cross against the evidence of the appellant. The

fact that the jury came back in to have reread to it some of the testimony concerning the trousers from which the tracings were taken and refused to convict appellant of the second count emphasizes the closeness of the case to the jury. We are satisfied that in a close case of this nature the error discussed may well have tipped the scales in the balance and hence was in fact prejudicial.

Judgment reversed for a new trial.

PETERS, P. J., and BRAY, J., concur.



164 Cal.App.2d 1

**The CITY OF SAN DIEGO, a Municipal Corporation, Plaintiff and Appellant,**

**v.**

**Thomas F. BOGGELN et al., Defendants,  
Martha May Rogers, Respondent.**

**Civ. 5864.**

**District Court of Appeal of California.  
Fourth District.**

**Oct. 2, 1958.**

**Rehearing Denied Oct. 27, 1958.**

**Hearing Denied Nov. 26, 1958.**

Action brought by city of San Diego to condemn land for Mission Bay Park project. The Superior Court of San Diego County. Joe L. Shell, J., rendered the judgment challenged by plaintiff's appeal. The District Court of Appeal, Mussell, J., held, inter alia, that requested instruction, failing to state judicially-announced rule as to other sales and excluding consideration of other sales which took place after city first fixed boundaries of park for public improvement, had been properly rejected.

Affirmed.

**I. Stipulations ⇨14(10)**

**Trial ⇨260(10)**

In action to condemn land for park purposes, any error in excluding evidence



which would have tended to show that property in question had been, from beginning, certain to be taken for park project and in refusing requested instruction to exclude, in determining fair market value, any enhancement in value of property due to development of property, could not have been prejudicial in view of stipulation that subject property was within boundaries of park and within boundaries of original condemnation case and in view of instruction that improvement was not a factor to be considered in determining market value.

## 2. Eminent Domain ⇨221

In action to condemn land for public park purposes, it was, on record presented, for jury to determine whether flood control channel was an integral part of park project and itself such an improvement that any benefit accruing therefrom to subject property should be excluded by jury in computation of fair market value.

## 3. Evidence ⇨142(3)

In condemnation action, filed June 29, 1954, it was not an abuse of discretion to refuse to permit condemnor to introduce evidence of comparable sales in 1940-1945 era, notwithstanding condemnor's contention that property involved had been earmarked for condemnation for project in 1945, and that any enhancement in market value of property thereafter was attributable to and anticipated actual development of project.

## 4. Eminent Domain ⇨222(4)

In action brought by city of San Diego to condemn land for Mission Bay Park project, requested instruction, failing to state judicially-announced rule as to other sales and excluding consideration of other sales which took place after city first fixed boundaries of park for public improvement, was properly rejected.

MUSSELL, Justice.

This is a condemnation action, filed June 29, 1954, in which the city of San Diego seeks to acquire for a public park and recreation purposes real property owned by defendant Martha May Rogers, near Mission Bay, and described as Block 12, Electric Line Addition in said city. A jury awarded said defendant the sum of \$53,750 for her property and the city appeals from the judgment thereupon entered, claiming that the trial court erred in admitting and excluding evidence and in its refusal to give certain offered instructions.

Prior to 1945 Mission Bay was owned by the state as a part of the state's park lands and in that year the State Legislature granted to the city of San Diego all of the tidelands and submerged lands in and around Mission Bay, upon condition that the property be developed and used for park and recreation purposes. On April 17, 1945, a municipal bond election was held and the city was authorized to issue bonds for the acquisition and construction of municipal improvements for park and recreation purposes in and around Mission Bay. On December 14, 1945, the city filed an action (City of San Diego v. Della Adams, et al.) to acquire certain properties adjacent to Mission Bay for park and recreation purposes. The complaint in this action, No. 130137, listed over 900 separate parcels of property, including the parcel here involved and owned by the defendant Martha May Rogers. However, this action was dismissed by the city on January 22, 1952. In 1946 the Congress of the United States authorized the improvement of the San Diego River and Mission Bay in accordance with a report of the Chief of Engineers, recommending that the flood control project for the San Diego River, as authorized, be extended to include a multiple-purpose project for flood control of said river and small boat navigation on Mission Bay; that the United States pay for the actual construction of the flood control channel and that local public interests pay for the development of the Mission Bay area and purchase and hold in the public interest the lands between the

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J. F. DuPaul, City Atty., and Frederick B. Holoboff, Deputy City Atty., San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

flood control channel and Mission Bay west of highway U. S. 101.

On January 6, 1948, the city adopted a resolution, No. 88026, in which it agreed to fulfill the conditions set forth in said act of Congress in the acquisition and construction of the multiple-purpose project for flood control on the San Diego River and small boat navigation on Mission Bay and to provide at its own expense necessary bulkheading and all necessary lands and rights of way. The city further agreed to make all necessary alterations to highway bridges, utilities and side drainage structures and to purchase and hold in its name for public interest and benefit the lands between the flood control channel and Mission Bay west of highway U. S. 101. The resolution further provided that the city will complete certain improvements in the area and will provide adequate facilities for storage, maintenance and supplying of small craft in Mission Bay and maintain and operate the entire project, except maintenance of jetties and stone revetment constructed by the United States. Bond issues were authorized in 1950 and 1956 and the proceeds therefrom were and are used for the development of the Mission Bay Park project.

While the real property here involved and owned by defendant Martha May Rogers was included in the property sought to be acquired by the city in the action filed against Della Adams, et al., supra, this action was dismissed before said defendant's property was so acquired and the present action was filed by the city on June 29, 1954.

It is the basic contention of appellant that the property involved was earmarked for condemnation for the Mission Bay Park project in 1945 and that any enhancement in the market value of the subject property which is attributable to either the anticipated or actual development of the Mission Bay Park project is not compensable to the extent of such enhancement. In support of this contention appellant cites Nichols on Eminent Domain, Volume 4, pages 122-126, stating that the general rule is that any enhancement in value which is brought about

in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land; that if it is known from the very beginning exactly where the improvement will be located if it is constructed at all, the property that will be required for its use will not participate in the rise or fall in values, and that the enhancement of price to the public improvement, if based on the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the land improved by the public is legitimate; but when this expectation is destroyed by the practical certainty as distinguished from the legal certainty that the lands are not to continue in private ownership adjacent to the public lands, then the reason for allowing such enhancement fails. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, is cited as holding that where the public project includes the taking of several tracts, but only one is taken in the first instance, the owners of the other tracts, when they are ultimately taken, should not be allowed an increased value resulting from the public improvement.

In *County of Los Angeles v. Hoe*, 138 Cal. App.2d 74, at page 78, 291 P.2d 98, 100 (also cited by appellant) the court said:

"It is the law, as stated by appellant, that in arriving at a determination of the market value of land which is the subject of a condemnation action, it is not proper to consider the increase, if any, in the value of such land by reason of the proposed improvement which is to be made on the land by the condemnor. (See *San Diego Land etc. Co. v. Neale*, 78 Cal. 63, 75, 20 P. 372, 3 L.R.A. 83; *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 345, 147 A.L.R. 55.)"

The respondent takes no exception to the law as stated in the foregoing text and cases but contends that it does not indicate that the trial court erred in its rulings on the introduction of evidence or in its instructions to the jury.

[1] Appellant first argues that the trial court erred in excluding evidence offered by the appellant which would have tended to show that the subject property was from the beginning of the Mission Bay Park project in 1945 certain to be taken for this purpose. However, respondent stipulated that the subject property was within the boundaries of the park and within the boundaries of the original condemnation case filed in 1945. Appellant offered the witness Schwob for the purpose of showing that the general boundaries of the park as they were initially determined included the subject property and that it was practically certain that the subject property would be taken for the project as early as 1945 and that appellant, through the expenditure of city funds, was responsible for certain of the public improvements. We find no reversible error in the court's ruling sustaining an objection to the admission of this evidence in view of the said stipulation and the following instruction given to the jury:

"You are instructed that it is improper for you to base your award in this case on any increase in value arising from the improvement proposed by the plaintiff, the City of San Diego.

"The condemnation project or improvement as a city park project is not a factor to be considered by the jury in determining the reasonable market value of the subject property."

In this connection appellant argues that the court erred in refusing to give the following instruction:

"You are instructed that if you find that it was practically certain on December 14, 1945, that the subject property would be included in the public project known as Mission Bay Park, then you must exclude in your determination of fair market value, any enhancement in its value which may be due to the development of the park."

Since the court instructed the jury to the effect that it should not consider in fixing its award any increase in value to

the subject property arising from the improvement proposed by plaintiff, it was not prejudicial error to refuse this offered instruction.

[2] Error is claimed by appellant in the refusal of the court to instruct the jury as follows:

"In your determination of the fair market value of the subject property, you are instructed that as a matter of law you are not to consider as compensable any enhancement of its value which may be attributable to the development of the public improvement for which the land is sought to be acquired, in this case, Mission Bay Park, including the construction of the San Diego River Flood Control Channel."

In this instruction the appellant included reference to the San Diego River flood control channel and asked the court to instruct the jury that as a matter of law the flood control channel was an integral part of the park project and itself such an improvement that any benefit accruing therefrom to the subject property must necessarily and as a matter of law be excluded by the jury in the computation of fair market value. The question of whether the flood control channel was an integral part of the city's Mission Bay project was a question of fact for the jury. The record shows that the construction of the flood control channel was a federal undertaking to stabilize the flow of the San Diego River, resulting in benefits to lands within the potential flood area of the river, including lands within the Mission Bay project of the city. Under these circumstances it was not error to refuse the last offered instruction.

Appellant argues that the trial court erred in refusing to strike the testimony of the defendant's witness, Stallard, as to the market value of the subject property. Stallard, who was a realtor and well qualified appraiser, testified that the fair market value of the subject property, at the time of trial, was the sum of \$57,500; that in fixing the value which he placed upon



the property he did not take into consideration the effect of the development of the Mission Bay project and that the price which he assigned to the subject property as a market price was aside from and divorced from any enhancement by virtue of the surrounding park; that the value which he fixed was based entirely upon the assumption that the subject property was available to be developed to a motel use and there existed a demand for that use in the vicinity of the property; that it would be a successful operation if carried through to completion and had nothing to do with the influence of the bay as it was to be developed. He testified that in 1955 there was an offer made for the subject property in the sum of \$50,000; that an escrow was opened to consummate this transaction but the sale was precluded by court action. Stallard also testified that in fixing the fair market value he considered other sales transactions and appellant argues that in these sales there was some increment of value which was attributable solely to the fact that the properties were situate proximate to the Mission Bay project; that this fact rendered the evidence of such other sales inadmissible. However, the motion to strike was based upon the claim that Stallard's valuation was as to a partial extent at least based upon taking into consideration an increment in value attributable to the Mission Bay park development. As heretofore stated, the court instructed the jury that it was improper to base an award on any increase in value arising from the improvement proposed by plaintiff, and in view of Stallard's testimony that he did not base his value on such enhancement, we find no error in the refusal to strike his testimony.

Appellant further contends that the court erred in refusing to permit appellant to introduce evidence of comparable sales in the 1940-1945 era which would tend to show what the current fair market value of the subject property would be exclusive

of the increment in value attributable to the public improvement for which the property is being taken.

In *County of Los Angeles v. Faus*, 48 Cal.2d 672, 678, 312 P.2d 680, 684, it is held that evidence of prices paid on other sales of real property in condemnation proceedings is admissible under the following safeguards: "The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted wide discretion."

[3] We cannot here hold as a matter of law that there was an abuse of discretion in the trial court's ruling in this connection.

[4] Appellant contends that the court erred in refusing to give the following instruction:

"You are instructed to disregard evidence tending to prove the prices actually paid on sales of property similar to that included in the public improvement for which the subject property is sought to be taken, in this case, Mission Bay Park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the City of San Diego first fixed the boundaries of Mission Bay Park and certain lands, including the subject property, for this particular public improvement."

This instruction is objectionable in that it does not state the rule set forth in *County of Los Angeles v. Faus*, supra, as to other sales and excludes the consideration of other sales which took place since the

city of San Diego first fixed the boundaries of the park for public improvement.

Judgment affirmed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem., concur.

suspicion and "must" reject all unless they shall be convinced, notwithstanding base character of witness, that he or she has in other particulars sworn to truth, was erroneous, but did not result in miscarriage of justice. West's Ann.Pen.Code, § 288.



164 Cal.App.2d 63

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Thomas WILLIAMS, Jr., also known as**  
**Tommy Williams, Defendant and**  
**Appellant.**

**Cr. 2825.**

District Court of Appeal, Third District,  
California.

Oct. 3, 1958.

Hearing Denied Nov. 26, 1958.

Prosecution for violation of section 288 of Penal Code. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment upon verdict of guilty and accused appealed. The Third District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to support conviction and that error in instruction addressed to subject of falsus in uno did not result in miscarriage of justice.

Affirmed.

#### 1. Infants ☞20

Evidence was sufficient to support conviction of violation of section 288 of Penal Code. West's Ann.Pen.Code, § 288.

#### 2. Criminal Law ☞785(16), 1172(2)

In prosecution for violation of section 288 of Penal Code, instruction that if jury was convinced that witness had stated what was untrue, not as a result of mistake or inadvertence, but willfully and with design to deceive, then jury must treat all of his or her testimony with distrust and

John J. Wilson, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a jury's verdict which found appellant guilty of a violation of Section 288 of the Penal Code.

The lewd and lascivious acts of which appellant was convicted were committed upon the body of a ten-year-old girl. Appellant was a friend of her mother and stepfather and was a frequent visitor at their home. He often accompanied the family on fishing and swimming trips and took her and her brothers and sisters to shows. On the night in question, appellant came home with the girl's stepfather and went to bed in a room in which she and her two sisters were sleeping. She testified that she awakened in the night and found appellant leaning over her and feeling her "privacy", but that he returned to his bed when her stepfather, in an adjoining room, muttered or talked in his sleep. Twice thereafter, according to her testimony, appellant returned to the side of her bed. The second time he repeated the same acts and she said that while feeling her "privacy" he also placed her hand upon his penis and began moving his body back and forth; that she took her hand away and he replaced it and that she then "punched" him and he went away. The third time he did not molest her. According to her testimony, he picked up her smaller sister but put her back without further molesting her. She also said that after the third occurrence, and after she gotten out of bed and gone into the living room where her 13-

year-old brother was sleeping, that appellant went to the bathroom and on his return tried to get her to go into the bathroom with him, which she refused to do. She said that when she went to her brother's bed, she told him that appellant had "tried to play nasty with me three times" and the brother corroborated this testimony. While there was other testimony such as that of the child's mother that two days after the nocturnal occurrences the child had complained to her and told her substantially the same story as she told on the stand, this evidence being introduced without objection, it is unnecessary to further state the testimony except to say that appellant took the stand and wholly denied all of the charges made by the girl. Substantially, the entire case rested on the girl's assertions and the appellant's denials.

[1] Appellant's first contention is that the evidence is insufficient to support the verdict, but there is no merit in this contention and the foregoing statement of the evidence is sufficient refutation.

[2] Appellant points out an obvious error in an instruction addressed to the subject of falsus in uno and the error is a serious one. As given by the court the instruction reads as follows, in material part:

"A witness wilfully false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a *material* point; and the jury being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth."

The first part of the instruction is correct. The statement that a witness wilfully false in one part of his or her testimony is to be distrusted in others is in the language of the code section. The next statement that the jury may reject the whole of the testimony of the witness who has wilfully sworn falsely to a material point is likewise a correct statement of the law. The error occurs in the balance of the instruction where the jury are told that if they are convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with design to deceive, then the jury must treat all of his or her testimony with distrust and suspicion and must reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth. The permissive "may" is supplanted by the mandatory "must". It is not true that a jury, convinced of falsity in the testimony of a witness, must reject all of that witness' testimony until they shall be convinced that in other particulars the witness has testified truly. The respondent does not contend that there was not error in the instruction, but insists that reversible error has not been committed. We are persuaded somewhat reluctantly that this contention is sound; that the faulty instruction did not result in the denial of a fair trial and that this is a proper case to apply the well known constitutional direction that judgments are not to be reversed unless from the whole record the reviewing court is of the opinion that the error complained of has resulted in a miscarriage of justice. In our opinion, the error here did not result in a miscarriage of justice and does not justify a reversal.

There are no other contentions of error which we think it necessary to treat.

For the reasons given, the judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



164 Cal.App.2d 66

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**  
**v.**

**Samuel BOSTON, Defendant and Appellant.**  
**Cr. 2842.**

District Court of Appeal, Third District,  
 California.

Oct. 3, 1958.

Rehearing Denied Oct. 17, 1958.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., for second degree burglary and he appealed. The Third District Court of Appeal, Peek, J., held that it is notice of offense with which he is charged, and not particular circumstances thereof, to which defendant is entitled; and held that absent showing that transcript of testimony upon which information was founded failed to furnish details which defendant contended had been omitted from information, it could not be said that he had suffered prejudicially even if information, under which he was convicted for second degree burglary, failed to allege that he had entered store building in question with "intent to commit grand or petit larceny or any felony."

Affirmed.

#### 1. Burglary $\S$ 41(1)

Second degree burglary conviction was sustained by evidence.

#### 2. Criminal Law $\S$ 406(1)

In burglary prosecution evidence that defendant had first been seen in rear of store with merchandise from its stock, that he had been seen putting merchandise from store into waiting automobile and that, after failing to start automobile, he had fled on foot was sufficient to establish corpus delicti and to render defendant's out-of-court admission admissible against him.

#### 3. Criminal Law $\S$ 1167(1)

It is notice of offense with which he is charged rather than particular circumstances thereof, to which defendant is

entitled; and absent showing that transcript of testimony upon which information was founded failed to furnish details which defendant contended had been omitted from information, it could not be said that he had suffered prejudicially even if information, under which he was convicted for second degree burglary, failed to allege that he had entered store building in question with "intent to commit grand or petit larceny or any felony." West's Ann.Pen.Code,  $\S\S$  459, 950.

#### 4. Criminal Law $\S$ 1167(1)

Judgment will not be reversed because of error in form of information unless, after examination of entire case, including evidence, reviewing court is of opinion that error complained of resulted in miscarriage of justice.

Walter Cook, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and William O. Minor, Deputy Attys. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of second degree burglary following a trial before the court sitting without a jury. He contends that (1) the evidence is insufficient to support the judgment; (2) the trial court improperly admitted an out-of-court statement; (3) the information fails to state a public offense; and (4) the trial court had no jurisdiction to try the case.

The record shows that an employee of the Myshoppe in North Sacramento heard clothes hangers rattling in a stock room in the back of the store. She investigated and found a man, later identified as the defendant, with an armload of merchandise retreating through the hallway at the rear of the shop which led to the street. The witness followed the defendant, saw him throw the clothes into a waiting car and get into the driver's seat. She called the store owner who ran to the car and recognized the clothes as merchandise from her store. The

defendant, being unable to start the car, fled as the owner screamed for assistance. At that point another man got into the car and also fled when he too was unable to start the motor. Both men were arrested within a matter of minutes approximately a block from the store. Following his arrest the defendant stated to police that he had recently come to North Sacramento after being told of a quick way to make money; that he entered the store through the back entrance, took the clothes out of the rear of the store and put them in the car. When asked what he proposed to do with the clothes, the defendant replied, "Sell them, I guess."

[1] We find no merit in defendant's first attack upon the sufficiency of the evidence. He was first seen in the rear of the store with merchandise from its stock. He was not seen to enter through the front door, nor was he seen at any time in the front part of the store where business was conducted. He was seen putting merchandise from the store into a waiting car in which he was attempting to flee, and failing to start the car he fled on foot. Such facts were amply sufficient to establish the elements of the offense and sustain the judgment of the trial court.

[2] Likewise without merit is defendant's second contention—that the trial court improperly admitted into evidence his out-of-court admission of the commission of the crime before the corpus delicti was proved. All of the above facts were in evidence prior to the admission of his statement.

[3, 4] He next contends that the information failed to state a public offense in that it failed to allege that he entered the store building with "intent to commit grand or petit larceny or any felony." Penal Code, sec. 459. Under the provisions of Penal Code, section 950, an accusatory pleading must contain a statement charging the commission of a public offense, the purpose being to inform the defendant of the charge

he must meet at the trial. It is the notice of the offense with which he is charged, not the particular circumstances thereof, to which a defendant is entitled. The details are furnished him by the transcript of the testimony upon which the information was founded. *People v. Beesly*, 119 Cal.App. 82, 87, 6 P.2d 114, 970 [cited with approval in *People v. Pierce*, 14 Cal.2d 639, 645-646, 96 P.2d 784]. Certainly under the circumstances as disclosed by the record herein, and in the absence of any showing that the transcript of the evidence taken at the preliminary hearing failed to furnish the details which he now contends were omitted from the information, it cannot be said that he has suffered prejudicially thereby. Moreover a judgment will not be reversed because of an error in the form of the information unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. *People v. Schoeller*, 96 Cal.App.2d 61, 64, 214 P.2d 565; *People v. Gordon*, 71 Cal.App.2d 606, 611, 163 P.2d 110. "Even where an indictment or information is so defective that a demurrer thereto should have been sustained, still, if upon the trial the crime sought to be charged is fully proved, the case falls within the saving grace of section 4½ of article VI of the California Constitution, and of section 960 of the Penal Code, relating to errors in matters of pleading, and the error is not prejudicial." *People v. Schoeller*, supra, 96 Cal.App.2d at page 64, 214 P.2d at page 568.

Since the final contention of defendant is dependent upon an affirmative answer to his contention above discussed, it becomes unnecessary to consider the same.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

163 Cal.App.2d 806

**Edward L. ISRAEL and Edward L. Israel, Jr., as Co-Partners and doing business under the firm name of Edwards Lumber & Mfg. Co., Plaintiffs and Appellants,**  
v.

**Jack T. CAMPBELL, doing business as an individual under the fictitious name of Campbell Construction & Equipment Co., Defendant and Respondent.**

**Jack T. CAMPBELL, individually and doing business as Campbell Construction & Equipment Co., Plaintiff and Respondent,**  
v.

**Edward L. ISRAEL, individually and doing business as Edwards Lumber & Mfg. Co., Defendant and Appellant.**  
Civ. 17771.

District Court of Appeal, First District,  
Division 1, California.  
Sept. 30, 1958.

Rehearing Denied Oct. 30, 1958.

Hearing Denied Nov. 26, 1958.

Consolidated actions (1) by sellers to recover for lumber sold and (2) by buyer to recover for failure to deliver lumber sold. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment for the buyer, and the sellers appealed. The District Court of Appeal, Bray, J., held that evidence would sustain finding of default by sellers and would not sustain sellers' contention that buyer had been in default.

Affirmed.

#### 1. Sales ⇨23(4)

Where purchase order was not unqualifiedly accepted, entire contract between parties consisted not only of purchase order and responsive letter but also buyer's oral agreement to modification proposed by sellers' letter. West's Ann.Civ.Code, § 1585.

#### 2. Appeal and Error ⇨1122(1)

Where trial court found that entire contract between parties consisted of purchase order and responsive letter, but, in another finding, trial court, in effect, found that buyer's oral acceptance of modifications proposed in sellers' letter was also part of agreement, reviewing court would

have power to correct finding so as to recite that purchase order, letter and oral acceptance of modifications constituted entire contract. West's Ann.Civ.Code, § 1585.

#### 3. Evidence ⇨450(8)

Where contract for purchase of lumber specifically set forth length of lumber to be delivered, parol testimony with regard thereto was properly rejected.

#### 4. Sales ⇨359(1), 417

In consolidated actions (1) by sellers to recover for lumber sold and (2) by buyer to recover for failure to deliver lumber sold, evidence would sustain finding of default by sellers and would not sustain sellers' contention that buyer had been in default.

#### 5. Sales ⇨418(1)

Difference between contract price for lumber and price which buyer was forced to pay, plus cost of cutting it to size, was total amount of damage proximately suffered by buyer as result of sellers' default.

#### 6. Damages ⇨6

An innocent party damaged by acts of contract violator will not be denied recovery simply because precise proof of amount of damage is not available.

#### 7. Damages ⇨6

The law only requires that some reasonable basis of computation be available, and will allow damages so computed even if result reached is only an approximation.

#### 8. Sales ⇨418(14)

Where, under exigencies of its own contract with government, buyer had been forced, upon sellers' default, to purchase mostly rough random pieces of lumber, which had to be cut to size, measure of damages was value to buyer of performance of contract as against damage occasioned to buyer by reason of sellers' nonperformance; and among items recoverable was difference in payroll costs of buyer in performing its contract with government when precision lumber was used and when it had to start process with rough lumber.



**9. Action** ⤵59**Appeal and Error** ⤵846(1)

Where actions are consolidated, there should be only one set of findings and conclusions of law and one judgment; and even if there are two sets, reviewing court will consider them as one.

**10. Trial** ⤵3

Issues between same parties should not be decided piecemeal in same litigation but should be settled in one set of findings and one judgment.

**11. Action** ⤵59

In consolidated actions (1) by sellers to recover for lumber sold and (2) by buyer to recover for failure to deliver lumber sold, trial court could not have given judgment in favor of each party, since each one charged other with breach of same contract.

**12. Action** ⤵59

In consolidated actions (1) by sellers to recover for lumber sold and (2) by buyer to recover for failure to deliver lumber sold, sellers' rights were limited, by court's finding that buyer had not breached the contract, to offsets and not to damages.

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Esmond Schapiro, Lee E. Solomon, San Francisco, for appellants.

Barrett & Harkleroad, Worthington, Park & Worthington, San Francisco, for respondent.

BRAY, Justice.

Each of the parties sued the other in separate actions for breach of contract. The actions were consolidated for trial. Appellants appeal from a judgment of \$13,123.14 in favor of respondent in the action brought by respondent and holding that appellants take nothing in the action brought by them.

**Questions Involved.**

1. Was the court's finding as to the contract erroneous?

1. A pallet is a wooden base to pile cartons on in loading ships.

2. This expression meant exactly 6 feet

2. Did the court err in striking parol evidence of the meaning of the contract?

3. Was Edwards in default?

4. Damages: (a) Was Edwards' breach the proximate cause? (b) Uncertainty and alleged improper allowance.

5. Alleged error in permitting witness to refresh his recollection.

6. Did the award exceed the prayer of the complaint?

**Record.**

Appellants are copartners doing business under the name of Edwards Lumber and Manufacturing Company. They will be referred to as Edwards. Respondent does business under the name of Campbell Construction and Equipment Company, and will be referred to as Campbell. Edwards sued Campbell for \$22,778.45 for lumber sold by the former to the latter pursuant to a contract and for \$4,578.80 damages from loss of profits. Campbell sued Edwards for failure to deliver lumber under said contract for \$11,087.53 damages. During the trial this amount was increased to \$30,079.96 by amendment to the complaint.

**Evidence.**

In June, 1953, Campbell had a contract with the United States Government to build 21,127 wooden pallets.<sup>1</sup> Negotiations between the parties resulted in a purchase order signed by Campbell being sent to Edwards. It stated: "Furnish and deliver, FOB Jobsite . . . 252,000 pcs-2" x 6" x 6' DF S4S . . . All lumber to be certified No. 2 and better and to be precision cut to length.<sup>2</sup> . . . Delivery to start on June 29, 1953 and to continue at the rate of 45,000 MBF per working day until completed." On July 1, 1953, Edwards wrote Campbell a letter stating: "Confirming our telephone conversation, we acknowledge receipt of the above order and accept same in all particulars except delivery is to commence at once and be completed within 90 days. We will en-

long or 4 feet long as the case might be. DF meant Douglas Fir. S4S meant surfaced four sides.

deavor to remain as close to your schedule as possible but cannot guarantee 45,000' per each working day. Hoping this will be satisfactory, we are \* \* \*." This letter was delivered by Israel Sr. who stated that he could not guarantee delivery of 45,000 board feet per day but felt that he could deliver the entire amount in the stipulated time. Mincey, Campbell's general superintendent, told him to do the best he possibly could. Mincey informed Israel of the job requirements schedule and the operation. The job was set up to produce 500 pallets a day. Under the purchase order Edwards could deliver green lumber. Campbell was going to "stick" the lumber to dry it. "Stick" means stacking the lumber with lathing in between so that the air can circulate around each piece separately. It was estimated that it would take three weeks to 30 days for drying and it was expected that Campbell would start to build pallets on August 1, 1953. The lumber ordered from Edwards would be all the lumber necessary for the pallets and it was not contemplated that any other would be bought.<sup>3</sup>

From July 1 to August 1 Edwards delivered 5 loads totalling 81,958 board feet. Campbell was constantly complaining about the lack of delivery and about August 3 handed Edwards a written protest stating that the deliveries were deficient in amount and grade and were not precision cut; that the situation was "intolerable" and that unless Edwards started to comply with the purchase order in 48 hours Campbell would buy lumber when and where possible and would charge Edwards with any excess costs. Mincey complained to Israel about once a week and Israel would reply that the lumber was coming. In August Edwards delivered 12 loads totalling 224,851 board feet and one load in September of 15,030 board feet. There were a number of rejects being pieces too short or warped or otherwise unusable. The rejects were either taken away by Edwards or sent back. They

amounted to about 16,000-19,000 board feet. August 19 a letter was sent Edwards to the effect that the 48 hour period of grace mentioned in the previous letter had expired and that Campbell was proceeding to purchase material where and as possible. Any excess cost would be charged to Edwards' account. However, Campbell would accept such deliveries as Edwards could make.

It was stipulated that the amount of lumber delivered by Edwards for which Edwards received credit was of the gross amount of \$22,778.45 less credits for rejects and back charges, or a net balance of \$19,812.49.

### 1. The Contract.

[1,2] The court found that the purchase order and the letter of July 1 constituted the entire contract between the parties and that there were no ambiguities in it. Edwards contends that the order was merely an offer and that the letter was a qualified acceptance which in turn became a new proposal which was never accepted, so that there was no contract. See section 1585, Civil Code, requiring an acceptance to be absolute and unqualified and stating that a qualified acceptance is a new proposal. See also *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 P. 366, 68 L.R.A. 226; *May Hosiery Mills v. G. C. Hall & Son*, 77 Cal.App. 291, 246 P. 332. However, here there was an acceptance of the counteroffer. It was not exactly expressed in words but the actions of both parties show that they considered a contract as expressed in the two writings was entered into, modified to the extent that delivery of said lumber was to be made over the 90 day period with delivery as near to 45,000 board feet per working day as possible. Edwards' complaint alleges that the parties entered into a written agreement in which Edwards agreed to sell and Campbell to buy certain lumber "delivery to be made within 90 days." The quantity and price are set forth the same as in the purchase order.

3. However, as appears later, the amount of lumber ordered was short by 11,176 board feet of the footage necessary to

make the pallets required by the government contract.

However, the finding that the *entire* contract between the parties consisted of the purchase order and the letter of July 1, 1953, is incorrect. It should have stated that these two writings and an oral acceptance agreeing to the modification above mentioned constituted the entire agreement between the parties. In another finding the court, in effect so found. It stated that "it was the clear understanding of said parties that said contract provided that delivery of said lumber should be made over the ninety day period mentioned in said contract, with delivery as near to 45,000 ft. per working day as possible." This court has power to, and hereby does correct the findings as hereinabove set forth.

### 2. Parol Evidence.

[3] Israel testified that in negotiating with Mincey, Israel stated that if Edwards could furnish "shorts" (pieces of lumber under 8 feet in length) the price would be considerably lower, that when he presented the July 1 letter to Mincey he recalled to Mincey that Edwards was to accumulate the material from mill shorts and he could not understand Campbell's request for 45,000 board feet per working day, that Mincey then told him that he understood the situation and that Israel should do the best he could. On the theory that the contract was not ambiguous, the court, on motion, struck out Israel's testimony concerning the shorts. Israel testified that he understood the contract to require delivery to be made within 90 days and in such manner as to conform as nearly as possible to the 45,000 board feet per day and that 90 days was a normal period for delivery of that volume of lumber. There was no ambiguity in the length of the lumber to be delivered. The contract specifically set forth the length. Assuming that the evidence should not have been stricken, no prejudice is shown as that evidence could not have changed the court's interpretation of the contract.

### 3. Default.

4. This contention is made in spite of the allegation in their complaint that the writ-

[4] Appellants contend that at no time was Edwards in default, first, because the court's construction of the time limit of the contract was wrong.<sup>4</sup> As we have shown, the court correctly construed the contract. Secondly, they contend that a statement made by Campbell to Israel at the time the letter demanding compliance within 48 hours was delivered, "Don't take this letter too seriously," off-set the effect of the letter and prevented a default. However, according to Israel's own testimony the statement of Campbell above quoted was immediately followed by "We want to put ourselves on record, but the main thing is we want the lumber in there, and you take care of it and everything will be all right." At that time Campbell agreed to accept four carloads of 2" x 6" in 12 foot lengths which Israel said he could ship immediately and which Campbell was to cut to 6 foot lengths at Edwards' expense. These carloads were shipped and used. However, at least once a week during August, Mincey was demanding increased deliveries and Israel would state that the lumber was coming. On August 10 Campbell sent Edwards another letter expressing the requirement of urgency and stating that Campbell would find it necessary to buy lumber elsewhere. At a conference on August 25 Mincey discussed with Israel the failure to deliver precision cut lumber. Israel said he would have it resawed at his own expense. Even when default was finally declared Campbell notified Edwards that it would receive such deliveries as Edwards could make. The first purchase from another source made by Campbell was on September 4. The next was on September 22. During this period Edwards only made delivery of one load. The completion date of the government contract was October 13, which fact was known to Edwards. Campbell's pallet plant was ready about the first of August and was set up to produce about 500 pallets per day, which would have required about 45,000 board feet per

ten contract required "delivery to be made within 90 days."



day. Due to lack of lumber only 250 pallets were built in any day and only 2500 in September. Actually Edwards only delivered 298,272 board feet out of 1,848,000 promised. Although respondent had some difficulty in getting the government to agree to accept No. 2 lumber, that fact did not excuse appellants' default. If appellants had delivered as agreed, no controversy could have arisen between the parties. It was no concern of appellants what the government prescribed. Moreover, the government permitted No. 2 lumber to be used, and that was the kind that respondent obtained from other sources. The evidence amply supports the finding of default of Edwards. Appellants make other contentions that Campbell waived the delay in delivery, based upon appellants' version of conflicting testimony. One of these was Israel's testimony that he informed Campbell that the government inspector was not going to accept the lumber and thereupon delivery was waived by Campbell. The trial court resolved that conflict against appellants.

Appellants claim that Campbell was in default because it did not pay for the deliveries actually made in 10 days. As required by the contract, Campbell paid for the first delivery, but thereafter held back payment because many difficulties of arriving at the amount due arose because the lumber was improperly cut and back charges for the cost of remedying the defects which Edwards agreed to pay were not settled and were in dispute. Campbell was not in default. Some of the first shipments were accepted under protest and pending acceptance by the government. This did not amount to a default by Campbell, for when Edwards objected to such acceptance Mincey admitted it was a mistake.

Appellants contend that the contract was that appellants only agreed to do the best they could to deliver lumber and that there is no evidence that they did not do so and that the evidence shows that

they did. As pointed out before, this was not the contract.

4. Damages. (a) *Proximate cause.*

[5] Appellants contend that the Edwards breach did not damage respondent but the real cause resulted from the difference in the lumber grade specifications in the government contract and those in the Edwards contract. Appellants contend that as a result of this difference there was a loss of lumber in regrading and cutting to meet the government regulations. These items were not charged to Edwards under Campbell's method of accounting which was to take the gross cost of all lumber and deduct from it as a credit to Edwards the amount of scrap and rejects. Therefore Edwards was only charged with the cost of lumber actually used for making pallets. It was Edwards' failure to deliver as required by the contract that compelled Campbell to buy lumber wherever it could. Under the exigencies of its contract with the government, Campbell was forced to purchase mostly rough random pieces which had to be cut to size. The court allowed Campbell the difference in the cost of the lumber between the Edwards contract price and that Campbell was forced to pay plus the cost of cutting to size. This total amount was the damage proximately suffered by reason of Edwards' default.

(b) *Uncertainty and Alleged Improper Allowance.*

[6, 7] Appellants contend that applicable to this case is the rule of *Austin v. Roberts*, 1933, 130 Cal.App. 328, 333, 20 P.2d 97, that where there is evidence as to damages from various causes, as to a portion of which the defendant cannot be held responsible, and not evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the court to apportion a part or all of the proved damages to the acts for which the defendant is responsible. This rule is not applicable here. Respondent's damages came from only one *source*, namely, appellant's default. If there is some slight un-

certainty as to the *amount* of the damage, then the rule of *Allen v. Gardner*, 1954, 126 Cal.App.2d 335, 272 P.2d 99, applies: "Appellants have misconceived the law applicable to this situation. They stand before the court as violators of their contract. Their acts caused damage, serious damage, to Gardner. Those facts were proved definitely and with certainty. \* \* \* Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required. An innocent party damaged by the acts of a contract violator will not be denied recovery simply because precise proof of the amount of damage is not available. The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation." 126 Cal.App.2d at page 340, 272 P.2d at page 102.

[8] This brings us to the items of damage which appellants claim were improperly allowed. (a) The contract price was \$71.50 per thousand board feet. Campbell purchased the lumber from other sources at \$68.16 per thousand board feet. Appellants contend they are entitled to a credit of the difference between these two prices. They are not entitled to such credit for the reason that the contract price was for precision cut lumber, while the lumber respondent was forced to buy was rough lumber which respondent had to cut. The court in determining respondent's damages added the cost of processing to the price respondent had to pay for the rough lumber. This was a proper method. The measure of damages in a situation of this kind is not the difference in market value where goods are readily available on the market, but the value to contractee of the performance of the contract as against the damage occasioned to him by reason of nonperformance, in our case, the cost to Campbell of obtaining lumber in the condition it would have been supplied under the contract, less \$8388.48 "salvage from rejected lumber" subtracted from what the contract cost

would have been to respondent had it been performed. This was a proper deduction as the actual cost to Campbell of performance by Edwards would have been that much less than the contract price. Particularly is this so when the court in determining what the actual cost to Campbell of Edwards' failure to perform was, deducted from the overall price of lumber purchased by Campbell, the salvage from all rejected lumber including the said \$8388.48 salvage.

(b) Cost of Handling.

In this regard there was clear evidence that a separate five man operation had to be set up to handle and saw the repurchased lumber. And there was expert testimony that the cost is \$5 per thousand board feet. This charge did not include the handling costs for any of the precision cut lumber which was purchased in that state, nor did it include cost of handling any lumber which respondent would have had to handle under the Edwards contract. This was sufficient proof to support the fact of damage and the amount of damage. Therefore, as no charges for handling material which would have been handled if Edwards had performed were included in this sum, this amount was properly included in respondent's damages.

(c) Additional lift truck rental.

The evidence established that it was necessary to rent additional lift trucks for the sawing or resawing operation. This item was not included in the costs of handling. Therefore the fact of damage resulting from the breach was established. The total rental for all lift trucks came to \$3175. Appellants were charged with \$1975. This was a sufficient approximation to prove the amount of damage. The trial court was not in error in awarding it.

(d) Additional superintendent and clerk time and property rental.

It took approximately five weeks to dismantle the plant. Edwards could not be charged for the cost of dismantling, as such cost would have been incurred by respondent had Edwards performed its contract. The evidence shows that the charges for

"additional superintendent time" and "additional clerk time" were for additional time required of these persons due to Edwards' nonperformance but did not include the dismantling time. There was some confusion concerning the clerk's pay between take home pay and actual pay. The amount found by the court was his actual pay. Respondent charged rental for the period October 15 to December 14, totaling \$850. Respondent concedes that had Edwards completed its contract it would have taken respondent the approximately 5 weeks to dismantle which it actually took. Therefore respondent is not entitled to damages for that 5 week period. This left only one month chargeable to Edwards' default. The rental was at the rate of \$425 per month. Thus, the amount of respondent's damages for rental was only \$425 instead of \$850, and the judgment should be reduced accordingly.

(e) Loss of efficiency.

This item represents the difference in payroll costs on the basis of cost per pallet manufactured at a time when precision lumber was used and at a time when respondent had to start the process with rough repurchase lumber.

In *Burrell v. Southern California Canning Co.*, 1917, 35 Cal.App. 162, 169 P. 405, damages were sought for the nonuse of a plant because of delivery of defective machinery to be used therein. The damage was determined by taking two-thirds of 10 per cent of the value of the plant investment. The court held that it was not a proper item of damage because it was remote and speculative and not contemplated by the parties. However, in *Kenyon v. Goodall*, 1853, 3 Cal. 257, it was held that the loss of time, value of services and wages of employees, caused by failure of a party to delivery machinery, are damages which are not remote but are proximate and immediate. And in *Allen v. Gardner*, supra, 126 Cal.App.2d 335, 272 P.2d 99, Gardner was allowed as damage a percentage of his overhead costs in the operation of the mixing of concrete, where this operation was commenced after Allen refused

to deliver the special concrete ordered under the contract. It would seem that the latter two cases would permit the respondent to recover for this item. This item can be distinguished from the *Burrell* case on the basis of proof. There the estimation was made only on the basis of the rental value of the plant which was taken to be 10 per cent of the investment; whereas, here there is actual proof of such loss of efficiency through the computation of costs of manufacture.

(f) Appellants claim that in the figures accepted by the court no credit was given appellants for lumber which was purchased by respondent from another source and used in the construction of pallets additional to those which the amount of lumber purchased from appellants would have constructed. However, appellants did receive credit therefor, it being included in the figure of \$1,151.43 "Cost of 183 additional pallets."

(g) In arriving at respondent's damage respondent and the court deducted from the total adjusted gross cost of materials purchased from all sources the sum of \$144,887.47 as the total adjusted cost to respondent if appellants had performed as agreed. In this latter figure was a credit to appellants of the sum of \$19,992.52 being "Cost of lumber to cover rejected lumber." In arriving at \$19,992.52 as the value of rejected lumber, respondent took 15 per cent of the total amount purchased, claiming this to be a percentage arrived at by experience. Appellants claim that this amount should be 23 per cent of a portion and 20 per cent of another portion of the total amount purchased. This contention is based upon a letter written by respondent to the government in which respondent estimated that its loss in this respect was 23 per cent before a certain change order was issued and 20 per cent thereafter. These latter percentages dealt with estimated cost of lumber rejected in connection with pallets delivered to the government. Respondent's figures were the actual cost of rejected lumber in connection with all lumber purchased by respondent. The actual



figures of the amount of rejected lumber showed a figure slightly in excess of the 15 per cent. The court accepted respondent's 15 per cent figure, rather than the estimates in the letter. As that percentage is proved correct by the actual figures we see no error in the court's action.

Contrary to appellant's contention the court's figures do not charge Edwards for lumber delivered by Edwards within the specifications of the contract but rejected by the government as not being within its specifications.

#### 5. Refreshing Recollection.

On rebuttal Mincey denied certain conversations in which Israel had testified Mincey consented to the delay by Edwards in performing the contract. Respondent then asked him if there was any fact which refreshed his memory in that connection. He stated that it was a letter written by Campbell to Edwards cancelling the order for nondelivery, and which was not sent because of the witness' request that it be not sent. Appellants moved to strike out the witness' answer. Considerable discussion between court and counsel resulted as to whether or not the letter was admissible in evidence. Finally the court ruled that the letter was not admissible but that the witness' answer might stand, and that his reference to the letter was solely for the purpose of refreshing his memory. The limitation placed upon the answer by the court was such that the witness' statement as to what was in the letter was no proof of the facts therein stated. We see no error in the court's ruling.

#### 6. Award and Prayer.

[9-12] Campbell's complaint originally prayed for \$11,087.53 damages. Campbell was permitted to amend to conform to the proof and to pray for \$30,079.96 damages.

The court awarded Campbell \$13,123.14 and denied Edwards recovery on its complaint which prayed for \$27,357.25. In arriving at the figure of \$13,123.14 the court found that the gross figure that Edwards owed Campbell was \$36,691.76 but that Edwards was entitled to a set-off of \$23,568.62. Appellants contend that thereby respondent recovered judgment in excess of the \$30,079.96 prayed for and that the court should have given appellants judgment for \$23,568.62 on its complaint and respondent judgment for \$36,691.76 on its complaint. This is a rather involved and far fetched contention. It would have been ridiculous for the court to grant two judgments in this case. Where actions are consolidated there should be only one set of findings and conclusions of law and one judgment. Even if there were two sets this court would consider them as one. See *Wolfson v. Beatty*, 1953, 118 Cal.App.2d 392, 257 P.2d 1017; *Clinton v. Hogan*, 1947, 80 Cal.App.2d 815, 183 P.2d 50. Issues between the same parties should not be decided piecemeal in the same litigation but should be settled in one finding and one judgment. *Blume v. MacGregor*, 1944, 64 Cal.App.2d 244, 249, 148 P.2d 656 (cross-complaint). Moreover, the trial court could not have given judgment in favor of each party as each one charged the other with breach of the same contract. Appellants' right to a judgment could have been based only upon a finding that respondent breached the contract. The court found to the contrary; hence, appellants' rights were limited to offsets and not to damages. The procedure contended for by appellants would result in contradictory findings and judgments.

The judgment is affirmed in the sum of \$12,698.14. Respondent will recover costs.

PETERS, P. J., and ST. CLAIR, J. pro tem., concur.

164 Cal.App.2d 70

**Daniel Claude GALLIPO, a minor, by Claude W. Gallipo, his Guardian ad Litem,**  
**Plaintiff and Respondent,**  
**v.**

**CITY OF LONG BEACH, a municipal corporation, Defendant and Appellant.**  
**Civ. 22994.**

District Court of Appeal, Second District,  
 Division 1, California.  
 Oct. 6, 1958.

Rehearing Denied Oct. 31, 1958.

Hearing Denied Dec. 3, 1958.

Child, by his guardian ad litem, brought action under the Public Liability Act against city for injuries sustained in fall from pipeline on side of bridge, which had no pedestrian walkway, when child was allegedly endeavoring to disentangle himself from barbed wire barricade in center of pipeline. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment in favor of the child, and the city appealed. The District Court of Appeal, White, P. J., held that evidence sustained the verdict and that Superior Court did not err in refusing city's requested instructions that child was a licensee or trespasser, as a matter of law, and that duty owed by city to child was only the duty owed to a licensee or trespasser, since measure of care to be exercised by owners of private property is not the measure of care required by the Public Liability Act.

Judgment affirmed.

#### 1. Municipal Corporations ⚡857

In action under the Public Liability Act by child against city for injuries sustained in fall from pipeline on side of bridge, which had no pedestrian walkway, when child was allegedly endeavoring to disentangle himself from barbed wire barricade in center of pipeline, evidence sustained verdict for child. West's Ann.Gov. Code, § 53050 et seq.

#### 2. Appeal and Error ⚡1001(1)

When any testimony believed by trier of the facts relates events, which are not

completely contrary to human experience, or would seem physically possible, judgment cannot be reversed on appeal on ground that such testimony is inherently unbelievable.

#### 3. Municipal Corporations ⚡857

In action under the Public Liability Act by child against city for injuries sustained in fall from pipeline on side of bridge, which had no pedestrian walkway, when child was allegedly endeavoring to disentangle himself from barbed wire barricade in center of pipeline, trial court did not err in refusing city's requested instructions that child was a licensee or trespasser as a matter of law, and that duty owed by city to child was only the duty owed a licensee or trespasser. West's Ann.Gov. Code, § 53050 et seq.

#### 4. Municipal Corporations ⚡847

Measure of care to be exercised by owners of private property is not measure of care required of a city by the Public Liability Act, which bases liability on any act which leaves a place or condition dangerous or defective and liable to cause some injury to the general public. West's Ann. Gov.Code, § 53050 et seq.

#### 5. Bridges ⚡35

One crossing a public bridge for any personal or private purpose is entitled to find the bridge in the same condition as is one crossing the bridge to perform a public duty.

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Walhfred Jacobson, City Atty., Long Beach, John R. Nimocks, Deputy City Atty., Palo Alto, for appellant.

Wise, Kilpatrick & Pulley, George E. Wise, Long Beach, for respondent.

WHITE, Presiding Justice.

Defendant City of Long Beach appeals from a judgment in favor of the plaintiff, Daniel Claude Gallipo, a minor, by his guardian ad litem, Claude W. Gallipo, who is also his father.

The action was occasioned by injuries to plaintiff, including permanent brain dam-

age, suffered because of his fall from the defendant's California Street Bridge when he was eight years old. A former trial resulted in a nonsuit and judgment for defendant, which was reversed on appeal. 146 Cal.App.2d 520, 304 P.2d 106. Hearing was denied by the Supreme Court.

The instant appeal is upon two grounds: (1) Insufficiency of the evidence to support the verdict; and (2) Error of the court in refusing requested instructions.

Appellant, in its opening brief, states that "At pages 523-525 of the former decision [146 Cal.App.2d 520, 304 P.2d 106] is a fairly complete statement of the facts presented on the first trial. \* \* \* Additional testimony of witnesses was presented herein." Appellant's contention is that the additional testimony at the second trial as to plaintiff's position after his fall materially changes the facts from those before the court at the first trial.

For purposes of clarity in our consideration of appellant's contention as to the effect of such additional evidence, we will first review the facts stated on the former appeal and so approved by appellant. The following excerpts are quoted from pages 523-525 of *Gallipo v. City of Long Beach*, 146 Cal.App.2d 520, 304 P.2d 107:

"\* \* \* The vehicular highway is a paved street which narrows down at the bridge entrance. The bridge spans a railroad right of way, with a drop of about 25 feet to the ground below at its highest point. There is a wooden railing on each side of the vehicular portion of the bridge. The roadway approaching the bridge has no sidewalks, nor is there any pedestrian passageway along the bridge. Adjacent to the lower railing on the west side of the bridge, and running parallel to and almost horizontal with it over the railroad right of way, is a pipeline about one foot in diameter. This pipeline, which is just outside the bridge railing, is attached to the bridge by a supporting structure, a part of which consists of two horizontal planks, one

on each side of the pipe. The plank nearest the roadway extends the full length of the bridge; the outer plank extends from the south end of the bridge northward about three-fourths the length of the bridge. There is no barrier at either end of the approaches to the bridge or pipeline to prevent pedestrians from walking upon the pipeline or the two beams flanking it and attempting to cross over in that manner. The grass alongside the bridge has been flattened and beaten into what appears to be a defined path leading up to the pipeline structure. However, near the center of the bridge and outside the west railing there are two parallel 2" x 4" beams about 5 feet apart which connect the bridge and pipeline structure. The beams slant across the pipeline to form an obstacle to passage. They are attached at one end to the outer wooden beam beside the pipeline and at the other near the top of the bridge railing. Several strands of barbed wire were loosely strung between the two boards and dangled over the edges.

\* \* \*

"\* \* \* The defendant city has operated and maintained the bridge and its appurtenances since 1924. The roadway portion of the bridge, which is approximately 20 feet wide, constitutes a two-lane arterial street used by north-south vehicular traffic, and carries several thousand vehicles daily.

\* \* \*

"Mr. Gilkerson, defendant's City Engineer, testified that the bridge in question is the only one in the city upon which no provision has been made for pedestrian crossing. He stated that he had personally seen children on the bridge 'quite frequently,' but not on the pipeline. \* \* \* Asked whether, at the time of the accident, he regarded the bridge as dangerous or defective for pedestrians, he replied: 'Only to the extent that it was narrow, and it would be necessary or desirable certainly for pedestrians not to attempt to cross with the vehicles.' \* \* \*



" \* \* \* Asked whether the bridge was a hazard to pedestrians, Mr. Dier (defendant's traffic engineer) responded: 'I would say it would depend on the pedestrians and the motor vehicles approaching, I would say that it might be safe for a person to cross. It would depend on certain conditions and on the actions of both the pedestrian and the motorist.'"

The additional testimony given at the second trial, and relied upon by defendant as such a material change in the factual situation as to preclude the application of the doctrine of the law of the case, was given by Mr. Gallipo and Mr. Pickler.

Mr. Gallipo, the plaintiff's father, testified that the boy's position on the ground was 6 feet south of the southernmost rail of the tracks and 13 feet to the west of the pipe alongside the bridge from which he fell. Mr. Pickler, a member of the train crew who came upon the scene shortly after the accident, and who went to plaintiff's house and brought his father to the scene, testified that the boy's position on the ground was 5-6 feet south of the south rail and 12-14 feet west of the pipeline. He further testified that the boy had not been moved after he came upon the scene. Neither Mr. Gallipo or Mr. Pickler was a witness at the first trial.

It is appellant's contention that this new evidence so places the boy after the fall that it is physically impossible that he could have fallen while trying to disentangle his trousers cuff from the barbed wire barricade near the center of the bridge. Bobby Sims, plaintiff's nephew who was five at the time of the accident, testified at both trials that he saw plaintiff so entangled in the barbed wire just before his fall. Appellant urges on this appeal that Bobby's testimony as to the place from which plaintiff fell is not sufficient to support a finding that plaintiff's injury was occasioned by defendant's negligence in maintaining the barbed wire barrier at the center of the bridge for the reason that Bobby's testimony is inherently improbable and contrary

to the "undisputed physical facts",—the plaintiff's position when seen by the witnesses Gallipo and Pickler. This contention is based on the theory that had plaintiff fallen from the spot where Bobby testified that he saw plaintiff trying to untangle his pants from the barbed wire he could not have landed where the witnesses Gallipo and Pickler saw plaintiff after the accident. It is appellant's contention that plaintiff must have fallen from a point on the pipeline some 10 or 12 feet short of the barbed wire where he was seen by Steven Hunter, a seven-year-old friend; and that plaintiff, falling from that spot, "struck the bank and rolled down the bank to the position where he was" when seen by the witnesses Gallipo and Pickler.

Plaintiff's memory of the fall was blacked out by his head injury. There is in the record no testimony of any witness who saw where he landed when he fell. Steven, Bobby and another child were there. None saw plaintiff fall and none saw him hit the ground. No witness testified that he watched plaintiff from the time he hit the ground until the witnesses Pickler and Gallipo saw him at the spot located on the photographic exhibits. After plaintiff's fall, the children heard the train coming and ran to meet it and stop it because they feared the side of the train would bump the plaintiff. When Pickler, a trainman, saw plaintiff he had Bobby show him where plaintiff lived and then came back to the spot with Mr. Gallipo and Bobby. Mr. Pickler did not believe plaintiff had been moved.

[1,2] Where the evidence is conflicting as in the instant action, the jury was warranted in believing, as they probably did, the testimony of Bobby that just before his fall plaintiff was trying to untangle his pants cuff from the barbed wire. Plaintiff could have landed in the spot where he would have fallen from the barbed wire barricade, and either crawled, rolled, or been moved to the place where the witnesses Pickler and Gallipo later saw him. Moving uphill is not as easy as downhill,

but it can be done. From the evidence adduced at the trial we are persuaded it cannot be said that an inference that Dannie fell while trying to release his pants from the barbed wire can be characterized as either improbable or unlikely. Nor can such a stricture be justly applied to the deduction that Dannie moved or was moved from the particular spot upon which he landed. When any testimony believed by the trier of the facts relates events which are not completely contrary to human experience or would seem physically possible, the judgment cannot be reversed on appeal on the ground that such testimony is inherently unbelievable. *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 183, 184, 195 P.2d 427.

[3] The remaining ground urged by appellant for reversal is that the court erred in refusing to instruct the jury either that plaintiff was a licensee or trespasser as a matter of law, and what duty was owed by defendant to plaintiff as such; or, at the minimum, the status of the plaintiff as trespasser or licensee should have been submitted to the jury under proper instructions for their determination as a question of fact. It is their contention that, while most of the decisions involving the requested instructions to the jury involve the private ownership of the land upon which the injury occurred, the duty of the landowner "differs in no respect whether the landowner is a private one or a public body". As authority for the last statement, appellant cites *Demmer v. City of Eureka*, 78 Cal.App.2d 708, 178 P.2d 472, and *Van Winkle v. City of King*, 149 Cal.App.2d 500, 308 P.2d 512.

The decision in *Demmer v. City of Eureka*, supra, affirmed a judgment for defendants after the sustaining of a general demurrer to the complaint and plaintiff's failure to amend.

There three children, 9 and 10 years of age, were walking along Buhne Street. During a storm a few days before, a large portion of the fill which was Buhne Street had fallen off, clogged the drain beneath

the fill, and caused the storm waters to form a pond 30 feet deep covering the portion of Buhne Street from which the fill had fallen and the adjoining property. A log 3 feet in diameter and about 6 feet long was floating on the portion of the pond in the street. The children climbed from the street onto the log, and paddled out over the adjoining property, where the minor son of the plaintiff fell off and drowned.

It was there stated that the child was not a trespasser while on Buhne Street; that he was not injured while using Buhne Street in the customary manner; that he left the highway upon which he had been walking and used the pond as a plaything; that a pond is not an attractive nuisance; and that the log in the pond did not make it one. The city was not liable to plaintiff for the death of his minor son for the reason that " \* \* \* the Legislature intended to limit the liability of the city for damages resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof." 78 Cal.App.2d at page 713, 178 P.2d at page 475.

In the instant action there was testimony that the property for many years before the accident had been in the same condition, that both adults and children had crossed the bridge on the pipeline for some years prior to plaintiff's accident, that such crossings had worn a path in the grass or weeds connecting with both ends of the pipeline, that the bridge had no pedestrian walkway, that it was so narrow as to be unsafe for pedestrians when automobiles were using it, and that thousands of automobiles and many pedestrians crossed it daily. Plaintiff's use of the public property in the instant action was neither extraordinary or unusual as was the use of the street by the decedent in the *Demmer* case, supra.

*Van Winkle v. City of King*, supra, reversed a judgment after verdict and orders denying motions for judgment notwithstanding the verdict. Plaintiff-respondent's son, Philip, who was then 2 years 10

months of age, went with larger children to the defendant's sewage disposal plant, went onto one of the rock filter beds, threw rocks from it into the nearby pools, then fell into a pool and drowned. It was there said that the child was a trespasser, that the sewage disposal plant was not intended to be used by the public, that defendant was not aware that either sightseers or children ever visited the plant, that pools of water are not attractive nuisances, and that a ladder, boat or springboard in a pool does not make it an attractive nuisance. No defective condition of public property was there involved.

In the instant action, at the request of both plaintiff and defendant, the jury was instructed that "Plaintiff's cause of action, if any he has, against the defendant, City of Long Beach, is based upon and must meet the requirements of a law of this state known as the Public Liability Act \* \* \*."

[4] It has heretofore been decided that the measure of care to be exercised by owners of private property is not the measure of care required by the Public Liability Act (Govt.Code, Sec. 53050 et seq.). *Gibson v. County of Mendocino*, 16 Cal.2d 80, 84, 85, 105 P.2d 105, 107. As was said in the case just cited, quoting from the case of *Castro v. Sutter Creek Union High School District*, 25 Cal.App.2d 372, 377, 77 P.2d 509: "\* \* \* the provisions of the section [Public Liability Act, *supra*] 'base liability upon any act which leaves a place or condition dangerous or defective and liable to cause some injury to the general public'". The act is designed not for the safety, particularly, either of licensees or invitees.

[5] One crossing a *public* bridge for any personal or private purpose is entitled to find the bridge in the same condition as is one crossing the bridge to perform a public duty. *Gibson v. County of Mendocino*, *supra*, 16 Cal.2d at pages 84, 85, 105 P.2d at page 107.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Jack STANPHILL, Defendant and  
Appellant.\*  
Cr. 3328.

District Court of Appeal, First District,  
Division 1, California.

Aug. 15, 1958.

Rehearing Granted Sept. 10, 1958.

For Opinion on Rehearing see  
333 P.2d 270.

Prosecution for robbery and conspiracy to rob. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., rendered judgment convicting defendant as an habitual criminal, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where defendant's conviction as an habitual criminal depended upon proof of the nature of foreign convictions, sentence as an habitual criminal was improper where documents concerning foreign convictions were not properly authenticated and were merely presented to the trial judge at the time of sentencing, without giving defendant an opportunity to question the correctness or legal competence of the authentication of the documents.

Judgment reversed in part and cause remanded with directions.

#### 1. Burglary ☞3

Under Oklahoma law, an entry for the purpose of committing any misdemeanor amounts to burglary, whereas under California law, petty larceny is the only misdemeanor included in such a category. 21 Okl.St. Ann. §§ 1431, 1435; West's Ann. Pen.Code, § 459.

#### 2. Criminal Law ☞1202(1)

Where, although defendant admitted prior convictions for burglary in another state, conviction for burglary might have been had in that state on facts not constituting burglary in California, a determination that defendant was habitual criminal

\* Opinion vacated 333 P.2d 270.



depended upon proof of the nature of the particular convictions. West's Ann.Pen.Code, § 644.

### 3. Criminal Law §1202(3)

Where defendant's conviction as an habitual criminal depended upon proof of the nature of foreign convictions, sentence as an habitual criminal was improper where documents concerning foreign convictions were not properly authenticated and were merely presented to the trial judge at the time of sentencing, without giving defendant an opportunity to question the correctness or legal competence of the authentication of the documents. West's Ann.Code Civ.Proc. § 1905; West's Ann.Pen.Code, § 644, 969b.

### 4. Criminal Law §1186(1)

Where judgment and sentence were incorrect in so far as defendant was adjudged an habitual criminal, judgment was reversed in part and remanded for retrial of issues limited to those pertaining to question whether defendant was an habitual criminal.

### 5. Criminal Law §1216(2)

Where defendant is convicted of several offenses, and also of being an habitual criminal, and a life sentence is imposed, all of the terms should run concurrently with the life term. West's Ann.Pen.Code, § 669.

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Edward Nelson, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of first degree robbery, committed while armed with a deadly weapon, and of conspiracy to commit robbery, with four prior convictions, (one in Oklahoma in 1947 and three in California in 1951),<sup>1</sup> defendant was found by the trial court to

be "a habitual criminal." Defendant questions this finding.

It is true that the indictment charged the Oklahoma conviction and the defendant admitted "as true the prior conviction of Felony of the date of September 4, 1947, as charged \* \* \*." However, it does not appear from the charge itself whether he was convicted of a crime which is specified by section 644 as one which is used as a basis for determining that a person is "a habitual criminal"; especially in view of the fact that the Oklahoma statute includes in its definition of burglary the doing of certain acts which would not constitute burglary in California under our statutes.

[1] For example, Oklahoma defines burglary as breaking into and entering a dwelling house in which there is at the time some human being "with intent to commit some crime therein"; burglary in the second degree as doing this in the day time, or in the night time, breaking an inner door or part of the house after entering lawfully or through an aperture not made by the defendant "with intent to commit any crime" or breaking and entering into certain other buildings "with intent to steal therein or to commit any felony." 21 Okl. St. Ann. §§ 1431, 1432, 1433, 1434, 1435. Accordingly, such an entry for the purpose of committing a mere misdemeanor, any misdemeanor, would amount to burglary in Oklahoma; whereas, under California law, "petit larceny" is the only misdemeanor included in such a category. Pen.Code, § 459.

[2] Accordingly, proof of the nature of this particular conviction (for example, whether or not it involved an entry for the purpose of committing a misdemeanor other than petit larceny) was necessary as a predicate to determination that defendant is a habitual criminal. The record indicates that such proof was tendered in this case by means of certain documents which the district attorney presented to

1. The three prior California priors were tried together. Only one qualifies as a prior conviction "upon charges separately

brought and tried" under Penal Code, section 644.

the trial judge. They consisted of certified photostatic copies of informations and commitment papers, guilty pleas of the defendant to those charges, and his commitment to the Oklahoma state penitentiary; also, a letter from the county attorney of Tulsa county, Oklahoma, to the district attorney of San Francisco outlining the details of the Oklahoma crimes. From these documents it would appear that each of the Oklahoma burglaries would have been a burglary under section 459 if committed in California. The entry in each case was for the purpose of stealing "certain personal property of value." That, at least, was a charge of an entry for the purpose of committing petit larceny.

[3] However, these documents were not authenticated in the manner prescribed by section 1905, Code of Civil Procedure, nor by production of the originals as sanctioned by *People v. Wilson*, 100 Cal.App. 397, 400, 280 P. 137, nor by authenticated copies of the judgments and testimony identifying the defendant (*People v. Wilson*, 103 Cal. App. 420, 423-424, 284 P. 988), nor in the manner provided by section 969, subdivision b, Penal Code. The respondent argues that section 969, subdivision b, has been satisfied, because the documents include a copy of the warden's receipt. The receipt is not a certification.

Moreover, the documents were merely presented to the trial judge by the district attorney at the time of sentencing. There is no indication in the record that defendant was at any time given an opportunity to question the correctness or legal competence of the authentication of the documents mentioned. Such an opportunity should have been afforded him.

Respondent says that because defendant admitted the Oklahoma priors as charged, there was no place during the trial where the admission of these documents in evidence would have been pertinent; indeed, their admission would have been prejudi-

cially erroneous, citing Penal Code, sections 1025 and 1093.<sup>2</sup> Accordingly, says respondent, "what else could the trial judge do but accept the documents as he did in this case, inspect them to make sure the defendant was convicted of a crime which if committed in California would have been burglary under the laws of \* \* \* California." That is not the production of evidence nor is it confrontation of the defendant with the purported "evidence" tendered, upon an issue of pivotal importance in the case. The habitual criminal, under the circumstances of this case, would be sentenced to imprisonment for life. Pen. Code, § 644. *People v. Morton*, 41 Cal.2d 536, 541-545, 261 P.2d 523, demonstrates that here we are not dealing with some trivial, inconsequential detail of procedure; instead, it is a matter of such great import, a formal adjudication is required.

[4] In such a case the established procedure is to reverse the judgment in part and remand for retrial of issues limited to those which pertain to the question whether or not defendant is a habitual criminal. *People v. Taylor*, 155 Cal.App. 2d 26, 317 P.2d 167; hearing by Supreme Court denied.

[5] We note in passing that if the retrial results in a determination that defendant is a habitual criminal and a life sentence is imposed, all other terms should run concurrently with the life term, not consecutively as heretofore adjudged herein. Pen.Code, § 669; *People v. Tucker*, 127 Cal.App.2d 436, 437, 273 P.2d 934.

The part of the judgment adjudging defendant a habitual criminal and imposing sentence is reversed and the cause is remanded with directions to resentence defendant after the conclusion of the limited new trial on the issue of the challenged prior convictions.

PETERS, P. J., and BRAY, J., concur.

2. Such evidence is not to be presented to the jury but only to the judge at or prior to the time of fixing sentence.

163 Cal.App.2d 827

**Harry SMISSAERT, Plaintiff and Appellant,**  
v.

**Louis F. CHIODO, Chiodo Candy Co., a corporation, et al., Defendants and Respondents.**

Civ. 17704.

District Court of Appeal, First District,  
Division 1, California.

Oct. 2, 1958.

Rehearing Denied Oct. 31, 1958.

Action for specific performance of alleged contract to sell real estate. The Superior Court, County of Alameda, Richard H. Chamberlain, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Bray, J., held that where plaintiff gave broker written offer in form of a standard deposit receipt and agent acknowledged deposit by agreement that offer was subject to a net net net lease for a period of 25 years at a net net rent of so much per annum and addendum was attached to the deposit receipt providing that it was mutually understood that the validity of proposed agreement was subject to and conditioned upon parties agreeing and reducing to writing all terms and conditions necessary and incidental to validity of proposed agreement, there was no final contract subject to specific performance.

Affirmed.

### 1. Contracts ⇨25

Whether writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties and in absence of ambiguity this must be determined by construction of the instrument taken as a whole.

### 2. Contracts ⇨32

Where all essential terms of agreement are definitely agreed upon in writing, there is a binding contract even though there is an intention that a formal writing will be executed later.

### 3. Contracts ⇨32

Where any of the terms are left for future determination or where there is manifest intention that formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done.

### 4. Vendor and Purchaser ⇨21

Where written standard form of deposit receipt for money given in connection with written offer to purchase realty recited that the "validity" of the proposed agreement was subject to and conditioned upon parties agreeing upon and reducing to writing all terms and conditions necessary, by use of term validity, it would appear that parties plainly indicated that agreement was not to be legally effective until reduced to formal writing.

See publication Words and Phrases, for other judicial constructions and definitions of "Validity".

### 5. Specific Performance ⇨31

Where owner of realty employed broker to sell same subject to lease back to owner and broker contacted prospective purchaser who gave a written offer in the form of a standard deposit receipt but before offer was accepted by owner an addendum was attached to receipt stating that it was mutually understood and agreed by and between the parties that the validity of proposed agreement would be subject to, and conditioned upon parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to validity of proposed agreement, there was no final contract of sale upon which prospective purchaser was entitled to specific performance. West's Ann.Civ.Code, § 2956.

Ernest I. Spiegl, San Francisco, for appellant.

Lewis P. May, Andrew P. Costelli, Russell W. Federspiel, Oakland, for respondents.



BRAY, Justice.

In this appeal by plaintiff from an adverse judgment in an action (1) for specific performance, or, in the alternative, damages, and (2) for declaratory relief, plaintiff raises many questions which, however, become moot if the trial court's finding to the effect that there was no final contract between the parties is supported. This question, in turn, depends upon whether the purported contract shows on its face that it was not intended to be a final contract.

#### The Undisputed Facts.

Defendant Chido Candy Company, a corporation, owns the property in question. To raise additional capital it decided to offer the real property for sale subject to a lease back to it. In May, 1955, defendant Louis Chido, president, director and general manager of the company, admittedly acting with authority, employed real estate brokers McLean and Korematsu to sell the property. The sale price, which included "equipment and chattels as per inventory to come," was \$550,000, all cash or "Cash and trade acceptable to Seller." "No sale shall be made unless the Seller completes a satisfactory lease back \* \* \* on terms and conditions acceptable to Seller." The brokers called in a third broker, Jacobson, to help find a purchaser. Jacobson brought the property to plaintiff's attention. Plaintiff gave Jacobson a written offer dated June 16, 1955, in the form of a standard deposit receipt. In it Jacobson, "agent," acknowledged receipt from plaintiff of \$2500 as a deposit on account of the purchase price of \$250,000 for the real property alone, balance to be paid within 60 days from date of acceptance by seller. "This offer is subject to a *net net net* lease for a period of twenty-five (25) years by sellers at a *net net* rent of \$27,500.00 per annum \* \* \*." (Emphasis added.) The lease was to be secured by a chattel mortgage on personal property used in the operation of the plant. "This offer is subject to satisfactory financing to be obtained by the purchaser at his own cost, effort and ex-

pense." It was stipulated that Jacobson was plaintiff's agent for the purpose of submitting the offer. Plaintiff gave Jacobson a \$2,500 check payable to California Pacific Title Company as a deposit. Jacobson retained the check and still retains it. He testified that it is customary on sales of industrial property for the broker to retain the deposit check until the offer is accepted. It is then placed in escrow with the seller's escrow instructions.

Before Chido accepted the offer the following addendum was attached to it: "It is further mutually understood and agreed by and between the parties to this agreement that the validity of said proposed agreement is subject and conditioned upon the parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to the validity of said proposed agreement; and that seller shall pay total real estate commission of 5% upon completion of said sale." Plaintiff signed the addendum. Thereafter negotiations between the parties continued in relation to the price for the property and the security for the lease. A higher price with a correspondingly higher rent was suggested, as well as a cash deposit or bond in lieu of the chattel mortgage since there already was a chattel mortgage on the plant equipment. Eventually Chido notified plaintiff that the property was being taken off the market. Plaintiff notified defendants that he was ready, able and willing to complete the purchase, and then filed suit.

#### Was There a Final Contract?

The court found that the deposit receipt was not intended by the parties to be an expression of the meeting of their minds and was but one step in negotiations which ultimately failed; that the receipt is not sufficiently definite or certain to be capable of specific performance, and that it does not specify all the terms of the lease and chattel mortgage which the parties thereto intended be established before either party would be obligated; that its terms are not shown by the evidence to be capable of being

established by custom or by reference to any other document. These findings are supported (1) by the document itself, and (2) by the fact that if the receipt does not show on its face that it was not final, then it is ambiguous, parol evidence was admissible to explain it, and such evidence although it might support conclusions to the contrary, fully supports the court's conclusions.

#### The Receipt Itself.

[1-3] It provides that the offer is subject to a "net net net" lease and that the "validity of said proposed agreement is subject and conditioned upon the parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to the validity of said proposed agreement \* \* \*." Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. In the absence of ambiguity this must be determined by a construction of the instrument taken as a whole. See *Pacific Improvement Co. v. Jones*, 1912, 164 Cal. 260, 263, 128 P. 404; *Gavina v. Smith*, 25 Cal.2d 501, 503, 154 P.2d 681. Where all of the essential terms of an agreement are definitely agreed upon in the writing there is a binding contract even though there is an intention that a formal writing will be executed later. See *Pacific Improvement Co. v. Jones*, supra; *Gavina v. Smith*, supra. The intent of the parties is to be determined by an objective standard and not by the unexpressed state of mind of the parties. *King v. Stanley*, 1948, 32 Cal. 2d 584, 591, 197 P.2d 321. Where any of the terms are left for future determination

or there is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done. *Store Properties, Inc., v. Neal*, 1945, 72 Cal.App.2d 112, 116, 164 P.2d 38.

Having in mind these rules, the receipt, were it not for the addendum, probably shows mutual assent to all the essential elements necessary for a valid contract.<sup>1</sup> There are primarily three parts to the agreement, namely purchase and sale of real property, lease back and chattel mortgage. The portion dealing with the real property contained all the necessary elements. See *King v. Stanley*, supra, 32 Cal. 2d 584, 197 P.2d 321. The portion dealing with the lease, with the exception of the "net net net" and "net net" references, probably embodied the essential terms of a lease as prescribed in *Levin v. Saroff*, 54 Cal.App. 285, 289, 201 P. 961.<sup>2</sup>

[4, 5] As to the "net net" references, we will assume for the moment that they were well understood terms. The portion dealing with the chattel mortgage contains the names of the proposed mortgagor and mortgagee, the description of the property to be mortgaged and a description of the obligation secured (the performance of the lease by lessee). This probably was a sufficient description of the proposed mortgage. See Civ.Code, § 2956; 10 Cal.Jur.2d § 20, p. 296. Therefore, if the addendum shows no more than an intent to further reduce the informal writing to a more formal one, there may have been a binding agreement and plaintiff might have been entitled, if not to specific performance, to damages. However, in construing the receipt and the addendum as a whole (and

1. It did not set forth all the incidental matters which necessarily would have been included in the final document.

2. As to the above mentioned references, plaintiff contends that the third "net" was merely a clerical error, and that the parties understood that "net net" meant that the tenant pays rent plus taxes, insurance and maintenance. But the Bank of America representative testified

it is a common term. Defendants' auditor testified that prior to the signing of the receipt by defendant Chiodo broker McLean explained to Chiodo that the term was used in standard real estate practice and meant as contended by plaintiff. On the other hand, the auditor stated that broker Korematsu, in the same conversation, told Chiodo that he thought the term did not include maintenance.

they are but one document) it appears that it was not intended to be and was not a binding agreement. It is only necessary to quote the language of the addendum to show that the parties intended and agreed not to be bound until a formal written contract was executed. It states "*\* \* \* the validity of said proposed agreement is subject and conditioned upon the parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to the validity of said proposed agreement \* \* \**" (Emphasis added.) Plaintiff contends that the word "validity" was used to mean not repugnant to some statute or public policy rather than to mean not binding. However, this narrow meaning is contrary to the general meaning. Webster's New Collegiate Dictionary, 2d Ed., defines "valid" as "Founded on truth of fact; capable of being justified, supported, or defended; well-grounded; sound. Efficient; effective. Having legal strength or force." Black's Law Dictionary, 4th Ed., states: "Having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or set aside. Of binding force; legally sufficient or efficacious; authorized by law. Good or sufficient in point of law; sustainable and effective in law, as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law." It would seem, therefore, that the use of the term plainly indicates that the agreement was not to be legally effective. And "all terms and conditions necessary and incidental" which were to be reduced to writing clearly shows that it was intended that a formal contract had to be executed before the parties became bound. Even though the informal agreement might have contained all the essential elements of a contract, the addendum conditioned validity on a formal document which would contain all the incidental terms.

The terms of the addendum showing that regardless of what had been agreed upon in the receipt, there was to be no binding agreement until the later agreement was agreed upon and reduced to writing, distinguishes this case from those like *Pacific Improvement Co. v. Jones*, supra, 164 Cal. 260, 128 P. 404; *Fly v. Cline*, 49 Cal.App. 414, 193 P. 615; *Levin v. Saroff*, supra, 54 Cal.App. 285, 201 P. 961, and *Gavina v. Smith*, supra, 25 Cal.2d 501, 154 P.2d 681, cited by plaintiff and which held that the mere fact that a formal writing was to follow, did not make the first agreement not binding where in it all essential terms had been agreed upon. Here it was expressly provided that the agreement could not be binding until even the "incidental" matters which the courts have held need not in the absence of such an agreement be inserted in the first writing, were agreed upon.

As the agreement in the absence of explanation shows that it was not intended to be the complete agreement of the parties, we deem it unnecessary to consider the claimed errors in the admission of evidence to explain the agreement except to say that most of the evidence now objected to was either brought out by plaintiff or not objected to by him.

Again, as there was no agreement it is unnecessary to determine whether the court's findings on the following subjects were supported: (1) that broker Jacobson was plaintiff's agent alone; (2) that no escrow was opened; (3) that plaintiff was not ready, able and willing to perform; (4) that there was a lack of mutuality; (5) findings on the question of damages including the finding that defendants did not act in bad faith.

The judgment is affirmed.

PETERS, P. J., and ST. CLAIR, J. pro tem., concur.



163 Cal.App.2d 847

**The PEOPLE of the State of California,**  
Respondent,

v.

**James BATES, Appellant.**  
Cr. 3512.

District Court of Appeal,  
First Appellate District,  
Division 1, California.

Oct. 2, 1958.

Defendant was convicted of illegal possession of heroin. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., rendered judgment, and defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence supported finding that officers had reasonable cause to justify arrest without a warrant.

Judgment affirmed.

**1. Arrest** Ⓒ63(4)

Under Penal Code, an officer may lawfully arrest without a warrant a person whom officer has reasonable cause to believe has committed a felony. West's Ann.Pen.Code, § 836, subd. 3.

**2. Arrest** Ⓒ63(4)

Evidence that arresting officers had been told by another officer in presence of informer that he had known informer for several years and that information which she had previously given police had been very reliable, coupled with fact that police had observed transaction described by informer as delivery of narcotics to accused and fact that information as to where accused might be found proved accurate, sufficiently supported finding that officers had reasonable cause to arrest accused without a warrant on information that he was a narcotics peddler and that narcotics had been delivered to him earlier that day for sale, though neither informer nor officer who had vouched for her reliability testified at trial. West's Ann.Pen.Code, § 836, subd. 3.

**3. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

Reasonable cause to justify arrest or search without a warrant may be based on information obtained from others, though inadmissible at trial on issue of guilt. West's Ann.Pen.Code, § 836, subd. 3.

**4. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

The test of whether officer had "reasonable cause" to justify arrest or search without a warrant is whether a reasonable man possessing information possessed by officer would reasonably believe that person involved had committed a felony. West's Ann.Pen.Code, § 836, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

**5. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

Where reasonable cause to justify arrest or search without a warrant is predicated upon information obtained from an informer, whom officer knows to be reliable and in good faith believes to be trustworthy, officer must have had sufficient dealings with informer to give him reasonable cause to believe that informer is reliable and that information given by him is truthful. West's Ann.Pen.Code, § 836, subd. 3.

**6. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

Arrest or search without a warrant on basis of information obtained from anonymous informer or from informer not known to officer to be reliable may be justified only in case of pressing emergency. West's Ann.Pen.Code, § 836, subd. 3.

**7. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

Reliability of information upon which reasonable cause to justify arrest or search without a warrant is based, may be established by proved accuracy of such information which officers from other sources know is accurate. West's Ann.Pen.Code, § 836, subd. 3.

**8. Arrest** Ⓒ63(4)**Searches and Seizures** Ⓒ3(1)

Coercion practiced on informer in obtaining information on which arrest or search without a warrant is based, is a factor affecting credibility of informer. West's Ann.Pen.Code, § 836, subd. 3.

**9. Arrest** Ⓒ63(4)

Record on appeal from conviction based on evidence obtained as a result of arrest and search without a warrant supported implied finding that no coercion had been practiced on informer in obtaining information on which such arrest was based, particularly in absence of showing that defendant made any effort to produce informer as a witness. West's Ann.Pen.Code, § 836, subd. 3.

**10. Criminal Law** Ⓒ394.3

Where at least one participant in telephone conversation consents to the monitoring of conversation by police, evidence thus obtained is not inadmissible on ground that it was obtained illegally in violation of state or federal law. West's Ann.Pen. Code, § 640; Federal Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

**11. Criminal Law** Ⓒ394.3

Record on appeal from conviction warranted inference that one party to telephone conversation had voluntarily consented to the monitoring of conversation by officers and hence supported ruling that evidence as to contents of conversation was admissible against the other party thereto. West's Ann.Pen.Code, § 640; Federal Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

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Harry A. Jackson, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboise, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant James Bates was charged and convicted, after a trial before the court

without a jury, of illegal possession of heroin. Defendant appeals from the judgment of conviction. His basic contention is that the uncontradicted evidence of his guilt was secured by an illegal search and seizure and was therefore inadmissible against him. There is no merit in the contention.

On and prior to September 16, 1957, one George Kostrikin had been under surveillance by the federal and county narcotic officers. Shortly before noon on September 16, 1957, the police observed defendant sitting in an automobile with one Swinger in front of a bowling alley on Mission Street, in San Francisco. Kostrikin entered the Swinger car, and that automobile was then driven about a block from the bowling alley and Kostrikin got out, walked back to his car and drove away. Bates and Swinger then also drove away. Later that afternoon Kostrikin was arrested for a narcotics offense.

The police knew where Kostrikin was living with one Nancy Francis. On the evening of September 16, 1957, four police officers proceeded to that apartment. One of the inspectors, Kerrigan by name, knew Miss Francis, and, when she came to the door, Kerrigan introduced her to the other officers and told her that they wanted to talk with her. Miss Francis invited the officers into the apartment. There was another unidentified young lady there.

It should be mentioned that Kerrigan was not a witness at the trial, but Daniel Casey and James Steffensen, narcotic agents, were. Casey testified that Kerrigan told the officers, in the presence of Miss Francis, that he had known her for several years, that she had cooperated with the police department in the past, and that her services had proven very reliable. The other officers, with the exception of Kerrigan, had had no prior experience with Miss Francis.

Both Casey and Steffensen testified that after the officers entered the apartment Miss Francis cooperated wholeheartedly with the police, and that no force or com-

pulsion was used against her. Miss Francis was not placed under arrest.

Casey testified that he and Officer Kerrigan went into the kitchen of the apartment with Miss Francis. Kerrigan told her that Kostrikin had been arrested for a narcotic violation, and asked her if she would tell them what she knew about Kostrikin and his associates. Miss Francis stated that she would cooperate. In response to questions from the officers she stated that she knew James Bates, and knew that he was a runner or peddler for Kostrikin. She said that Kostrikin would give Bates narcotics on consignment and, after Bates sold them, he would bring the money to Kostrikin. She then stated that she knew that that very morning Bates had been given some narcotics by Kostrikin on Mission Street in front of the Sportsman's Bowl. This was the very transaction observed by the officers earlier that day. Miss Francis also told the officers that Bates customarily kept the narcotics on his person and did not usually leave them at his residence. She did not know where Bates lived, but she did know that he spent a lot of time at Ray Swinger's house. She agreed to introduce an undercover agent to Bates in an attempt to develop a case against him.

At about this stage of the conversation the telephone in the apartment rang. Miss Francis answered it and agent Steffenson monitored the call by listening at the earpiece held by Miss Francis. Steffensen heard the voice at the other end of the line say: "This is Bates. I understand George has been busted. I have got stuff on me. What will I do with it?" The person also stated that he was calling from Swinger's house. At the direction of the officers Miss Francis told Bates to stay where he was and that she would call him back. At this time two additional officers had arrived, so that there were six officers in the apartment.

Bates testified and admitted that he had telephoned to Kostrikin's apartment that day and had talked with Nancy. He stated that he had learned that Kostrikin had been arrested and called to ask about him. He testified that Nancy told him that George was then out and would be right back. Bates asked Nancy to have George call Ray's house when he returned. He did not tell Nancy that he had some "stuff."

Miss Francis, who did not testify, had a police record and had been an addict.

The police officers then proceeded to Ray Swinger's house, the address of which was known to them. Mrs. Swinger came to the door and admitted them. From the door the officers could see Bates seated in a chair. The police came in and placed Bates under arrest. The chair in which he was sitting was searched and an envelope containing a hypodermic outfit and 19 bindles of heroin were found. Bates then stated: "I don't want to get these other people in trouble. That stuff is mine."

The officers did not have a warrant to arrest Bates or a warrant to search the Swingers' premises.

[1,2] Appellant challenges the validity of his arrest and search, contending that the information gained from Nancy Francis was not a sufficient basis to constitute reasonable cause for the arrest without a warrant. Under Penal Code section 836, subdivision 3, an officer may lawfully arrest a person without a warrant when the officer has reasonable cause\* to believe that the person has committed a felony. In the instant case we think the finding that reasonable cause existed is amply supported.

[3-6] In the first place, it is now settled law that reasonable cause to justify an arrest or search may consist of information gained from others, and is not limited to evidence that would be admissible at the trial on the issue of guilt. *People v. King*, 140 Cal.App.2d 1, 294 P.2d 972; *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36.

\* For good definitions of "reasonable or probable cause" see *People v. King*, 140 Cal.App.2d 1, 5, 294 P.2d 972, 975;

*Trowbridge v. Superior Court*, 144 Cal. App.2d 13, 16, 300 P.2d 222.



The test is, did the officer have reasonable cause to make the arrest—would a reasonable man, possessing the information possessed by the officer, reasonably believe that the person involved had committed a felony? This information may be, and usually is, evidence that would be hearsay on the issue of guilt. It may consist of information obtained from an informant known to the officer to be reliable and whom the officer in good faith believes to be trustworthy. *People v. Rixner*, 157 Cal.App.2d 387, 321 P.2d 91, and cases there cited. In most cases the informant must not only be known to the officer, but the officer must have had sufficient dealings with the informant to give him reasonable cause to believe that the informant is reliable and that the information given by him is truthful. It is only in the case of a pressing emergency that an arrest or search without warrants may be justified based upon information secured from an anonymous informant, or from an informant not known to the officer to be reliable. *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36.

These rules are well settled. It is also well settled that in the absence of a pressing emergency, the officer may not properly arrest or search a person based upon information gained from an informant not known to the arresting officer, or, if known, not known from past experience to have been a source of tested reliable information. *People v. Dewson*, 150 Cal.App.2d 119, 310 P.2d 162. It is this rule that the appellant seeks to apply here. He correctly points out that the arresting officers, or at least those who testified, were Casey and Steffensen, and that they admitted that until they met Miss Francis in the apartment they did not know her nor had they any prior experiences with her. Appellant also correctly points out that there was no pressing emergency. Hence, it is argued, the arresting officers had no reasonable grounds to make the arrest and search without a warrant.

The argument is unsound. The evidence shows that Officer Kerrigan had known Miss Francis for several years, and that he

knew her to be a person who had been cooperative with the police in the past and who, on numerous occasions, had given information which had proved to be reliable. Officer Kerrigan, who was one of the officers present in the apartment and one of the arresting party, told these facts to Casey and Steffensen in the Kostrikin apartment in the presence of Miss Francis. Of course, had Kerrigan made the arrest based upon his knowledge and experience with Miss Francis, there could be little doubt that the trial court could have found that Miss Francis was a reliable informant. The facts that Kerrigan was not called as a witness, and that Casey and Steffensen, who did testify, did not know Miss Francis, are immaterial. As long as the informer was known to one of the officers of the arresting party to be reliable, or as long as he communicated the knowledge he had to the other officers in the official line of duty, the rule of the *Dewson* case is satisfied.

[7] It should also be pointed out that the reliability of the informant may be shown not only by past experience with the informant but also may be substantiated by the proven accuracy of the information given by the informant and which the officers from other sources know is accurate. *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36; *People v. Holguin*, 145 Cal. App.2d 520, 302 P.2d 635. In the instant case Miss Francis not only told the police that appellant was a runner for Kostrikin, but also that Kostrikin had made a delivery to appellant that very morning in front of the named bowling alley on Mission Street. That very morning these officers had observed appellant sitting in Swinger's car in front of that bowling alley, and they had seen Kostrikin enter that car, drive with the other two a short distance and then park, and had seen Kostrikin emerge from the car and go back to his own car, and then had seen both cars drive away. Miss Francis also told the officers that appellant could be found at Swinger's house. Appellant was found there. Thus, much of the information given by Miss Francis was corroborated by this information known by

the officers to be correct. Thus, this is not a case like *People v. Goodo*, 147 Cal.App.2d 7, 304 P.2d 776, relied upon by appellant, where none of the officers had any previous experience with the informer, and where the only actions of the defendant observed by the officers were non-suspicious actions. In the instant case the informant was known to one of the arresting officers to be reliable and that fact was communicated to the other officers, and several of the basic facts given by the informer were known by the arresting officers to be accurate from other sources of information.

It is also contended that under any rational interpretation of the evidence, it must be held that Miss Francis did not voluntarily give the information to the officers. It is pointed out that four officers arrived at her apartment, and shortly thereafter two other officers arrived, so that there were six officers in the apartment when she gave the officers the information. It is pointed out that Miss Francis was not produced as a witness. It is argued that the very presence of six officers in the apartment amounted to coercion.

[8,9] Of course, coercion practiced on an informer is a factor affecting the credibility of the informer, but the present record supports the implied finding of the court that no coercion was practiced on her. The evidence is to the effect that Miss Francis, after being told of the arrest of Kostrikin, freely cooperated with the officers. She went into the kitchen with two of the officers and gave them the information upon which they acted. There is no evidence, or no inference from the evidence, except the fact of the presence of six officers, that Miss Francis was coerced. There is no evidence that she was threatened, placed under arrest, or promised leniency. All of the evidence is to the effect that she voluntarily and freely cooperated. Her name was divulged to the defense. So far as the record shows, the defense made no effort to produce her.

[10,11] The only other point urged by appellant is that some of the information

secured by the officers was illegally secured by the officers by monitoring the telephone call from appellant to Miss Francis. It is urged that information so obtained was inadmissible because illegally secured in violation of section 640 of the Penal Code and section 605 of the Federal Communications Act of 1934. (U.S.C.A., Title 47, § 605.) These sections are not applicable where at least one of the participants to the telephone call consents to the overhearing it by the police. *People v. Malotte*, 46 Cal.2d 59, 292 P.2d 517. In the present case it is a reasonable inference from the evidence that Miss Francis voluntarily consented to the officers monitoring the call. Certainly there is no evidence to the contrary. Thus, the ruling of the trial court that the contents of the conversation were admissible is supported by the record.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem.,  
concur.



164 Cal.App.2d 55

**Nathan M. DICKER et al., Plaintiffs,  
Cross-Defendants and  
Respondents,**

**v.**

**Harvey WEST, an individual doing business  
under the firm name and style of Placer-  
ville Lumber Co., Defendant, Cross-Com-  
plainant and Appellant.**

Civ. 9399.

District Court of Appeal, Third District,  
California.

Oct. 3, 1958.

Rehearing Denied Oct. 27, 1958.

Hearing Denied Nov. 26, 1958.

Action by personal representatives of lessee and sublessee of sawmill against lessor to recover balance of deposit from which rent was paid under lease, wherein lessor filed cross-complaint to recover damages for breach of covenant of lease to

deliver possession of property in same condition as when received. The Superior Court, El Dorado County, Robert E. Roberts, J., entered judgment for representatives of lessees, lessor was denied recovery on his cross-complaint and lessor appealed. The District Court of Appeal, Warne, J. pro tem., held that where lease obligated lessee to pay as rent for mill \$3 per 1,000 board feet for all lumber cut and to deposit \$10,000 with lessor to apply on rent and to deposit another \$5,000 with lessor as soon as the deposit had been reduced to \$5,000, the deposit was not intended as prepaid rent but only as security, lessor was obligated to refund any unused portion thereof when no further rent could accrue, either by virtue of expiration of term of lease or destruction of premises.

Affirmed.

#### 1. Landlord and Tenant ⇨184(2), 210

Under lease which obligated lessee to pay as rent for mill \$3 per 1,000 board feet for all lumber cut and to deposit \$10,000 with lessor to apply on rent and to deposit another \$5,000 with lessor as soon as the deposit had been reduced to \$5,000, the deposit was not intended as prepaid rent but only as security, lessor was obligated to refund any unused portion thereof when no further rent could accrue, either by virtue of expiration of term of lease or destruction of premises and the rule that in absence of a qualifying provision in lease, rent paid in advance will not be apportioned on surrender or termination of lease was not applicable, notwithstanding provision of lease that in event of failure of lessee to cut 250,000 board feet of lumber per week lessee was to pay lessor difference between amount cut and 250,000 board feet at rate of \$3 per thousand.

#### 2. Landlord and Tenant ⇨200

Requirement of contract, entered into by lessor and lessee of sawmill, that in event of failure of lessee to cut 250,000 board feet of lumber per week, lessee was to pay lessor difference between amount cut and 250,000 board feet at rate of \$3

per thousand, did not contemplate destruction of mill by fire.

#### 3. Landlord and Tenant ⇨160(2)

Provision of lease that lessee shall deliver up possession of mill, all property used in connection therewith and all machinery, equipment and tools in accordance with inventory attached, in same condition as when he received same, and if he fails to do so he shall pay lessor reasonable value of any personal property not delivered up by him as aforesaid and shall pay for any property damaged by him or delivered up in damaged or excessively worn condition, did not make lessee insurer of property.

#### 4. Landlord and Tenant ⇨160(2)

Covenant to deliver up premises in same condition as when received, subject to ordinary and reasonable use and wear and tear and to pay for property not delivered up at end of term, did not contemplate nor include covenant to pay for structure wholly destroyed by fire without fault of lessee.

#### 5. Executors and Administrators ⇨222(1)

Lessor who filed cross complaint to recover rent from destruction of premises by fire to end of term provided for in lease was not entitled to relief against the estate of sublessee where no claim had been presented for allowance to decedent's estate.

#### 6. Executors and Administrators ⇨224

A claim for rent due under a lease is of such nature that it must be presented for allowance to decedent's estate.

#### 7. Appeal and Error ⇨347(2)

Formal entry of judgment of nonsuit elsewhere than in the minutes is not required and time for taking of appeal therefrom begins to run from date of minute order. West's Ann.Code Civ.Proc. § 581c.

#### 8. Appeal and Error ⇨356

Where lessor's appeal from judgment in favor of lessee in action to recover balance of deposit from which rent was paid under lease made no reference to order granting nonsuit on cross complaint and time within which lessor could have ap-



pealed from said order had expired, appellate court was required to dismiss purported appeal from order.

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Forrest E. Macomber and Gordan J. Aulik, Stockton, for appellant.

Brandenburger, White & Dillon, Sacramento, for respondents Dicker & Margolis.

E. R. Vaughn, Sacramento, for respondent Wagner.

Lewis, Lewis & Lewis, Sacramento, for respondent Caplan.

WARNE, Justice pro tem.

This is an appeal from a money judgment in favor of respondents in an action brought to recover the balance of a deposit from which rent was paid under a lease, and also (1) an appeal from the judgment in so far as it denies appellant any relief on his cross-complaint to recover rent from and after the destruction of the premises to the end of the term provided in said lease, and, (2) damages for respondents' alleged breach of a covenant of the lease to deliver possession of the leased premises in the same condition as when they were received, subject to ordinary and reasonable use and wear, though destroyed by fire without fault of the tenant.

On May 29, 1950, appellant leased a sawmill and machinery and equipment to the deceased Ben Caplan for a term commencing on the date of the lease and terminating at the close of the 1952 logging season. The lease provided:

"As rental for said Mill, machinery and equipment, Caplan shall pay unto West the sum of Three and no/100 (\$3.00) Dollars per thousand board feet for all lumber cut by him in said Mill, \* \* \* Caplan shall, upon the execution of this Agreement of Lease, deposit the sum of Ten Thousand and no/100 (\$10,000.00) Dollars with West, which Ten Thousand Dollars (\$10,000.00) shall apply on the rental of said sawmill, as herein set forth. As soon as said sawyer's lists aggregate the

sum of Five Thousand and no/100 (\$5,000.00) Dollars, calculated at the rate of Three (\$3.00) Dollars per thousand board feet, Caplan shall immediately and forthwith deposit another Five Thousand and no/100 (\$5,000.00) Dollars with West, to the end that West shall have a deposit of Ten Thousand and no/100 (\$10,000.00) Dollars in advance on account of the rental due on said sawmill."

Pursuant to the terms of the lease, Caplan deposited \$10,000 with West and took possession of the demised premises. Thereafter, the lessee, Caplan, with West's consent, assigned the lease to Louis Novick, now deceased, who operated the mill under the fictitious name of Lake Mill Lumber Company until it was destroyed by fire on August 17, 1951. Subsequently, in an action to which appellant was not a party, the Superior Court in and for the County of Sacramento entered judgment decreeing the proportionate interests of the respondents in the assets of the Lake Mill Lumber Company, including any claims against appellant arising out of this lease to the deceased, Ben Caplan. Thereafter, respondents brought this action to recover \$3,971.26, the balance of the deposit of the prepaid rent at the time of the destruction of the mill and by cross-complaint appellant sought to recover damages for respondents' breach of the covenant of the lease to deliver possession of the property in the same condition as it was when received. The court found that the covenant did not make the lessee an insurer against destruction by fire which was caused other than by want of his ordinary care. The court further found that the lease was terminated by operation of law on August 17, 1951, that is, as of the date of the fire. Judgment in the amount of \$3,971.26 was entered in favor of respondents, and appellant was denied recovery on his cross-complaint.

[1] Appellant takes the position that the \$10,000 deposit required by the terms of the lease was prepaid rent, and that the trial court erred in allowing the respond-

ents to recover the proportionate unused portion thereof.

As stated in *Friedman v. Isenbruck*, 111 Cal.App.2d 326, 335, 244 P.2d 718, 723:

"It is a harsh but well settled rule that, in the absence of a qualifying provision in the lease, rent will not be apportioned, that is, where rent is paid in advance, a lawful surrender or termination during the prepaid period does not entitle the lessee to a proportional rebate. Rent does not accrue from day to day, but accrues on the day it is payable. [Citing cases.] This rule applies where the premises have been destroyed and the lease is thus terminated. *C. M. Staub Shoe Co. v. Byrne*, 169 Cal. 122, 145 P. 1032."

We do not agree with appellant's contention that the trial court erred in not applying the above rule to the instant case.

It is our opinion that the \$10,000 advance deposit required by the terms of the lease was not contemplated as prepaid rent but only as a fund deposited for the security of the lessor out of which the rent was to be paid as it accrued from day to day. Hence the rule that, in the absence of a qualifying provision in the lease, rent paid in advance will not be apportioned upon surrender or termination of the lease is not applicable to this case. Here, the amount of rent was to be computed on the daily output of the mill. It was to be computed by West from the sawyer's lists of the lumber cut which Caplan was required to furnish him each day. It was computed at the rate of \$3 per thousand board feet of lumber cut in the mill. It was West's duty to compute the amount of the rent and invoice Caplan for the amount thereon on the first and fifteenth of each month. The deposit was applied against the accrued rent and when the deposit was depleted to the sum of \$5,000, Caplan was required to deposit an additional \$5,000 so as to bring it up to the original \$10,000. Since we hold that these moneys were not intended as prepaid rent, but only as security for the

payment of the rent, West was obligated to refund any unused portion thereof when no further rent could accrue, either by virtue of the expiration of the term of the lease or destruction of the premises.

[2] Nor do we feel that the following provision in the lease in any way militates against our conclusion that the \$10,000 was intended as surety for the lessor and not as prepaid rent:

"It is Agreed that during the logging seasons of 1950, 1951 and 1952, Caplan shall cut not less than two hundred fifty thousand (250,000) board feet of timber per week in said Mill, or, in the event Caplan fails to do so, he shall pay West the difference between the number of board feet of timber actually cut by him in the said Mill and said minimum of 250,000 board feet, at the rate set forth in said Lease."

This was merely a covenant whereby the lessee obligated himself to cut 250,000 board feet of lumber per week and in the event of his failure to do so, lessee was to pay West the difference between the cut and the minimum of 250,000 board feet at the rate of \$3 per thousand. This provision was obviously written into the lease to assure prompt performance by the lessee. The mill having been destroyed by fire, it was no longer possible for respondents to comply with the terms thereof. The total amount of rent and the requirement for additional deposits of \$5,000 depended solely upon the amount of lumber cut, except in the event that lessees fail to cut the required weekly 250,000 board feet of timber. Of course, this requirement did not contemplate the destruction of the mill.

[3] The lease also provides:

"Said Caplan shall be entitled to the possession of said Mill from the time of the execution of this Lease until the close of the logging season of 1952, at which time Caplan shall deliver up possession of said Mill, mill property, all property used in connection therewith, and all machinery, equipment and tools in accordance with the inventory at-

tached hereto, in the same condition as when he received the same, subject to ordinary and reasonable use and wear and tear, and if he fails to do so, he shall pay West the reasonable value of any personal property not delivered up by him as aforesaid and shall pay West for any property damaged by him or delivered up in a damaged or excessively worn condition."

Appellant contends that, under this provision, Caplan not only agreed to keep the premises in good condition and repair, but also agreed to pay West the reasonable value of any of the leased property which he did not deliver up to West at the end of the term. He urges that this provision, in effect, made the lessee an insurer of the property. There is no merit in such contention.

It is stated in *Friedman v. Isenbruck*, supra, 111 Cal.App.2d at page 334, 244 P.2d at page 722:

"While it is true that at common law and in some states an unqualified covenant to repair was interpreted to impose upon the lessee the duty to rebuild a structure which was destroyed without the fault of the lessee, see annotations, 45 A.L.R. 12, 39; 106 A.L.R. 1358, 1364, and while that was perhaps the early rule in California, *Polack v. Pioche*, 35 Cal. 416 [95 Am.Dec. 115], this state no longer follows that harsh and unrealistic doctrine. In *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 P. 1024, the *Polack* case was distinguished and the more enlightened and modern rule adopted that a covenant to repair does not include an obligation to rebuild a structure destroyed through no fault of the lessee. There the structures involved were destroyed by an accidental fire. The court stated, 184 Cal. at page 576, 194 P. at page 1029: 'To repair' means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence. [Citing a case.] When we

speak of repairing a thing, the very expression presupposes a thing in existence to be repaired. If a workman undertakes to repair an article, he obviously contemplates making whole an existing article and not the manufacture of something new.' After elaborating on these arguments at some length, the court concluded, 184 Cal. at page 578, 194 P. at page 1029: 'It follows that the agreements to keep the premises in good repair and, at the end of the term, to surrender them in as good condition as they were in at the beginning of or during the term are not, and do not include, a covenant to replace a structure totally destroyed by fire without the fault of the tenant. [Citing cases.]'"

[4] In the instant case, it was alleged in the complaint and admitted by the answer that the mill was totally destroyed by fire. In his cross-complaint, appellant also alleged that the mill was totally destroyed by fire and the court found that the fire was caused other than by want of ordinary care on the part of the lessee. Hence, applying the rule concerning a covenant to repair as stated in the *Friedman and Realty & Rebuilding Co.* cases, it follows by the same token that covenants to deliver up the premises "in the same condition as when he received the same, subject to ordinary and reasonable use and wear and tear" and to pay for property "not delivered up by him" at the end of the term do not contemplate nor include a covenant to pay for a structure wholly destroyed by fire without the fault of the lessee.

[5] Further, in so far as the appellant's cross-complaint is founded on an alleged claim for rent claimed to have accrued to the end of the term provided in the lease, no relief could have been granted him against the Estate of Novick since he failed to present such claim to said estate. The trial court found that no claim or claims for cross-complainant's demands as set forth in his cross-complaint were ever presented to Albert L. Wagner as executor of the last will and testament of said de-



cedent, nor was any claim filed with the clerk of the court where said estate is pending administration, or at all.

[6] A claim for rent due under a lease is of such a nature that it must be presented for allowance to the decedent's estate. *Lesser v. Pomin*, 3 Cal.App.2d 117, 39 P.2d 451; also see *Executors and Administrators*, 20 Cal.Jur.2d, p. 783.

During the pendency of this appeal a motion was made by the respondent Herbert P. Caplan, as executor of the last will and testament of Ben Caplan, deceased, to dismiss the appeal against said respondent on the ground that no appeal had been taken from the order granting nonsuit in favor of said respondent.

The minute order appearing in the clerk's minutes of May 13, 1957, reads: "Cross-defendant Caplan's motion for nonsuit is granted, and cross-complaint is dismissed."

Section 581c of the Code of Civil Procedure provides in part:

"\* \* \* If the motion is granted, unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits."

[7] Formal entry of such judgment elsewhere than in the minutes is not required and time for the taking of an appeal therefrom begins to run from the date of the minute order. *Costa v. Regents of University of California*, 103 Cal.App.2d 491, 229 P.2d 867.

[8] In the instant case, the minute order was entered May 13, 1957. The purported appeal filed by appellant herein is "from the Judgment \* \* \* entered \* \* \* on the 10th day of July, 1957, in favor of Plaintiffs in said action, and against said Defendant and Cross-Complainant, and from the whole thereof." It makes no reference to the order granting nonsuit, nor does it purport to appeal from said order. Therefore, since the time within which appellant could have appealed from said order had expired, the purported appeal must be dismissed.

We do not deem it necessary to discuss other points raised upon this appeal.

The purported appeal from the nonsuit as to Caplan is dismissed. The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; SCHAUER, J., dissenting.



50 Cal.2d 835

Caryl CHESSMAN, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF LOS ANGELES, and The Honorable Walter R. Evans, Judge of the Superior Court, Respondents.

The People of the State of California,  
Real Party in Interest.

L. A. 25061.

Supreme Court of California, in Bank.

Oct. 2, 1958.

Mandamus proceeding to compel trial court and judge thereof to vacate a nunc pro tunc minute order, to grant petitioner an opportunity to be heard in opposition to changes made in resettlement of reporter's transcript and for transmittal of complete copy of transcripts of resettlement proceedings to the Governor. The Supreme Court, Schauer, J., held that although making of 90 changes in corrected reporter's transcript on appeal may have been but the exercise of inherent power of the court to correct clerical errors not affecting defendant's substantial rights, court could not properly, without notice to defendant, amend such determinations when it was not entirely clear from record that changes involved no judicial determinations, and defendant was entitled to opportunity to appear and be heard, in person or by counsel, as to changes.

Application for writ of mandamus granted in part and denied in part.

#### 1. Witnesses ⇨34

Where nunc pro tunc minute order appointing reporter, who had transcribed undictated notes of deceased trial reporter, an expert witness in proceedings for resettlement of reporter's transcript had no bearing on merits of resettlement proceedings and no effect upon any right of defendant and order was made for sole purpose of enabling judge to direct that witness be

compensated out of county treasury as a court-appointed expert rather than be paid ordinary witness fees, defendant had no standing to attack the order. West's Ann. Code Civ.Proc. § 1871.

#### 2. Criminal Law ⇨1110(1)

Although making of 90 changes in corrected reporter's transcript on appeal may have been but exercise of inherent power of court to correct clerical errors not affecting defendant's substantial rights, court could not properly, without notice to defendant, amend such determinations when it was not entirely clear from record that changes involved no judicial determinations, and defendant was entitled to be afforded opportunity to appear and be heard, in person or by counsel, as to the changes.

#### 3. Criminal Law ⇨1110(1)

Where proceedings for resettlement of reporter's transcript of trial involving a judgment of death related to the content of the trial transcript, it was proper to direct transmittal to Governor of copies of transcripts of the resettlement proceedings but it was not necessary that the transcripts be accompanied by photostatic copies of exhibits. West's Ann.Pen.Code, § 1218; West's Ann.Rules on Appeal, rule 33.

Caryl Chessman, in pro. per.

No appearance for respondents on real party in interest.

SCHAUER, Justice.

Petitioner seeks a writ of mandate directing respondent court to take the following action in connection with proceedings before it which resulted in the resettlement of a reporter's transcript on appeal in *People v. Chessman* (Crim. No. 5006 in the files of this court):

"1. To vacate \* \* \* its March 13, 1958 nunc pro tunc minute 'order' appointing Stanley Fraser an expert under § 1871 of the Code of Civil Procedure<sup>1</sup> \* \* \*

1. Section 1871 provides for appointment of expert witnesses by the court and for their compensation.



with instructions that if it again wishes to attempt to make such an order (assuming this Court finds it has the power to do so under any circumstances) it must put Chessman on notice, produce him and allow him to be heard in opposition;

"2. To recall the record on appeal in *Crim. 5006* from this Court and grant Chessman a hearing and an opportunity to be personally heard in opposition to its informal action in making changes and corrections, ninety in number, in the changes and corrections it had finally ordered in the original trial transcript, and to resolve this matter in accordance with the controlling principles of procedural due process required by *Chessman v. Teets*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed. 1253; and

"3. To order, under § 1218 of the Penal Code,<sup>2</sup> preparation and transmittal to the Governor of California [of] a complete and properly authenticated copy of the Clerk's and Reporter's Transcripts of the Settlement Proceedings, along with photostatic copies of the exhibits received in evidence (excepting court records)."

We have concluded:

[1] 1. Petitioner cannot attack the nunc pro tunc order because that order had no bearing on the merits of the resettlement proceedings and no effect upon any right of petitioner.

2. It well may be that no hearing as to the 90 changes was necessary because they were made in the exercise of the court's inherent power to correct clerical misprisions which are apparent on the face of the record and which do not affect petitioner's substantial rights. However, to expedite ultimate disposition of this matter, petitioner should be expressly afforded the opportunity to appear before respondent court, in person or by counsel, and to be heard as to such changes.

3. Section 1218 of the Penal Code does not contemplate transmittal to the governor

of copies of exhibits or of transcripts of mesne proceedings for settlement of the reporter's transcript on appeal from the judgments of conviction. However, in the circumstances of this case, petitioner's request will be granted in respect to the transcripts of the mesne proceedings, but not in respect to copies of exhibits.

There is now pending before us an appeal in *Crim. No. 5006*. In disposing of that appeal we will, in the exercise of our inherent power to pass upon all questions as to preparation of the record on appeal (see *Cross v. Superior Court* (1951), 104 Cal. App.2d 594, 595-596 [3]), 232 P.2d 255, review the resettlement proceedings. Therefore, petitioner could advance his present contentions on appeal. However, we agree with petitioner that ultimate disposition of that appeal may be facilitated if those contentions are considered at this time.

The following circumstances led to this mandate proceeding:

Petitioner appealed from judgments of conviction of 17 felonies, including two judgments of death. The official court reporter, Mr. Ernest Perry, died before he had completed dictating his notes of the trial. Another official reporter, Mr. Stanley Fraser, under court order prepared a transcript of the balance of Mr. Perry's notes. Petitioner, who was confined in San Quentin State Prison under the 17 sentences, requested and was granted a hearing in respondent court on the questions whether Perry's notes were legible, whether Fraser could read them, and whether the transcript was "usable"; at this hearing petitioner also presented some proposed specific changes in the transcript. Petitioner was not personally present at the hearing because he was not permitted to leave the prison in which he was confined. He was not and did not ask to be represented by counsel, but participated in the hearing by the filing of documents in propria persona.

2. Section 1218 provides that the judge of the court in which a judgment of death is had must transmit to the governor "a

statement of the conviction and judgment, and of the testimony given at the trial."

The judge rejected petitioner's general complaints as to the transcript, allowed some proposed specific changes, and settled and certified the transcript.

In *People v. Chessman* (1950), 35 Cal.2d 455, 218 P.2d 769, 19 A.L.R.2d 1084, petitioner by motions in this court attacked the reporter's transcript and the proceedings by which it was produced. At his request, this court's appointment of counsel to represent him before us was terminated and he conducted his case in *propria persona* by written documents. We held that (at page 462 [11] of 35 Cal.2d, at page 773 of 218 P.2d) "Examination of the record in the light of defendant's claims discloses that it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been any miscarriage of justice"; that (at page 467 [15] of 35 Cal.2d, at page 776 of 218 P.2d) because petitioner was lawfully imprisoned he was not entitled to appear personally in the courtroom in settlement proceedings; and that because prior to his conviction he had repeatedly been offered and refused counsel in the trial court and because he had persisted in this court in his refusal to appear by counsel, he could not complain that he was prejudiced by the fact that since his conviction he had not been allowed to leave the prison to appear personally in court.

In *People v. Chessman* (1951), 38 Cal.2d 166, 172, 238 P.2d 1001, we again considered and rejected petitioner's arguments as to the reporter's transcript and affirmed the judgments of conviction.

After federal and state courts had rejected many attacks by petitioner upon the reporter's transcript and the proceedings which produced it, the United States Supreme Court held, in *Chessman v. Teets* (1957), 354 U.S. 156, 162, 77 S.Ct. 1127, 1130, 1 L.Ed.2d 1253, that "the *ex parte* settlement of this state court record violated petitioner's constitutional right to procedural due process. \* \* \* If California chose to deny petitioner's request to appear in those proceedings *in propria persona*, it

then became incumbent on the State to appoint counsel for him."

Pursuant to the quoted holding of the supreme federal court and ensuing orders of the United States District Court (August 14, 1957) and of this court (August 29, 1957) obedient thereto, new hearings directed to the adequacy and correctness of the reporter's transcript were had in respondent court (Judge Walter R. Evans, assigned). At these hearings petitioner was allowed to leave the prison, to appear personally and actively represent himself, and to be actively represented by counsel of record whenever he so desired.

Among the witnesses for the People at the resettlement hearings was Stanley Fraser, the reporter who had transcribed the undictated notes of the deceased reporter Perry.

On February 28, 1958, with petitioner and his counsel present, respondent court by minute order denied a motion of petitioner which asked, among other things, that the court "reject the present reporter's transcript" and "find that no usable or adequate reporter's transcript can be prepared from Ernest R. Perry's shorthand notes." Further, by written order filed on February 28, 1958, respondent court found "that the shorthand notes of Mr. Perry were decipherable and that Mr. Frazier [sic] was competent and qualified to transcribe and did so transcribe those notes fairly and in a substantially accurate manner"; attached to and made a part of the order is a list of about 2,000 "changes to be made by the Clerk of this Court" in the 2,102 pages of the original reporter's transcript. The changes appear both in the 646 pages of transcript which were dictated by Perry and in the portion of the transcript which was prepared by Fraser. The court found that these changes "in no way change the substance and nature of either the People's case or the defendant's defense."

On March 11, 1958, petitioner was returned to San Quentin. On March 13, 1958, Judge Evans, without notice or hear-

ing, made the order which nunc pro tunc appointed Fraser "to testify as an expert witness in Pittmanic [sic] Shorthand."

A corrected reporter's transcript on appeal was prepared. In this transcript there are 90 changes, made without notice or hearing and without any order appearing in the record before us, in the changes which were set forth in the order of February 28, 1958. On May 1, 1958, Judge Evans certified the corrected reporter's transcript.

Petitioner, acting in propria persona, forwarded to respondent court "Objections, Proposed Corrections, and Application for a Hearing." This document asks relief in the three respects as to which petitioner now seeks mandate. On June 16, 1958, Judge Evans denied such relief.

*The Nunc Pro Tunc Order.* The minute order of March 13, 1958, made without notice or hearing, is as follows: "The minute order of November 27, 1957, [is] amended nunc pro tunc as of that date to add to said minute order the following terminology: 'Stanley Fraser is appointed under the provisions of Section 1871, Code of Civil Procedure to testify as an expert witness in Pittmanic [sic] Shorthand', it being the intention of the Court to have made the above appointment to be included in the minute order of November 27, 1957." November 27 was the second day on which Fraser testified in the resettlement proceedings.

Section 1871 of the Code of Civil Procedure provides that the court or judge may appoint experts to investigate and testify and may fix reasonable compensation for services, if any, rendered by them in addition to their services as witnesses; *that in criminal proceedings such compensation shall be paid out of the county treasury*; that expert witnesses called by a party and not appointed by the court are entitled to "ordinary witness fees only"; and that a court-appointed expert may be called as a witness by any party or by the court itself.

The order of March 13, 1958, was manifestly made for the sole purpose of enabling

the judge, under the authority of section 1871, to order (as he did on March 21, 1958) that Fraser be compensated out of the county treasury as a court-appointed expert rather than be paid "ordinary [\$4.00 a day] witness fees only." (See Pen.Code, § 1329.) Such order has no relation to and could not affect the determination of the merits of the resettlement proceedings.

Petitioner's claims that the nunc pro tunc order prejudicially affects him are based on his mistaken assumptions that Fraser did not testify as an expert and that the nunc pro tunc order purports retroactively to confer expertness upon Fraser and to give his testimony an effect which it did not have at the time he testified. However, petitioner and his counsel expressly recognized at the resettlement hearings that Fraser was produced as an expert and cross-examined him as to his qualifications and bias in that regard. Obviously the nunc pro tunc order has no application to the effect to be accorded Fraser's testimony, and this court on its review of the resettlement proceedings will not give it any such application. Therefore, since petitioner is not aggrieved by the order, he has no standing to attack it.

[2] *The 90 Changes, Made without Notice, Hearing or Order of Record, in the Changes which Appear in the Order of February 28, 1958.* Because of obvious clerical errors in the list of changes ordered on February 28, 90 of such changes either could not be made in accord with the language of the order of February 28 or, if they had been so made, would have been unintelligible or obviously incorrect. In the corrected reporter's transcript, some of these 90 changes were not made and some were made in a manner different from that specified in the order. The 90 respects in which the corrected reporter's transcript does not conform to the language of the order of February 28, 1958, are listed on the first page of each volume of such transcript and (pursuant to order of June 16, 1958) are entitled "Corrections



and Changes Ordered and Made Subsequent to the Order of February 28, 1958 and Prior to Final Approval by the Court."

Regardless of whether the 90 changes could in any way affect this court's consideration and disposition of the appeal from the judgments of conviction, we assume for the purpose of expediting disposition of this proceeding (but without so holding) that in view of the language of the order and the opinion pursuant to which this case has been returned to us (see *Chessman v. Teets* (1957), *supra*, 354 U.S. 156, 164, note 12, 77 S.Ct. 1127, 1 L.Ed.2d 1253), lack of a hearing as to the 90 changes cannot be excused upon the basis of a determination that such changes are immaterial.

The making of the 90 changes may have been but the exercise of the inherent power of respondent court, without notice or hearing, to correct obvious clerical errors which did not affect petitioner's substantial rights (see *In re Estate of Hultin* (1947), 29 Cal.2d 825, 829-830 [1, 2], 178 P.2d 756), and it may be that such a procedure did not transgress the decision of the United States Supreme Court that *Chessman* was entitled to be represented throughout the settlement proceedings in person or by counsel (*Chessman v. Teets* (1957), *supra*, 354 U.S. 156, 162, 77 S.Ct. 1127, 1 L.Ed.2d 1253). However, it is not entirely clear from the record before us that the 90 changes involved no judicial determinations. Respondent court could not properly, without notice, amend such determinations. (*Beyerbach v. Juno Oil Co.* (1954), 42 Cal.2d 11, 28 [21], 265 P.2d 1.) In the circumstances it appears proper that *Chessman* be afforded the opportunity to appear and be heard, in person or by counsel, as to all the 90 changes.

The new hearing will result in a new order. It is therefore unnecessary to discuss the effect of the absence from the record now before us of an order directing such 90 changes.

[3] *The Refusal to Send the Governor a Copy of the Record of the Resettle-*

*ment Proceedings.* Petitioner urges that "in the unique circumstances of this case" section 1218 of the Penal Code requires that the judge before whom the resettlement proceedings were had transmit to the governor copies of the clerk's and reporter's transcripts of the resettlement proceedings and photostatic copies of the exhibits received in evidence at those proceedings (except court records).

Section 1218 of the Penal Code provides, "The judge of the court at which a conviction requiring judgment of death is had, must, immediately after the conviction, transmit to the governor \* \* \* a statement of the conviction and judgment, and of the testimony given at the trial."

Certainly by its language the above quoted section does not purport to require that any transcript of mesne proceedings to settle the trial transcript shall be forwarded to the governor. But it is to be recognized that the mesne proceedings do relate to the content of the trial transcript. Petitioner appears to believe that it might be important to him to have a copy of the transcript of the mesne proceedings in the hands of the governor. It has been said that "Exacting as the state may be in ultimately bringing retribution to those who violate its highest laws, it is at least equally solicitous that those who are prosecuted shall be accorded full measure of every legal right." (*People v. Gilbert* (1944), 25 Cal.2d 422, 442 [12], 154 P.2d 657, 667.) It is also the policy of California (see, e. g., *People v. Stuart* (1956), 47 Cal.2d 167, 175 [7], 302 P.2d 5, 55 A.L.R.2d 705) to construe and apply penal statutes as favorably to the defendant as the language of the statute and the circumstances of its application may reasonably permit. Under all the circumstances of the case at bar we conclude that it is proper to direct transmittal to the governor of copies of the transcripts of the resettlement proceedings. As has been stated, petitioner also asks that the above mentioned transcripts be accompanied by photostatic copies of exhibits "excepting court rec-

ords." The exhibits in the resettlement proceedings "excepting court records" include more than 89 books, papers, and documents. Section 1218 of the Penal Code does not, as we understand it, contemplate transmission of copies of exhibits to the governor. It is not the practice of this court to require, and the Rules on Appeal (see Rule 33) do not provide for, the inclusion of copies of exhibits in the transcript. When examination of exhibits appears to be necessary or desirable in the determination of an issue before us, we have such exhibits transmitted to us. No doubt if it became material in any application to the governor for him to examine an exhibit or exhibits, arrangements to that end could easily be made. In any event it is unnecessary that copies of the exhibits be made and included with the transcripts to be sent to the governor at this time.

For the reasons above stated it is ordered as follows:

1. The application for an order requiring respondent court to vacate its March 13, 1958, minute order and for instructions to respondent court pertaining to such matter is denied.

2. The application for an order directing transmittal to the governor of photostatic copies of exhibits is denied.

3. The original reporter's transcript and the corrected reporter's transcript on appeal from the judgments of conviction in Crim. No. 5006 are returned to respondent court.

4. Let a peremptory writ of mandate issue directing respondent court to explicitly grant petitioner an opportunity to be heard in person or by counsel in opposition to its action with respect to its changes in the "Order re Hearing on Objections" filed February 28, 1958, which changes are described in the corrected reporter's transcript as "Corrections and Changes Ordered and Made Subsequent to the Order of February 28, 1958 and Prior to Final Approval by the Court." The order determining petitioner's objections to

such "Corrections and Changes" shall be made, and the making of the corrections and changes pursuant thereto shall be accomplished, in the presence of petitioner or his counsel, or after express notice and opportunity given them to be present. When petitioner's objections to such "Corrections and Changes" have been heard and determined, and the corrections and changes as ordered have been actually made, respondent court shall certify the corrected reporter's transcript.

Such peremptory writ of mandate shall also direct respondent court to transmit to the governor of California complete, authenticated copies of the clerk's and reporter's transcripts of the resettlement proceedings.

This order is final forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

CARTER, J., concurs in the order.



164 Cal.App.2d 165

**PEOPLE of the State of California,**  
Plaintiff and Respondent,  
v.

**ONE 1954 OLDSMOBILE 4-DR. SEDAN,**  
**LICENSE NO. KVS173, ENGINE NO.**  
**V308154, SERIAL NO. 548C14407, Defendant,**

**Donald E. Medaris and Marjorie Medaris,**  
also known as Marjorie L. Call, as Owners of One 1954 Oldsmobile 4-Door, License No. KVS173, Registered Owners and Appellants.

Civ. 23156.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 14, 1958.

Proceeding to forfeit an automobile on the ground that it was used unlawfully to

transport narcotics. From a judgment of the Superior Court of Los Angeles County, Burnett Wolfson, J., the coowners appealed. The District Court of Appeal, Patrosso, J. pro tem., held that the evidence established that the narcotics were in the automobile and that there was a transportation thereof.

Judgment affirmed.

#### 1. Forfeitures ⇐5

In proceeding to forfeit an automobile on the ground it was used unlawfully to transport narcotics, evidence established that a vial delivered to co-owner of the automobile based on a forged prescription contained Demerol, a narcotic. West's Ann.Health & Safety Code, § 11610.

#### 2. Forfeitures ⇐5

In proceeding to forfeit an automobile on the ground it was used unlawfully to transport narcotics, evidence established that the narcotics were in the automobile and that there was a place-to-place movement which would warrant a finding of transportation. West's Ann.Health & Safety Code, § 11610.

Boller, Suttner & Boller, Arcadia, for appellants.

Edmund G. Brown, Atty. Gen., and Herschel T. Elkins, Deputy Atty. Gen., for respondent.

PATROSSO, Justice pro tem.

Defendants, husband and wife, appeal from a judgment forfeiting to the State a 1954 Oldsmobile of which they were the registered co-owners upon the ground that it was used unlawfully to transport narcotics. Health & Safety Code, § 11610.

The trial court found that the vehicle was used by the defendant Mrs. Medaris to unlawfully carry and transport isonipocaine (Demerol), a narcotic, and that such narcotic was unlawfully in her possession while she was an occupant of the vehicle. The defendants contend that this

finding is not supported by the evidence. We find no merit in this claim and accordingly are affirming the judgment.

The evidence is undisputed. On March 30, 1957, the defendant Mrs. Medaris presented to P. Melvin Knoll, a pharmacist employed by the Temple City Professional Pharmacy in Temple City, a prescription for 30 ccs. of Demerol with 100 milligrams per 2 ccs. Mr. Knoll obtained from the pharmacy stock a sealed vial containing 30 ccs. of Demerol; removed therefrom the manufacturer's label; placed thereon the label of the pharmacy and delivered the same to Mrs. Medaris, who thereupon proceeded directly to the automobile in question, entered the same and drove away. The prescription which Mrs. Medaris delivered to the pharmacist had been written by her and she had forged thereto the name of a Dr. Morris.

[1] In support of their contention as to the insufficiency of the evidence the appellants first argue that there is no proof that the vial delivered to Mrs. Medaris in fact contained Demerol. This argument is predicated upon the testimony of the pharmacist that Demerol is water white in color as a result of which its identity may not be ascertained by visual inspection, and that the only basis for his testimony that the product contained in the sealed vial was Demerol is the fact that it was so labeled by the manufacturer. The defendants adduced no evidence that the vial did not in fact contain Demerol. From the proof that it was in a sealed vial, labeled by the manufacturer as such and that it was delivered to Mrs. Medaris upon a prescription presented by her calling for the drug the trial court was fully warranted in concluding that the vial contained Demerol.

[2] The defendants next assert that there is no evidence that the narcotic was ever in the automobile and further that there is no showing that there was a place-to-place movement which would warrant a finding of transportation of the narcotic. The fact, however, that after receiving the



drug Mrs. Medaris immediately proceeded to her automobile and drove away justified the trial court in concluding that she had the drug in her possession when she entered the automobile and drove away in it. Moreover, the fact that she had the drug in her possession when she entered the automobile is sufficient to support the judgment without proof of transportation, for section 11610, Health & Safety Code, provides that "A vehicle \* \* \* in which any narcotic is unlawfully kept, deposited or concealed, \* \* \* or in which any narcotic is unlawfully possessed by an occupant thereof, \* \* \* shall be forfeited to the State."

In view of the foregoing it is unnecessary to consider appellants' final contention that the trial court's further finding that the vehicle was used "to facilitate the transportation" of the narcotic is unsupported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



164 Cal.App.2d 160

**In the Matter of the ESTATE OF Robert BROWN, Deceased.**

**James M. BROWN, John Robert Brown, Mary Brown Dardis and Alice Brown Healy, Appellants and Petitioners,**

**v.**

**Mrs. Grace MILNER, Objector and Respondent.**

**Civ. 23140.**

District Court of Appeal, Second District,  
Division 3, California.

Oct. 14, 1958.

Proceeding wherein natural born children sought determination that they were pretermitted heirs of testator entitled to succeed to portion of his estate. The Su-

perior Court of Los Angeles County, Clyde Triplett, J., entered decree determining that natural born children were not pretermitted heirs and children appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where will provided that testator was widower and had no children, that, except as otherwise in will specified, he intentionally and with full knowledge, and not as result of any accident, mistake or inadvertence, omitted to provide for any other of his heirs living at time of his demise, and that if any person who would be entitled to share in estate of testator if he had died intestate should contest will, then such person was bequeathed one dollar, will evidenced testator's intention to disinherit all of his heirs including his children.

Affirmed.

**1. Descent and Distribution ⇨48**

Paragraph of will providing that if any person who would be entitled to share in estate of testator if testator had died intestate should contest will, then such person was bequeathed one dollar, effectively operated to disinherit natural born children of testator. West's Ann.Prob. Code, § 90.

**2. Descent and Distribution ⇨48**

Where will provided that testator was widower and had no children, that testator, except as otherwise in will specified, intentionally and with full knowledge, and not as result of any accident, mistake or inadvertence, omitted to provide for any other of testator's heirs living at time of his demise and that, if any person who would be entitled to share in estate of testator if he had died intestate should contest will, then such person was bequeathed one dollar, will evidenced testator's intention to disinherit all of his heirs including his children. West's Ann. Prob.Code, § 90.

David M. Richman, Beverly Hills, for appellants.

Rose, Klein & Marias, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by four natural children of the above named decedent from a decree determining that they were not pretermitted heirs and hence not entitled as such to succeed to any portion of his estate.

By his last will and testament the decedent devised and bequeathed the whole of his estate to Grace Milner and appointed her executrix thereof. The other relevant provisions of the will are the following:

"Second: I declare that I am a widower, and that I have no children.

"Fourth: I have, except as otherwise in this Will specified, intentionally and with full knowledge, and not as a result of any accident, mistake or inadvertence, omitted to provide for any other of my heirs living at the time of my demise.

"Fifth: If any person \* \* \* who, if I died intestate, would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly, contest this Will or attack, oppose or seek to impair, or invalidate any provision hereof, \* \* \* then I hereby bequeath to each such person the sum of One Dollar (\$1.00) only, \* \* \*."

Appellants contend that the foregoing provisions of the will are insufficient to establish that the failure of the testator to provide for his children was intentional within the meaning of section 90 of the Probate Code. Their argument is that the statement in paragraph second quoted above that the testator had no children, demonstrates that the testator did not have his children in mind when he executed the will. A like contention was advanced with respect to a will containing substantially the same language as that which appears in paragraphs second and fourth of the will in the instant case in the *In re Estate of Fernstrom*, 1958, 157 Cal.App.2d 380, 321 P.2d 25, 27 in

which a hearing by the Supreme Court was denied. There the will stated, in part, that the testator "had no children" and added "I have, except as otherwise provided in this Will, intentionally and with full knowledge omitted to provide for my heirs who may be living at the time of my death." In holding that this language was sufficient to establish that the omission to provide for his daughter was intentional, the court said (157 Cal.App.2d at page 383, 321 P.2d at page 27):

"The courts of California have held repeatedly and consistently that a testator's declaration in his will that he has intentionally omitted to provide for his heirs is a sufficient expression of his intentional omission of provision for children. In *re Estate of Hassell*, 168 Cal. 287, 142 P. 838; In *re Estate of Lindsay*, 176 Cal. 238, 168 P. 113; In *re Estate of Lombard*, 16 Cal.App.2d 526, 60 P.2d 1000; In *re Estate of Doell*, 113 Cal.App.2d 37, 247 P.2d 580.

"In a number of California cases it has been held that nominal testamentary provisions for 'heirs' were effective to preclude children from taking as pretermitted heirs, even though such children were not named. *Van Strien v. Jones*, 46 Cal. 2d 705, 299 P.2d 1; In *re Estate of Lindsay*, supra; In *re Estate of Minear*, 180 Cal. 239, 180 P. 535; In *re Estate of Talmage*, 114 Cal.App.2d 18, 249 P.2d 345; In *re Estate of Allmaras*, 24 Cal.App.2d 457, 75 P.2d 557. As stated in the recent decision of *Van Strien v. Jones*, supra, 46 Cal.2d at page 707, 299 P.2d at page 2: 'It is well settled that where in a will a testator's child is intentionally omitted or given \$1 or any other sum, section 90 of the Probate Code is satisfied although the child is not mentioned by name.'"

Appellants seek to distinguish the foregoing case from that at bar by the argument that inasmuch as the testator left surviving two sisters, the use of the words "any other of my heirs" in paragraph fourth must be construed as referring to heirs other than his children. Substan-

tially the same argument was advanced by the appellant daughter in the Fernstrom case and rejected, the court saying (157 Cal.App.2d at pages 385, 386, 321 P.2d at page 28):

"Again, proceeding upon the hypothesis that the testator was unaware of appellant's existence, appellant argues that by the use of the word 'heirs' in article XI, testator must have referred only to his brothers and sister. The essence of appellant's argument is that under testator's conception of his family situation as revealed by his will the term 'heirs,' used in a legal sense, could refer only to the brothers and sister.

"The fallacy in this argument is easily demonstrated. Indeed, the cutting edge of the sword which appellant has thus raised is against her. The skilled attorney who drafted the Fernstrom will presumably was aware of the law that no declaration of intention is necessary to effectuate a disinheritance of brothers and sisters not mentioned or provided for. The attorney presumably was aware, also, of the law that a declaration of intent to disinherit 'heirs' would not effectively bar the claim of a person claiming to have been married to the testator subsequent to the execution of the will.

"It follows that article XI can be given legal effect only by applying it to appellant who, assuming the truth of her allegation that she is a daughter, is a member of the only class of heirs legally subject to the effect of such a clause, to wit lineal descendants."

Substantially identical provisions were contained in the will involved in the *In re Estate of Lombard*, supra, 1936, 16 Cal. App.2d 526, at page 528, 60 P.2d 1000, at page 1001, where the court in concluding that the children of the testator were expressly and effectively disinherited thereby said:

"It is argued by petitioners that the language of section eight of the will to the effect that the testator had 'intentionally and with full knowledge omitted to

provide for my heirs living at the time of my demise' should not be construed to mean and to include the testator's children, since if he had intended to exclude his children he would have used the precise word. We cannot put such a strained construction upon the word 'heirs'. 'At law, while the word may include others, it always includes the children of a decedent.' *In re Estate of Hassell*, supra."

To the same effect are the following: *In re Estate of Doell*, supra, 113 Cal.App. 2d 37, 247 P.2d 580; *In re Estate of Hassell*, supra, 168 Cal. 287, 142 P. 838; *In re Estate of Lindsay*, supra, 176 Cal. 238, 168 P. 113.

[1] Moreover, if we entirely disregard paragraphs second and fourth of the will paragraph fifth thereof quoted above effectively operates to disinherit the appellants. In *Van Strien v. Jones*, supra, 1956, 46 Cal.2d 705, 299 P.2d 1, the question presented was whether the following provision of the will disinherited the plaintiff, a daughter of the testator, who was not provided for or otherwise mentioned therein, in terms sufficient to satisfy section 90 of the Probate Code (46 Cal.2d at pages 706-707, 299 P.2d at page 2):

"If any person who is, or claims under or through, a devisee, legatee, or beneficiary under this Will, or *any person who if I died intestate would be entitled to share in my estate*, shall, in any manner whatsoever, directly or indirectly contest this Will \* \* \* then I hereby bequeath to each such person the sum of One Dollar (\$1.00) only \* \* \*." (Emphasis added.)

It will be noted that the language of the will there was substantially identical with that contained in paragraph fifth of the will in the instant case. Said the court (46 Cal.2d at pages 707-708, 299 P. 2d at page 3):

"In the present case the will, in addition to providing generally for 'any person' who claims under the will, also provides that if 'any person who if I died



intestate would be entitled to share in my estate' should contest the will he bequeaths to such person the sum of \$1.

In *In re Estate of Kurtz*, 190 Cal. 146, 210 P. 959, 960, the testator provided; 'I \* \* \* disinherit each and all persons whatsoever claiming to be, and who may be, my heirs at law \* \* \* and if any of such parties or such heirs, or any person whomsoever *who, if I died intestate, would be entitled to any part of my estate* \* \* \* seek or establish or assert any claim to my estate \* \* \* I hereby give and bequeath to said person or persons the sum of one (\$1.00) dollar \* \* \*.' The portions of that will which have been emphasized are almost identical with the clause in the will in the present case. In *Re Estate of Dixon*, 28 Cal.App.2d 598, 83 P.2d 98, 99, the will also 'contained a clause almost identical with the will of the decedent in' the Kurtz case. See also *In re Estate of Lindsay*, supra, 176 Cal. 238, 168 P. 113; *In re Estate of Hassell*, supra, 168 Cal. 287, 142 P. 838; *In re Estate of Lombard*, 16 Cal.App.2d 526, 60 P.2d 1000. In all of the foregoing cases it was held that children or grandchildren of the testator were not pretermitted where the wills referred to them only as 'heirs not herein mentioned,' or 'persons claiming to be heirs,' or as in the present case, 'persons who if I died intestate would be entitled to any part of my estate.' Such provisions in wills are guards against specific contests of the will, as distinguished from provisions whereby the testator bequeaths \$1 or other sum to 'anyone who may contest this will.' In *re Estate of Cochran*, supra, 116 Cal.App. 2d 98, 253 P.2d 41. The wills in the Kurtz and other cases herein cited to like effect make definite and specific reference to persons who, by the laws of succession, would be entitled to participate in the testator's estate had he died intestate, or had he died testate but failed to mention them in his will or otherwise provide for them. Those cases support the conclusion of the trial court in sustaining the demurrer."

[2] In light of the foregoing the trial court correctly concluded that by the terms of his will the testator evidenced his intention to disinherit all of his heirs including his children, the appellants herein.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



164 Cal.App.2d 168

Henry B. CRAMER, Plaintiff and Appellant,

v.

CITY OF SAN DIEGO, a Municipal Corporation, Defendant and Respondent.

Civ. 5895.

District Court of Appeal, Fourth District, California.

Oct. 14, 1958.

Rehearing Denied Nov. 5, 1958.

Hearing Denied Dec. 10, 1958.

Action by tax holder and resident seeking a declaration that charter provision, ordinances, and rules were invalid because they conflicted with general law and were an unreasonable exercise of police power. From adverse judgment of the Superior Court, San Diego County, L. N. Turrentine, J., the taxpayer appealed. The District Court of Appeal, Coughlin, J. pro tem., held that even if provision of charter and ordinance of chartered city authorizing use of sewer service revenues for cost and expense of extending, reconstructing or improving city sewer system conflicted with general statute providing that such revenue should not be used for acquisition of any new local street sewers or laterals, such charter provision, ordinances and regulations concerned "municipal affairs"

and they were not subject to limitation by general law, and any conflict therewith did not render them invalid.

Judgment affirmed.

#### 1. Municipal Corporations ⚖79

Even if provision of charter and ordinances of chartered city authorizing use of sewer service revenues for cost and expense of extending, reconstructing or improving city sewer system conflicted with general statute providing that such revenue should not be used for acquisition of any new local street sewers or laterals, such charter provision, ordinances and regulations concerned "municipal affairs" and they were not subject to limitation by general law, and any conflict therewith did not render them invalid. St.1931, p. 2838, § 90.2 as amended by St.1957, p. 4221; West's Ann.Const. art. 11, §§ 6, 11; West's Ann.Health & Safety Code, § 5471.

#### 2. Municipal Corporations ⚖79

A charter adopted by city under provisions of constitution respecting powers of city to make and enforce regulations concerning their municipal affairs is absolutely controlling and free from impairment by general laws of the state as to all "municipal affairs" and insofar as such charter makes provision relative to any municipal affairs, it is the supreme law, paramount to any law enacted by the state legislature, and general laws enacted by the legislature in regard thereto have no application. West's Ann.Const. art. 11, §§ 6, 11; West's Ann.Health & Safety Code, § 5471.

#### 3. Municipal Corporations ⚖79

The acquisition, construction, improvement, extension, maintenance, operation and financing of a sewer system are "municipal affairs" concerning which a chartered city is not subject to general law, except as its charter may provide. West's Ann.Const. art. 11, §§ 6, 11; West's Ann. Health & Safety Code, § 5471.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affairs".

#### 4. Municipal Corporations ⚖79

The determination and implementation of fiscal policies and procedures, including imposition and collection of charges for sewer services rendered, and the use of revenue obtained therefrom for sewer system purposes, are "municipal affairs" concerning which a chartered city is not subject to general law, except as its charter may provide. West's Ann.Const. art. 11, §§ 6, 11; West's Ann.Health & Safety Code, § 5471.

#### 5. Municipal Corporations ⚖985

Provisions of charter and ordinances authorizing use of sewer service revenue for cost and expense of extending, reconstructing or improving sewer system were not unreasonable and were not void. West's Ann.Const. art. 11, §§ 6, 11; St.1931, p. 2838, § 90.2 as added by St.1957, p. 4221; West's Ann.Health & Safety Code, § 5471.

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Tom Sherrard, San Diego, for appellant.

J. F. DuPaul, City Atty., San Diego, and Alan M. Firestone, Chief Deputy, San Diego, for respondent.

O'Melveny & Myers, James L. Beebe, William D. Moore, Los Angeles, amici curiae in behalf of respondent.

COUGHLIN, Justice pro tem.

Action for declaratory relief.

This is an appeal from a judgment, in an action for declaratory relief, upholding the validity of charter provisions of the City of San Diego, of ordinances enacted thereunder, and of a resolution prescribing rules of interpretation and procedure.

[1] The City of San Diego operates under a charter, adopted in 1931 pursuant to the provisions of Article XI, section 6, of the California Constitution (Stats.1931, Sen.Con.Res.No. 34, p. 2838). Section 90.2 was added to the charter by amendment in

1956 and, among other things, authorizes the city council to establish charges for sewer services; permits the billing and collection of these charges along with those for water as one item; and directs that the sewer service charges be paid into a fund used only for sewer system purposes, including "paying all or any part of the cost and expense of extending, reconstructing or improving the sewer system of the City or any part thereof". St.1957, p. 4221. The city council has adopted ordinances adding sections to the San Diego Municipal Code fixing sewer service charges; providing for their collection; and creating a sewer revenue fund. Section 64.31 of the Municipal Code provides that the sewer service charges shall be paid into this fund and shall be used only for the purposes therein designated, which include "paying all or any part of the cost and expense of extending, constructing, reconstructing or improving the sewer system, or any part thereof". Subsequently, the council adopted a resolution establishing rules of interpretation and procedure to be used in connection with the administration of the sewer service charges theretofore fixed.

Appellant, a citizen and taxpayer of San Diego, owning real property therein, had been charged for sewer services in accord with the foregoing Municipal Code provisions and rules of interpretation. He brought this action seeking a declaration that the charter provisions, the ordinances, and the rules in question are invalid under Article XI, section 11, of the California Constitution because they conflict with the general law, and also in that they constitute an unreasonable exercise of the police power.

Amongst other things, section 5471 of the Health and Safety Code empowers cities to prescribe charges for sewer services; permits the collection of such charges together with those for any other utility service by a single billing; and directs that the revenue so obtained "shall be used

only for the acquisition, construction, reconstruction, maintenance and operation of \* \* \* sewer facilities; \* \* \* provided, however, that such revenue shall not be used for the acquisition or construction of any local street sewers or laterals as distinguished from main trunk, interceptor and outfall sewers".

Appellant adopts the premise that the authority of the City of San Diego respecting the acquisition, construction, maintenance and operation of a sewer system is limited by Article XI, section 11, of the California Constitution, which provides that "Any \* \* \* city \* \* \* may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."; contends that the San Diego charter provisions, ordinances and rules under consideration are in conflict with section 5471 of the Health and Safety Code, a general law; and concludes that those charter provisions, ordinances and rules are invalid.

[2] For the purposes of this decision it may be assumed that the provisions of the charter and ordinances in question authorizing the use of sewer service revenue for the "cost and expense of extending, reconstructing or improving" the city sewer system conflict with the provisions of the Health and Safety Code that such revenue shall not be used for "the acquisition \* \* \* of new local street sewers or laterals". However, the limitation of authority relied upon by appellant, which is expressed in Article XI, section 11, of the Constitution, does not apply to regulations concerning municipal affairs by a city chartered pursuant to Article XI, section 6, of the Constitution. A charter adopted thereunder is "absolutely controlling and free from impairment by general laws of the state, as to all 'municipal affairs'. \* \* \* In so far as such a charter makes provision relative to any 'municipal affair,' it is the supreme law, paramount to any law enacted by the State Legislature,



and general laws enacted by the Legislature in regard thereto can have no application". *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 232, 159 P. 600, 602; *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal.2d 516, 521, 95 P.2d 138; *City of Pasadena v. Charleville*, 215 Cal. 384, 388, 10 P.2d 745.

Where there is a conflict between state and local regulations the principle of law applicable is that stated in *Natural Milk Producers Ass'n of California v. City and County of San Francisco*, 20 Cal.2d 101, 108, 124 P.2d 25, 29, as follows:

"It is true, as a general rule, that when there is a conflict between the local police regulations and the general police regulations of the state, the former is invalid if passed after the general law or is superseded if followed by the latter. In either case the result is the same, the local law has no effective force. There is of course the qualification with respect to chartered cities in regard to local laws dealing with purely municipal affairs, \* \* \* then the local law prevails."

[3] The acquisition, construction, improvement, extension, maintenance, operation and financing of a sewer system are "municipal affairs" concerning which a chartered city is not subject to general law, except as its charter may provide. *Loop Lumber Co. v. Van Loben Sels*, supra, 173 Cal. 228, 159 P. 600; *City of Glendale v. Trondsen*, 48 Cal.2d 93, 99, 308 P.2d 1; *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 598, 599, 212 P.2d 894; *Mefford v. City of Tulare*, 102 Cal. App.2d 919, 923, 924, 228 P.2d 847.

[4] The efficient operation of such a system necessarily includes the determination and implementation of fiscal policies and procedures, including the imposition and collection of charges for services rendered, and the use of revenue obtained therefrom for sewer system purposes. These, likewise, are "municipal affairs".

In support of his contention that the City of San Diego is not authorized to use

revenues from sewer service charges to extend or improve its system, appellant cites *City of Madera v. Black*, 181 Cal. 306, 184 P. 397, which declared invalid the sewer service charge there under consideration. However, two factors obviously distinguish the cited case from the one at bar: (1) In the former, the revenue obtained from sewer service charges was used for general municipal purposes; not for the extension or improvement of the sewer system; (2) The City of Madera was not a chartered city; its only authority came from general law which did not permit charges against sewer users as a means of raising revenue for general purposes.

As the charter provisions, ordinances and regulations in question concern "municipal affairs", they are not subject to limitation by general law, and any conflict therewith does not render them invalid.

[5] Appellant further contends that these enactments are unreasonable and therefore are void. Objection is made to the use of sewer service charges to extend or improve the system. In this regard our attention is not directed to the infringement or denial of any right protected by the Constitution. None appears to be involved. *City of Glendale v. Trondsen*, supra, 48 Cal.2d 93, 102, 308 P.2d 1. The only citation submitted is to the general proposition that the exercise of the police power must be reasonable (18 Cal. Jur. 823-824). The arguments advanced in support of the contention concern the economic and administrative propriety and wisdom of legislation which would permit, although it does not require, the cost of extending or improving the sewer system to be paid from service charges levied against those owners using the same.

From a legal standpoint the charter provisions and ordinances under consideration are not unreasonable. To consider the sewer system in its entirety, just as a water system, transportation system, electric light and power system, or any utility, is

not unreasonable. The making of additions or improvements to such a system, or of reconstructing outmoded or deteriorated parts thereof, both of which are in the nature of capital investments, may be financed in a number of different ways. A bond issue, assessment proceedings, general ad valorem tax, a charge against subdivisions as a condition precedent to acceptance into the system, as well as a fund created by allocating thereto a part of the charges made for service rendered, are some of the methods which have been used. The selection of the method of financing is an administrative matter, the exercise of which is within the legal discretion of the city.

In *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 8 S.Ct. 113, 116, 31 L.Ed. 149, where the constitutionality of a toll charge for the use of a waterway was questioned, because improvements were made from the toll charges collected, the court said:

"\* \* \* [t]o meet the cost of such improvements, the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce  
\* \* \* Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state."

Sewer service charges for the purpose of defraying costs of constructing additions or improvements to the system, as well as of operation and maintenance, have been approved in *Morse v. Wise*, 37 Wash. 2d 806, 226 P.2d 214; *City of Maryville v. Cushman*, 363 Mo. 87, 249 S.W.2d 347; and *Waterworks and Sanitary Sewer Board v. Dean*, 260 Ala. 221, 69 So.2d 704, 708.

The contention of appellant is not well taken.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Allan Harold DUKE, Defendant and  
Appellant.

Cr. No. 6209.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 15, 1958.

Hearing Denied Dec. 10, 1958.

Defendant was convicted of forgery and from a judgment of the Superior Court of Los Angeles County, Thomas J. Ambrose, J., the defendant appealed. The District Court of Appeal, Fox, P. J., held that there was no issue of illegal search and seizure where there was no showing that any evidence obtained thereby was used in the trial and that the facts justified the denial of probation.

Judgment affirmed.

#### 1. Searches and Seizures $\S$ 7(1)

No issue of illegal search and seizure was involved where there was no showing that any evidence obtained by the search and seizure was used in the trial.

#### 2. Jury $\S$ 29(4)

In prosecution for forgery, evidence established that defendant, by entering a plea of guilty waived his right to a jury trial. West's Ann.Pen.Code,  $\S$  470.

#### 3. Criminal Law $\S$ 982.3(3)

The granting or withholding of probation is a matter that rests in the sound discretion of the trial court. West's Ann.Pen.Code,  $\S$  1203.

#### 4. Criminal Law $\S$ 982.4

Probation is not an absolute right to which a defendant is entitled, but is an act of grace and clemency which may be granted to a seemingly deserving defendant. West's Ann.Pen.Code,  $\S$  1203.

#### 5. Criminal Law $\S$ 982.4

Where defendant had a prior felony conviction and the probate report disclosed a record of other offenses, probation was properly denied on his conviction of forgery. West's Ann.Pen.Code,  $\S$  470.

Allan Harold Duke in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was charged with forgery in violation of Penal Code, section 470. It was also alleged that he had suffered a prior felony conviction for attempted grand larceny, second degree, in the state of New York, for which he had served a term in the state prison. Defendant entered a plea of guilty but denied the prior conviction. He waived a jury trial on the issue of the prior conviction. The court found the allegation of a prior conviction to be true. Probation was denied and defendant was sentenced to the state prison. He has appealed from the judgment.

[1] Defendant attempts to raise the issue of illegal search and seizure because, upon searching defendant, the police assertedly found \$564 on his person which he claims they took from him without giving him a receipt. It is plain that there is no issue of illegal search and seizure here since there is no showing that any evidence obtained by search and seizure was used in the trial. He entered a plea of guilty; hence there was no issue as to the admission or exclusion of any evidence. Defendant does not dispute the reasonableness of the arrest or the search. His incidental complaint that the police did not give him a receipt for this money finds no support in the record. And, in any event, such a matter would not be appropriate for consideration on this appeal.

[2] Defendant's claim that he "at no time waived his right to a jury trial," can be quickly disposed of. He entered a plea of guilty to the charge of forgery. On the issue of the alleged prior conviction, the record shows that the defendant personally waived a jury trial on this issue and the waiver was joined in by his attorney and the prosecutor.

Defendant's claim that he was erroneously advised by his counsel, particularly

with respect to entering his plea and receiving probation with the first year in the county jail, finds no support whatever in the record.

[3,4] There is likewise no merit in defendant's contention that he should have been granted probation. The granting or withholding of probation is a matter that rests in the sound discretion of the trial court. Pen.Code, § 1203; *People v. Jackson*, 89 Cal.App.2d 181, 182, 200 P.2d 204. Probation is not an absolute right to which a defendant is entitled, but is an act of grace and clemency which may be granted to a seemingly deserving defendant. *People v. Wiley*, 33 Cal.App.2d 424, 429, 91 P.2d 907; *People v. Hainline*, 219 Cal. 532, 534, 28 P.2d 16.

[5] The court was clearly justified in denying probation to defendant. He had a prior felony conviction and the probation report, according to the judge, discloses that he had "quite an impressive record" of other offenses.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



164 Cal.App.2d 99

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Cedric BAKER, Defendant and Appellant.**  
Cr. 2768.

District Court of Appeal, Third District,  
California.

Oct. 10, 1958.

Hearing Denied Dec. 3, 1958.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., for robbery, and he appealed. The Third District Court of Appeal, Van Dyke, P. J., held that since defendant was, because of prior felony



convictions, ineligible for probation, trial court had acted within its rights in refusing to refer his case to probation officer for report and recommendations.

Affirmed.

**1. Criminal Law**  $\S$  1144(7)

Where record was destitute of any objections raised by defendant as to delay, reviewing court would have to assume that no objection had been raised and that any postponement had been with sanction of defendant. West's Ann.Pen.Code,  $\S\S$  1050, 1382.

**2. Criminal Law**  $\S$  576(5)

Right to speedy trial, guaranteed by constitution and implemented by statutes, is a right that may be waived. West's Ann.Pen.Code,  $\S\S$  1050, 1382.

**3. Criminal Law**  $\S$  982.6

Where defendant was, because of prior felony convictions, ineligible for probation, trial court acted within its rights in refusing to refer his case to probation officer for report and recommendations. West's Ann.Pen.Code,  $\S$  1203.

**4. Criminal Law**  $\S$  1163(1), 1166½(13)

It is for appellant to show prejudice; and, on record presented, on appeal from robbery conviction, defendant was not shown to have been prejudiced by reason of conferences at bench had out of hearing of defendant but participated in by his own counsel.

**5. Criminal Law**  $\S$  1036(2)

**Witnesses**  $\S$  246(2)

In robbery prosecution, it was duty of court to examine witnesses, if necessary or appropriate in order to elicit facts material to just determination of case; and, absent objection to questions asked by trial judge, defendant could not successfully complain on appeal.

**6. Criminal Law**  $\S$  511(1)

In robbery prosecution, accomplice's testimony was sufficiently corroborated. West's Ann.Pen.Code,  $\S$  1111.

**7. Criminal Law**  $\S$  823(1)

Defendant in robbery prosecution could not have been prejudiced by instruction that it was for jury to decide under evidence whether a certain individual was an accomplice, where court thereafter told jurors that such individual was, as a matter of law under the evidence, an accomplice and that they should so consider him in considering whether or not his testimony had been sufficiently corroborated.

**8. Criminal Law**  $\S$  780(4), 1173(2)

In robbery prosecution, requested instruction with regard to corroboration of accomplice's testimony was proper and might well have been given; but failure to give such instruction would not require reversal where it appeared, in view of quantum of evidence connecting defendant with commission of crime and its ample and substantial character, that no different result could have followed.

**9. Criminal Law**  $\S$  792(1)

The crime of being an accessory is not a necessarily included offense in principal crime, and defendant charged and prosecuted as a principal in commission of robbery could not have been convicted as an accessory; and, hence, it was not error to refuse to instruct as to accessories after fact. West's Ann.Pen.Code,  $\S\S$  31, 32.

Thomas W. Martin, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Lloyd Hinkelman, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment and order denying motion for new trial after a jury's verdict found appellant guilty of robbery.

We will first consider appellant's contention that the evidence is insufficient to sustain the verdict of the jury. There was evidence as follows: On October 4, 1956, appellant received possession of one

Mary Todd's 1950 green Chevrolet to perform engine repairs. About 7 P.M. on that day appellant and one John Sanders, a codefendant with appellant herein, began using Mary Todd's car to drive around the Sacramento area. They called at the home of appellant's sister in Carmichael, then at the residence of appellant's girl friend in Sacramento, and then drove into the western part of the city where a third man entered the car. The three drove around town for about an hour, then parked the car across the street from a service station. Sanders crossed the street and entered the station, where at knife-point he compelled the attendant to give him approximately \$100. This happened about 10:30 to 11 o'clock P.M. The three drove from the scene of the robbery and to Land Park, where the attendant followed them in his own car. He was able to obtain the license number of Mary Todd's car. This he communicated to the police upon his return to the service station. The three men proceeded to Franklin and Fruitridge Boulevards, where Sanders and the stranger left the car. Appellant parked the car in the service station where he was employed as a mechanic. While there he encountered one Jack Hudson, who accompanied him to a bar located across the street from the station. In the bar, appellant told Hudson that he had "just pulled a job on the Lucky Market." He also told Hudson that a man had followed him from the scene of the robbery and had obtained his license number. Later appellant met Sanders and the third man at the apartment occupied by appellant and Sanders and there the three men divided the money obtained in the robbery. The third man received \$20, Sanders \$25 or \$30, and appellant \$35 at that time, and \$15 at a later date. The foregoing recital of the evidence in the record makes it obvious that appellant's contention as to the insufficiency of the evidence to justify the jury's verdict is without merit.

[1,2] Appellant contends that he was denied his rights in that he did not receive

a fair and speedy trial. The record reveals that the information charging appellant with armed robbery and three prior felony convictions was filed November 7, 1956. Appellant entered his plea of not guilty on November 21st, following. At that time the court ordered the matter set for trial on January 9, 1957, sixty-three days from the filing of the information. Appellant was tried January 9th, 10th and 11th. Forty-nine days elapsed from the entry of plea to the beginning of the trial. Appellant asserts that the three days beyond the sixty-day provision of Section 1382 of the Penal Code and the nineteen days beyond the thirty-day provision provided by Section 1050 of that code constituted the denial of a speedy trial as required by the statutes. This record is silent with respect to the reasons for the delays. It equally is destitute of any record of objections raised by appellant as to delay. On such a record we must presume that no objection was raised and that any postponement was with the sanction of the appellant. *People v. Lamb*, 133 Cal.App. 2d 179, 283 P.2d 727. It is for the appellant to present a record which discloses error. The right to a speedy trial guaranteed by the Constitution and implemented by the statutes is a right that may be waived. *People v. Tenedor*, 107 Cal.App. 2d 581, 237 P.2d 679. The record discloses that appellant and his counsel were present when the orders were made and raised no objection. Under such circumstances it is presumed that there was a waiver of any right to an earlier trial. *People v. Anderson*, 126 Cal.App.2d 702, 704, 272 P.2d 805.

[3] Appellant contends that he was denied a substantial right by the trial court's refusal to refer his case to the probation officer for report and recommendations. Appellant had admitted the commission of three prior felony convictions. He was not eligible to probation. Section 1203 of the Penal Code, provides, in effect: A defendant previously convicted of two felonies committed in this state or of two offenses which would have been felonies if

committed in California, is ineligible for probation; further, that a person previously convicted of a single felony in California or of a single offense which would have been a felony if committed in this state, is barred from probation when convicted in California of robbery of the first degree.

It, therefore, appears from the record herein that appellant was not entitled to probation and in such a situation Section 1203 of the Penal Code provides only that the judge may, in his discretion, refer the matter to the probation officer for an investigation of the facts relevant to sentence. The trial court acted within its rights in refusing to refer appellant's case to the probation officer.

[4] Appellant contends that the trial court committed prejudicial error when, on a certain occasion, the court called counsel to the bench to discuss a matter outside of appellant's hearing. The record discloses the following: Appellant's accomplice in the crime, Sanders, was testifying for the prosecution. When asked to relate where he went and what he did on the evening of the robbery, he stated he would like to ask the judge a question, and further stated that he would rather not say anything at the time if his silence was agreeable to the court. A considerable colloquy followed between the court and counsel, and the attorney who had been defending Sanders was called in to advise Sanders if necessary. This attorney took the position that his work was through and that he ought, therefore, not to claim or assume any right to represent the witness. The attorney informed the court that he had already told the witness to do what he thought was right concerning being a witness in the cause and that he felt he had no legal right to tell him what to do or not to do. The court then ordered the witness to answer questions and the witness proceeded to do so for a time until interrupted by an objection from counsel for the prosecution. His former attorney thereupon asked that the jury be excused, saying that

he would like to make a statement to the court. The court did not excuse the jury, but told counsel that they could come up to the bench. Just what happened then, the record does not show, but at the end of whatever conversation was held the court ordered the trial to proceed and it did proceed without any objection from anyone and the witness continued his testimony. It is apparent that the conference, whatever it was, concerned the witness Sanders and his right to refuse to answer questions. No objection was made by appellant or his counsel at the time that anything was being said out of the hearing of appellant. His own counsel took part in the conversation at the bench. Therefore this record does not disclose a situation where in any practical sense appellant was not present at all times during the trial. It is for the appellant to show prejudice. *People v. Isby*, 30 Cal.2d 879, 189 P.2d 405. This record fails signally to meet that requirement.

[5] Appellant contends the court was guilty of misconduct in questioning witnesses. It is unnecessary to quote those portions of the record referred to by appellant in support of this contention. We have examined them with care and find therein no instance wherein the trial court went beyond the proper performance of its duty to examine witnesses if necessary or appropriate in order to elicit facts material to a just determination of the case. *People v. Corrigan*, 48 Cal.2d 551, 559, 310 P.2d 953. Moreover, no objection was made to the questions asked, no motion to strike the answers given, and it is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred. *People v. Corrigan*, *supra*, 48 Cal.2d at page 556, 310 P.2d at page 955.

[6] The contentions of error we have been discussing appear in appellant's brief filed in *propria persona*. After it was filed he requested this court to appoint counsel to assist him. This was done and a supplemental brief was filed by the appointed counsel. Therein it is urged that the evi-



dence was insufficient to support the verdict of the jury without the testimony of the witness Sanders; and that his testimony, since he was not corroborated, cannot be considered. It clearly appears from the record that Sanders was an accomplice and it results that his testimony must have been corroborated if it was to be considered. Sec. 1111, Penal Code. Excluding from consideration the testimony of Sanders, the record discloses the following: On October 4, 1956, Mary Todd, the owner of a 1950 green Chevrolet automobile with license number ASL 472, turned said vehicle over to one Earl Butts and appellant for engine repairs. Appellant, who was employed by Butts as a mechanic at Norwalk service station in Sacramento, drove the vehicle to the station and proceeded to repair it. Sometime around 7 o'clock on that evening the appellant and John Sanders, appellant's roommate, drove Mary Todd's vehicle to the home of appellant's sister in Carmichael. Around 8 o'clock the two men left her home and drove to the home of one Bertha Lawrence in Sacramento. Between 10:30 and 11 P. M. one Charles R. Wallace, an employee at the College Chevron service station in Sacramento, was held up at knife point by Sanders. Sanders ran from the scene of the robbery to a parked vehicle where two men were waiting for him. The three men got into the vehicle and drove south on Freeport Boulevard. Wallace followed the vehicle into Land Park where he overtook it and was able to ascertain that it was a 1950 green Chevrolet with license number ASL 472. At about 11 P.M. appellant was seen driving the getaway vehicle into the Norwalk station at Franklin and Fruitridge Boulevards. He was seen to back the vehicle into the tune-up bay of the station and park it. After parking the automobile he met one Jack Hudson, a fellow employee, and together they went across the street to a bar about half a block from the station. While there appellant told Hudson that he had "just pulled a job on the Lucky Market". He also told Hudson that a man had followed him and

had obtained his license number. After his arrest he was questioned by the police and made several inconsistent statements with respect to his activities on October 4th. We thus have appellant in custody of the car used in the robbery, we have him driving that car in the company of his roommate Sanders between the hours of 7 and 9 P.M., we have him driving the same car shortly after the robbery, during which time he was followed by Wallace, the victim of the robbery, we have appellant's statement to Hudson that he was in trouble because he had pulled a job "on the Lucky Market" and that someone had followed him and gotten his license number. That is enough. He had told Hudson he had pulled a job; that someone had followed him from that job and gotten his license number. The fact that he said the job was on the Lucky Market, rather than the service station, does not preclude the inference that this was mere concealment. In testing the sufficiency of corroboration, the trier of fact could determine that his statement he had pulled a job and been followed so closely that the follower had gotten his license number, together with the testimony as to Wallace's pursuit of the getaway car was sufficient to connect him with the crime so as to permit consideration of the testimony of the accomplice.

[7] Appellant next contends that the court committed prejudicial error in instructing the jury as to accomplices. It was the theory of the prosecution and the implied finding of the jury that appellant had waited in the getaway car while Sanders went into the station and committed the actual robbery at knife point. This theory was borne out by the evidence and it may, therefore, be said as a matter of law that Sanders was appellant's accomplice. But appellant complains that the court in one instruction submitted the issue of Sanders' complicity to the jury as a question of fact and in another instruction told them that he was an accomplice as a matter of law. The court first gave the usual instructions defining an accomplice

and telling the jury that it was for them to decide under the evidence whether or not Sanders qualified as such. Shortly thereafter, the court told them that as a matter of law under the evidence in the case he was an accomplice and that they should consider him as such in considering whether or not he had been sufficiently corroborated and in weighing his testimony if they found that he had been. We think no prejudice could have been suffered from these instructions.

[8] The court told the jury that all persons concerned in the commission of a crime who either directly and actively committed the act constituting the offense or who knowingly and with criminal intent aided and abetted in its commission were regarded in law as principals; that a conviction, however, could not be had upon the testimony of an accomplice unless it be corroborated with such evidence as should tend to connect the defendant with the commission of the offense; that an accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial; that in determining corroboration the jury should examine all other evidence in the case other than that of the accomplice with a view of determining if there was therein any inculpatory evidence, that is, evidence tending to connect the defendant with the commission of the crime; that if such other evidence did do that then the testimony of the accomplice was corroborated and that if it did not then there was no corroboration, although the accomplice might be corroborated in regard to any number of facts sworn to by him. Both appellant and the prosecution had requested the giving by the court of CALJIC No. 822, but the requests were refused on the ground that the matter had already been covered. It is noted that the requested instruction contains the following: "The corroboration of the testimony of an accomplice required by the law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise

a suspicion of the guilt of the defendant." The requested instruction was proper and it might well have been given since the additional discussion it contains of the sufficiency of corroboration is well calculated to make that matter clearer to the jury than to tell them simply that evidence of corroboration was not sufficient unless it tended to connect the defendant with the commission of the crime. However, we cannot predicate prejudicial error upon this failure to give the explanatory instruction. We have already discussed the quantum of evidence connecting the defendant with the commission of the crime with which he was charged and, in view of its ample and substantial character, we do not believe that had the additional instruction requested been given any different result would have followed.

[9] Appellant contends that the court committed prejudicial error in denying appellant's requested instruction on accessories. Appellant was charged and prosecuted as a principal in the commission of the crime. It was the theory of the prosecution, supported by ample testimony and reflected in the verdict of the jury, that appellant was an active participant before the commission of the crime. All persons concerned in the commission of a crime are principals. Every person who, after a felony has been committed, harbors, conceals, or aids a principal with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony, or has been charged with such felony, or convicted thereof, is an accessory to such felony. Penal Code, secs. 31, 32. Appellant points to evidence of acts upon his part committed after Sanders had robbed Wallace which he argues would have justified the jury in finding him guilty of the crime of being an accessory. However, he was not prosecuted as such. The crime of being an accessory is not a necessarily included offense in the principal crime. *People v. Brown*, 131 Cal.App.2d 643, 658, 281 P.2d 319. Appellant, therefore, could not have

been convicted as an accessory and hence it was not error to refuse to instruct as to accessories after the fact, for such an instruction would not have been responsive to any issue before the court. *People v. Brown*, supra.

No further assignments of error merit consideration.

The judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.



164 Cal.App.2d 191

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Albert HOLLINS, Defendant and Appellant.**  
Cr. 6143.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 15, 1958.

Defendant was convicted of unlawful possession of narcotics. The Superior Court, Los Angeles County, Herbert V. Walker, J., rendered judgment, and defendant appealed. The District Court of Appeal, Ashburn, J., held that it was duty of defendant, who alleged that he was deprived of his constitutional right to have an issue raised at preliminary hearing through entry of plea to complaint and that court exceeded its jurisdiction in hearing evidence without taking a plea from him, to present a record on appeal affirmatively disclosing any error or denial of rights of which he complained, and where record was silent on subject of arraignment it would be presumed that proceedings were proper.

Affirmed.

#### 1. Criminal Law ⇨1144(4)

It was duty of defendant, who alleged that he was deprived of his constitutional right to have an issue raised at preliminary hearing through entry of plea to complaint and that court exceeded its jurisdiction in hearing evidence without taking a plea from him, to present a record on appeal affirmatively disclosing any error or denial of rights of which he complained, and where record was silent on subject of arraignment it would be presumed that proceedings were proper. West's Ann.Const. art. 1, § 8.

#### 2. Criminal Law ⇨245

Where defendant did not make motion to set aside information upon ground that before filing thereof he had not been legally committed by magistrate, he waived objection. West's Ann.Pen.Code, §§ 995, 996.

#### 3. Criminal Law ⇨1186(4)

Where alleged errors in criminal proceeding were insufficient to warrant a reversal under law which prevailed prior to enactment of section of constitution providing that no judgment should be set aside or new trial granted for error as to matter of procedure, unless error results in miscarriage of justice, constitutional provision would not be applied. West's Ann.Const. art. 6, § 4½; U.S.C.A.Const. Amend. 14.

#### 4. Criminal Law ⇨1186(1)

Even if it were assumed that certain inconsistencies in testimony of police officer who changed his testimony on cross-examination amounted to perjury, reversal was not required, where there was no showing that prosecuting officials knew that any of assertedly perjurious evidence was false.

#### 5. Criminal Law ⇨1166½(1)

Allegation that defendant was ineffectively represented by counsel of his own choice on ground that counsel failed in his duty to court as well as to defendant to diligently pursue and timely raise objections necessary to protect fundamental rights of accused was not ground for reversal in absence of showing that counsel displayed such a lack of diligence and competence as to reduce trial to a farce or sham.



**6. Criminal Law** §1186(1)

Where defendant in response to officer's knock on door invited officer in, a search was made of defendant's person and his room, and defendant was arrested upon suspicion of unlawful possession of narcotics, but nothing in way of narcotics was found, the search, even though unlawful, could have had no prejudicial effect upon defendant's trial. West's Ann. Health & Safety Code, § 11500.

**7. Criminal Law** §1166½(1)

Where police officer who was on call as defense witness, did not appear, but defendant's counsel stated that he would try to get along without him, court suggested continuance of one week, but attorneys made stipulation concerning identification of a certain diagram and certain photographs which satisfied defense counsel and matter was dropped, defendant was not entitled to reversal on ground that his counsel improperly waived defendant's right to have process of court to compel attendance of witnesses.

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Albert Hollins, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of unlawful possession of narcotics (Health & Safety Code, § 11500), with a prior conviction of a like offense found to be true, defendant appeals from the judgment, appearing in *propria persona*. He makes various contentions, none of which is meritorious.

[1] It is argued that appellant, who was tried upon an information, was deprived of his constitutional right to have an issue raised at the preliminary hearing through entry of a plea to the complaint; that the court exceeded its jurisdiction in hearing evidence without having taken a plea from defendant. Reliance is placed upon that portion of § 8, Article I, of the State Constitution, which reads: "If the felony charged is not punishable with death, the

magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein." There is no basis in the record for this argument. There is before us only the transcript of the hearing before the magistrate and that of the trial in the superior court, which included by stipulation the transcript of the preliminary hearing. The record is silent on the subject of arraignment and hence the presumption is against appellant, whose duty it was to present a record affirmatively disclosing any error or denial of rights of which he complains. *People v. Lane*, 144 Cal.App.2d 87, 90, 300 P.2d 321, 323, is in point. It says: "Defendant, in *propria persona*, first contends that he is entitled to a reversal of the judgment 'because he had no preliminary hearing on the charge for which he was sent to prison.' The record does not bear out this contention and in the absence of proof to the contrary, it must be presumed on appeal that the proceedings in the court below were proper and in accordance with the law and that the court was acting in the lawful exercise of its jurisdiction." Also declaring and applying that presumption are *People v. Hinshaw*, 194 Cal. 1, 10, 227 P. 156; *People v. Jackson*, 138 Cal. 462, 463, 71 P. 566; *People v. Denne*, 141 Cal.App.2d 499, 514, 297 P.2d 451; *People v. Goldberg*, 152 Cal.App.2d 562, 576, 314 P.2d 151.

[2] Section 995, Penal Code, provides that an information must be set aside upon motion of defendant upon a showing that "before the filing thereof the defendant had not been legally committed by a magistrate." Appellant claims that that is the situation here, but the record discloses no such motion made by him. Section 996, Penal Code, says: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section." Such waiver has been enforced frequently by the courts. "Complaint is also made of a number of asserted

irregularities in connection with petitioner's arrest and preliminary examination, including the claim of lack of sufficient evidence to warrant holding him for trial, but none of them furnish ground for release on habeas corpus after trial and conviction. All of these objections relate to the legality of the commitment by the magistrate, and petitioner's remedy was by motion pursuant to section 995 of the Penal Code to set aside the information. No such motion was made and, accordingly, any invalidity in the proceedings prior to the commitment is deemed waived under section 996. In re Tedford, 31 Cal.2d 693, 694, 192 P.2d 3; People v. Harris, 219 Cal. 727, 729-730, 28 P.2d 906; People v. Coates, 95 Cal.App.2d 78, [80], 212 P.2d 263; In re Heinze, 116 Cal.App. 286, 288-289, 2 P.2d 561; In re Northcott, 71 Cal.App. 281, 283, 235 P. 458." In re Razutis, 35 Cal.2d 532, 534, 219 P.2d 15, 16; People v. Lane, supra, 144 Cal.App.2d 87, 90, 300 P.2d 321, is to the same effect.

[3] Next it is argued that § 4½ of Article VI of the California Constitution cannot be applied to this case in such manner as to deprive appellant of due process or equal protection of the laws as guaranteed by the Federal Constitution, Amend. 14. Granted. But there is no occasion to apply § 4½ to the instant case. The alleged errors are insufficient to warrant a reversal under the law which prevailed prior to enactment of § 4½. There is no prejudicial error shown at bar. Moreover, § 4½ has been held not vulnerable to the attack now made by appellant. See *Sampsel v. People of State of California*, 9 Cir., 191 F.2d 721, 726; *People v. Cowan*, 44 Cal.App.2d 155, 159, 112 P.2d 62.

[4] The contention that the prosecutor knowingly used perjured testimony as a means of securing appellant's conviction is without substance. Appellant relies upon certain inconsistencies in the testimony of Police Officer Campillo who in two instances changed his testimony on cross-examination in respects which were and are inconsequential. The changes well may be considered as corrections of statements

made inadvertently upon direct examination. Moreover, there is not an iota of evidence to indicate that the prosecuting officials knew that any of the assertedly perjurious evidence was false. In re Allen, 47 Cal.2d 55, 59, 301 P.2d 577, 580, is apposite: "But even if we were to assume, as petitioners contend, that Biersdorff did testify falsely, there has been a failure to prove sufficient facts to warrant relief in a habeas corpus proceeding. Petitioners have the burden of showing, not only that they were convicted by perjured testimony, but also that the prosecuting officials suffered the testimony to be introduced knowing that it was perjured. [Citations.] Here there is a complete lack of evidence that the prosecuting officials knew that the testimony was false." "The petitioner must show by a preponderance of substantial, credible evidence that perjured testimony was knowingly presented by the prosecution, In re Mooney, 10 Cal.2d 1, 15, 73 P.2d 554, and that such testimony established an essential element of her conviction." In re Mitchell, 35 Cal.2d 849, 856, 221 P.2d 689, 693.

[5] Appellant says that he was "ineffectively represented by counsel of his own choice" who "failed in his duty to the court as well as the defendant to diligently pursue and timely raise the objections necessary to protect the fundamental rights of the accused." The Supreme Court recently said, concerning the claim of inadequate representation by counsel: "But even if we concede that defendant's attorney may not have used the best of strategy in handling the *voir dire* examination and in failing to challenge some of the prosecutor's remarks, defendant still has not made that type of showing which alone would compel us to conclude that he was deprived of due process within the meaning of the constitutional guarantees. U.S.Const. 14th Amend. § 1. The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.' *Lunce v.*

Overlade, 7 Cir., 244 F.2d 108, 110; see also Taylor v. United States, 9 Cir., 238 F.2d 409, 413-414, certiorari denied, 353 U.S. 938, 77 S.Ct. 817, 1 L.Ed.2d 761; United States ex rel. Feeley v. Ragen, 7 Cir., 166 F.2d 976, 980-981; Hendrickson v. Overlade, D.C.N.D.Ind., 131 F.Supp. 561, 562-564. The record in this case does not even remotely approach such a situation. Defendant's sole defense lay in his claim that his identification by the victims was incorrect. His counsel vigorously cross-examined the prosecution's witnesses to test their memories, and assiduously attempted to establish an alibi and to show defendant's good character. He at most committed what in retrospect may be claimed to be mistakes in judgment by following certain strategy employed. Such mistakes, if any, do not constitute a denial of due process. United States ex rel. Darcy v. Handy, 3 Cir., 203 F.2d 407, 426, certiorari denied sub nom. Maroney v. United States ex rel. Darcy, 346 U.S. 865, 74 S.Ct. 103, 98 L.Ed. 375." People v. Wein, 50 Cal.2d 383, 326 P.2d 457, 473. Appellant's assignments do not approach fulfillment of the test prescribed by the Wein case.

He claims there is in the reporter's transcript an answer of a forensic chemist which required vigorous cross-examination by defense counsel and that the matter was not properly pursued. This is an effort to capitalize an obvious error in transcription.<sup>1</sup> The attorney had ceased to represent appellant before the transcript was prepared. Appellant filed the notice of appeal in propria persona on November 18, 1957 and the re-

porter's transcript was not certified by the court reporter until December 11, 1957, or by the judge until December 27, 1957. So far as the record shows defendant's former counsel could not have had anything to do with the correction or settlement of the transcript.

[6] Appellant says his counsel should have moved to dismiss because the arresting officer made an illegal search. Appellant was arrested when he opened the door in response to the officer's knock; told that he was arrested upon "suspicion of narcotics," he invited the officer in and a search was then made of appellant's person and his room. But nothing in the way of narcotics was found. Hence the search, even if unlawful, could have no prejudicial effect upon his trial.

It is also said that counsel did not properly capitalize by cross-examination, objection or motion to dismiss, alleged hearsay and inconsistent statements in Officer Campillo's testimony. People v. Wein, supra, fully answers this contention.

[7] Again it is argued that defense counsel improperly waived defendant's right to have the process of the court to compel the attendance of witnesses and the right of defendant to confront the witnesses against him. This contention grows out of the fact that Officer Campillo was on call as a defense witness when the superior court trial opened but he did not appear at that time. Defendant's counsel said: "I know Officer Campillo very, very well. I feel the only thing that kept him from getting here is something unavoidable. I

1. Reference is made to the following portion of the transcript:

"Q. Have you had an opportunity to analyze the contents of any of the containers? A. I analyzed the contents of all of the containers.

"Q. And you formed an opinion as to what these contents are? A. I did, sir.

"Q. What is that opinion each of the small rubber containers contained the narcotic commonly referred to as heroin.

"Q. Have you made a determination of the amount or weight of this substance?

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A. The total weight would be approximately 221 grains."

In his argument to the trial judge (there being no jury) counsel for defendant said:

"I submit to the Court that this defendant has nothing in his possession, he has completely denied any knowledge of the articles found there, and the only testimony we have is that of the officer that this particular defendant buried something in a patch of asphalt out there and that later on they dug it up and found it to be a package containing heroin."



will try to get along without him." The court suggested a continuance of one week but the attorneys made a stipulation concerning identification of a certain diagram and certain photographs which satisfied defense counsel and the matter was dropped. Obviously the argument is without merit.

Appellant has shown no prejudicial error. The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.



164 Cal.App.2d 125

**Dorothy S. HENNEBERRY, Plaintiff and Appellant,**  
v.

**William T. HENNEBERRY, Defendant and Respondent.**  
Civ. 17843.

District Court of Appeal, First District,  
Division 1, California.  
Oct. 14, 1958.

Action by alleged owner of undivided one-half interest in certain real property demanding restitution of property by the defendant to such alleged owner. From adverse judgment of the Superior Court, City & County of San Francisco, Thomas M. Foley, J., the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where grantor executed gift deed and handed it to grantee, who had it recorded but in executing deed grantor did not intend to presently divest himself of title in the property and grantee did not presently intend to receive and accept title or ownership in said property, and parties intended document to become operative only upon death of grantor, deed was testamentary in character and was void as a deed since there was not a mutual intention on part of

parties, particularly grantor, to pass title to property immediately.

Judgment affirmed.

#### 1. Deeds ⚡9

Wills ⚡38(3)

Where grantor executed gift deed and handed it to grantee, who had it recorded but in executing deed grantor did not intend to presently divest himself of title in property and grantee did not presently intend to receive and accept title or ownership in said property, and parties intended document to become operative only upon death of grantor, deed was testamentary in character and was void as a deed since there was not a mutual intention on part of parties, particularly grantor, to pass title to property immediately.

#### 2. Deeds ⚡56(2)

In addition to physical delivery and acceptance by grantee, to constitute a valid delivery there must exist a mutual intention on part of parties, particularly grantor, to pass title to property immediately.

#### 3. Deeds ⚡194(1)

In determining issue of intent particularly on part of grantor to pass title to property immediately, various presumptions and inferences arise in favor of validity of delivery because of due execution, manual transfer, possession of document by grantee and its acknowledgment and recordation, but those presumptions and inferences are rebuttable.

#### 4. Deeds ⚡200

Evidence ⚡269(1)

Declaration and acts of grantor before and after alleged delivery and of grantee afterwards are admissible on issue of intent on part of parties to pass title to property immediately.

#### 5. Deeds ⚡66

Question of intent to pass title to property is one of fact to be determined by trier of facts on all the evidence.

#### 6. Deeds ⚡66

Wills ⚡88(4)

Fact that gift deed was made and physically delivered some five years before death

of transferor did not require a determination as a matter of law that it was not made in contemplation of death and did not require that it be conclusively assumed that delivery of deed was a valid and legal one. West's Ann.Rev. & Tax.Code §§ 13642, 13644, 13648.

#### 7. Deeds ⇨2

Tests set forth in statute concerning transfers made in contemplation of death to determine whether a gift deed is or is not taxable are to be applied only after it has been established that there has been a valid delivery of deed, and statutes do not attempt to determine whether a valid delivery has taken place. West's Ann.Rev. & Tax.Code, §§ 13642, 13644, 13648.

#### 8. Deeds ⇨194(5)

Presumption in favor of delivery arising from recordation of gift deed by grantee was not conclusive but was rebuttable.

#### 9. Evidence ⇨383(7)

Conclusive presumption as to truth of facts recited in a written instrument between the parties thereto or their successors in interest by a subsequent title is not applicable in case where the action is not against a party to the deed. West's Ann. Code Civ.Proc. § 1962, subd. 2.

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Joseph P. Henneberry, San Anselmo, for appellant.

Shirley, Saroyan, Calvert & Peterson, J. Francis Shirley, San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Dorothy Henneberry brought this action against William Henneberry, alleging that she is the owner of an undivided one-half interest in certain real property in San Francisco, that William is wrongfully in possession of the property against her will, and demanding restitution of the property to her. By answer, William denied that plaintiff owns any interest in the property. The trial court found that plaintiff is not the owner of any interest in the property in that

the deed under which she claims is void because of lack of delivery. From the judgment so declaring, plaintiff appeals.

The case involves an unpleasant squabble between members of a family over property. The building involved is a pair of flats. In 1941 Thomas and Michael Henneberry, brothers, held title to the property in joint tenancy. There were two other brothers, Joseph and William. Dorothy Henneberry, the plaintiff, is the wife of Joseph. At the time of trial in 1956 Michael was confined in a state hospital as a mentally ill person and had been so confined for over ten years. He had no guardian. Thomas, the other joint tenant, from 1949 until his death in 1955, was a very sick man, spending most of his time in hospitals or institutions.

The gift deed through which Dorothy Henneberry claims was executed on April 25, 1950. It is a gift deed purporting to convey all of the right, title and interest of Thomas in the property to Joseph. On this date Thomas was a patient in the San Francisco Hospital and had just undergone a serious operation. The deed was prepared by Joseph, who is an attorney. Why it was prepared, and at whose request, does not appear in the evidence. It was not recorded until several months after the death of Thomas, which occurred in 1955.

At the trial, in explanation of why he had not recorded the deed until after Thomas' death, and in describing the circumstances under which it was executed, Joseph testified that "the thought uppermost in my mind when I made that deed, I thought my brother was going to blow his top, I thought he would really go insane and the tormenting that that young fellow was going through—but as far as making it in contemplation of death, it probably was a secondary motive; but the primary motive that I had the deed made was, I thought Tom might blow his top."

Joseph testified that on the date the deed was executed he and Mrs. William Henneberry and the notary were in the room with Thomas; that he, Joseph, told Thomas that he had a deed to the property; that Mrs.

William Henneberry vigorously objected; that Thomas reached over and grabbed the deed, took a pen from the notary public, and signed the deed; that the notary informed Thomas that the deed was a gift deed, and that he was there to notarize it; that after Thomas signed the deed he handed it to Joseph without comment. According to Joseph, all of this occurred without Thomas uttering one word.

After the physical delivery of the deed, Joseph took it to the notary's office where a notary's seal was affixed, and then took it home and put it in a safe deposit box where it remained until several months after Thomas' death, when it was recorded. Joseph testified that "In fact, I was never going to record it, if he did the right thing with the property."

The testimony is to the effect that, after the deed was signed and physically delivered, both Joseph and Thomas intended that the property remain the property of Thomas, and both considered that Thomas was the owner of it until the time of his death. Joseph stated that he did not want to assert ownership because he wanted Thomas to have a place to come to after he got out of the hospital. Thomas always insisted that it was his property and that no one was going to get it away from him. Joseph testified that even if he had recorded the deed during the lifetime of Thomas, he would have considered Thomas as the owner. It is conceded that Joseph asserted no ownership over the house until after the death of Thomas, made no improvements, paid no taxes, even when he knew they were delinquent, did not collect the rents, did not pay any insurance premiums, and filed no gift tax return on the property.

In 1948 William Henneberry and his family moved into one of the flats at Thomas' request and upon Thomas' promise that if William would move in and take care of Thomas, William would have a home for the rest of his life. William and his family moved in, and, until Thomas' death, took care of Thomas when he was home. Thomas, during most of this period, was inca-

pacitated and needed help, care and attention. William's wife acted as a nurse for Thomas, cooked for him, and fed and waited on him. When Thomas was in the hospital William or his wife visited him every visiting day. William collected the \$25 a month rent for the other flat and bought things for Thomas that practically consumed the entire \$25. In addition, William paid the taxes, insurance and maintenance costs.

On this evidence the trial court found that the plaintiff was not the owner of an undivided interest in the property for the reason that the gift deed to Joseph "is void and of no legal effect because of the lack of valid legal delivery thereof with intent to presently pass the title of Thomas A. Henneberry in the property described. In executing said deed Thomas A. Henneberry, grantor, did not intend to presently divest himself of his title in said property and Joseph P. Henneberry, grantee, did not intend to presently receive and accept a title or ownership in said property." Judgment was entered accordingly and plaintiff appeals, challenging the correctness of the quoted finding.

The challenged finding is amply supported. Appellant seems to argue that because Thomas admittedly signed the deed, admittedly handed it to Joseph, and because Joseph admittedly recorded it, a valid legal delivery was shown as a matter of law, which can be attacked only on the grounds of fraud and undue influence. Such is not the law.

[2] The rules applicable to a delivery of a deed are well settled. In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered, but the evidence shows that the parties or the grantor intended the document



to become operative only upon death, the document is testamentary in character and void as a deed.

[3-5] In determining this fundamental issue of intent, various presumptions and inferences arise in favor of the validity of the delivery because of due execution, manual transfer, possession of the document by the grantee, its acknowledgment and recordation. But these presumptions and inferences are all rebuttable. Declarations and acts of the grantor before and after the alleged delivery, and of the grantee afterwards, are admissible on this issue. Fundamentally, the question of intent is one of fact to be determined by the trier of the facts on all the evidence. For a general discussion of these principles see 15 Cal. Jur.2d p. 477, § 79 et seq.; see also *Kelly v. Bank of America*, 112 Cal.App.2d 388, 246 P.2d 92, 34 A.L.R.2d 578.

In the present proceeding a prima facie case of a valid delivery was established by the evidence that Thomas signed the deed and handed it to Joseph, that the deed was acknowledged and recorded, and was in the possession of the grantee. But that prima facie case was rebutted by Joseph's own testimony and by the testimony produced by William. Joseph admitted that after the date of the alleged delivery Thomas always considered that the property was his and frequently stated that no one would take it from him as long as he lived. Joseph also testified that he agreed with Thomas, and that he always wanted Thomas to have the place as his home as long as he lived. He did not consider that the property was his until after Thomas' death. Joseph filed no gift tax return, he paid no taxes, insurance premiums or maintenance expenses. He collected no rents and did not object to William's occupancy until after Thomas' death. Not one act of dominion over the property was performed by Joseph until after Thomas' death. Joseph stated that he always considered that the place was Thomas' as long as he was alive, and that he intended to record the deed only upon Thomas' death, or if he became insane. On the other hand, the

evidence shows that after the date of the alleged delivery, Thomas, through the agency of William, continued to exercise complete dominion over the property and not only acted as if the property was his, but so stated. This evidence amply rebuts the prima facie case of delivery and amply supports the finding that the document was not to take effect until the death of the grantor and was, therefore, an attempt at testamentary disposition.

There are many cases in the books discussing these principles. But one needs to be mentioned. In *Counter v. Counter*, 104 Cal. App.2d 786, 232 P.2d 551, a gift deed was signed by the plaintiff and his wife and manually transferred to their son Richard. Nine years later the wife died, and Richard, who had possession of the deed, recorded it. The father brought an action to cancel the deed. He testified that after the deed had been signed he told Richard not to record it unless something happened to him. He testified that at all times after the alleged delivery he considered the property his, managed it, collected the rents, paid income tax on the sums so received, paid the cost of insurance, taxes and upkeep. Richard knew of these facts. Richard, prior to his father's remarriage after his mother's death, had never asserted any claim to the property, never attempted to collect the rents, or never offered to pay any of the expenses. Two days after his father remarried he recorded the deed. The trial court found that the deed had never been delivered. In affirming this finding this court stated (104 Cal.App.2d at page 789, 232 P.2d at page 553): "Defendant's main contention is that the physical delivery of the deed to defendant vested title in the grantee subject only to a life estate in the grantors, regardless of the circumstances of the delivery. He contends that such delivery bars any claim that the intention of the grantors was otherwise. This contention disregards one of the most important matters in connection with the delivery of a deed, which is, what was the intention of the grantors? 'The delivery of a deed is not effected by a mere manual tradition of the instrument, unless the act "be

accompanied with the intent that the deed shall become operative as such" [citation]; i. e., that it shall presently pass title, without the reservation of any right of revocation or recall. [Citation.] \* \* \* Physical delivery raises an inference that the grantors are immediately parting with the title. But that inference may be overcome by evidence showing that such was not the intention of the grantors. Here, while the circumstances were such as to support a conclusion, had the trial court made it, that the grantors intended to vest title reserving to themselves only a life estate, such a conclusion is not compelled. A very reasonable conclusion is the one drawn by the court, namely, that the grantors did not intend to part with the title but merely intended the deed as a testamentary disposition to take effect upon their death." The reasoning of this case is conclusive here.

[6] Appellant next contends that under section 13642 of the Revenue and Taxation Code, since the gift deed was made and physically delivered some five years before the death of the transferor, it must be determined, as a matter of law, that it was not made in contemplation of death and it must be conclusively assumed that the delivery was a valid and legal one. The section requires no such result. It provides:

"A transfer conforming to Section 13641 and made in contemplation of the death of the transferor is a transfer subject to this part, but no such transfer shall be deemed or held to have been made in contemplation of death if made more than three years prior to the death of the transferor.

"'Contemplation of death' includes that expectancy of death which actuates the mind of a person on the execution of his will. The term is not restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis."

[7] It is quite apparent that this quoted section, and section 13644 of the Revenue

and Taxation Code, also referred to by appellant, do not purport to define what is or is not a valid delivery, but relate to the taxation of transfers without consideration, and that their purpose is to prevent the evasion of taxes. See § 13648 of the Rev. & Tax. Code. The tests set forth in the relied upon sections to determine whether a gift deed is or is not taxable are applied only after it has been established that there has been a valid delivery of the deed. The sections do not attempt to determine whether a valid delivery has taken place. See 24 Cal.Jur.2d p. 31, § 17.

[8] Appellant places considerable reliance on the fact that the deed to Joseph was recorded, and seems to contend that such admitted fact raises a conclusive presumption in favor of delivery. The fact of recordation is important, but the presumption raised by it is rebuttable, not conclusive. The evidence in the record clearly rebutted that presumption. See *Rousseau v. Hurtado*, 122 Cal.App.2d 705, 265 P.2d 580.

[9] Appellant refers to other presumptions and inferences that she claims support her case. Thus, she contends that under the provisions of section 1962, subd. 2, of the Code of Civil Procedure "The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title" must be conclusively presumed. This, indeed, is a conclusive presumption, but it obviously is not applicable to this case where the action is not against a party to the deed.

Other presumptions or inferences relied upon are either not applicable to the facts or are rebuttable. As already pointed out, all the rebuttable presumptions and the inferences in favor of appellant were rebutted by the evidence.

The other points raised do not require discussion.

The judgment appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.

164 Cal.App.2d 12

**Robert F. MINNEY, Plaintiff and Appellant,**  
v.

**CITY OF AZUSA, a municipal corporation,**  
**Defendant and Respondent.**

Civ. 22896.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 3, 1958.

Hearing Denied Dec. 1, 1958.

Action by church attacking denial of variance in City of Azusa comprehensive zoning ordinance for purpose of permitting construction of church in residential zone. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment sustaining demurrer to complaint and church appealed. The District Court of Appeal, Ashburn, J., held that where party sought variance in zoning ordinance, party could not attack validity of ordinance itself and there was no showing of an abuse of discretion in denying variance to zoning ordinance to permit erection of church in residential area.

Affirmed.

#### 1. Municipal Corporations ⇨601(7)

A zoning ordinance can lawfully exclude churches from a residential district. West's Ann.Gov.Code, § 65853; St.1883, p. 93.

#### 2. Municipal Corporations ⇨601(7)

Zoning ordinance which excludes churches from residential zone and in consequence classifies them in relation to other activities is valid unless it discriminates against churches upon its face or is so administered as to accomplish that result.

#### 3. Municipal Corporations ⇨122(2)

Burden rests upon him who asserts invalidity of zoning ordinance to show such an abuse of discretion on part of zoning authorities as would justify court in concluding as a matter of law that ordinance is unduly oppressive and not reasonably necessary to promote general welfare of people.

#### 4. Municipal Corporations ⇨122(2), 601(18)

Every intendment favors a valid exercise of police power with respect to enactment of zoning ordinance, and any zoning plan must be viewed as a whole and court will not search out individual cases of discrimination or hardship.

#### 5. Municipal Corporations ⇨601(5)

Effect of particular zoning upon surrounding properties is to be considered by the zoning authorities as are existing conditions and probabilities of future developments in the area under consideration.

#### 6. Municipal Corporations ⇨63(2)

Wisdom of zoning ordinance is not a matter for the courts unless there is a manifestly unreasonable classification.

#### 7. Municipal Corporations ⇨601(7)

Comprehensive zoning ordinance forbidding erection of churches in residential zone open to single family residences and also to agriculture, horticulture, flower and vegetable gardens, etc., was not manifestly unreasonable classification. St.1883, p. 93.

#### 8. Pleading ⇨312

Where action was brought attacking validity of zoning ordinance and it was claimed that ordinance excluding churches from 90% of area of city was unreasonable because remaining locations were undesirable because of obnoxious fumes, noise, etc., and case came before District Court of Appeal as result of sustaining of demurrer to complaint to which were attached or incorporated by reference zoning ordinances and maps, allegations of complaint must yield to the showing of exhibits which it undertook to interpret.

#### 9. Municipal Corporations ⇨122(2)

Burden rests upon party attacking ordinance to establish invalidity of same in its application to property involved and failure to sustain burden raises presumption of existence of such facts as are sufficient to sustain ordinance.

#### 10. Municipal Corporations ⇨621.13

Since a variance presupposes reasonableness of zoning regulations as a whole, where party applies for a variance in zon-



ing ordinance he precludes himself from arguing that zoning board has no power because of invalidity of ordinance to grant concession.

#### 11. Municipal Corporations Ⓒ621.41

Where record disclosed that party seeking variance in zoning ordinance to enable him to erect church in residential zone had never acquired title to property covered by application but had entered into arrangement with owner by which he had agreed to purchase lot provided he was able to secure a variance for construction of church thereon, applicant was not the "owner" within purview of ordinance making ownership criterion of right to file petition for variance.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

#### 12. Municipal Corporations Ⓒ621.13

One who purchases property in anticipation of procuring a variance to enable him to use it for purpose forbidden at time of sale cannot complain of hardship ensuing from denial of desired variance.

#### 13. Municipal Corporations Ⓒ621.55

In action attacking denial by zoning board of variance to permit party to erect a church in residential district, notwithstanding the prior grant of variances to allow erections of churches in the area, evidence disclosed that commission and council had not discriminated against churches as such.

#### 14. Municipal Corporations Ⓒ621.13

Prior exceptions granted by adjustment board in zoning ordinance are not in themselves controlling since ill-advised or illegal variances do not furnish grounds for repetition of the wrong.

#### 15. Municipal Corporations Ⓒ621.55

In action by church attacking denial of variance in zoning ordinance which would enable church to erect a church in a residential area, evidence failed to disclose any prejudice against the particular church which controlled the decision of zoning authorities.

#### 16. Municipal Corporations Ⓒ621.50

Averments of complaint in action attacking legality of denial of variance in zoning ordinance could not fill any hiatus in proof before commission and city council, since court had no jurisdiction to grant hearing de novo.

#### 17. Municipal Corporations Ⓒ621.52, 621.53

A clear showing of abuse of discretion is essential to a successful attack upon granting or denial of a variance, and there is presumption that necessary facts have been ascertained and found by zoning commission.

#### 18. Municipal Corporations Ⓒ591

Power to hear arguments for and against granting of variance in zoning ordinance and to give recommendations thereon may be validly delegated to zoning commission by city council. St.1883, p. 93.

#### 19. Municipal Corporations Ⓒ625

Reasonably definite standards must be prescribed as a basis for zoning board's action in recommending the grant or denial of variance in zoning ordinance, but degree of definiteness must be treated according to the inherent uncertainties in the subject matter.

#### 20. Municipal Corporations Ⓒ621.55

In action by party attacking legality of denial of variance in zoning ordinance to enable party to erect church in residential area, record failed to disclose that arbitrary power was conferred upon zoning commission by city council or that power delegated to it was arbitrarily exercised. West's Ann.Gov.Code, § 65853.

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Birnbaum & Hemmerling, Los Angeles, Hayden C. Covington, Brooklyn, N. Y., for appellant.

Tscharner & Tscharner, Azusa, for respondent.

ASHBURN, Justice.

Reverend Robert F. Minney, acting as congregation servant and presiding minister of Azusa Congregation of Jehovah's Wit-

nesses (a religious organization), appeals from a judgment which upholds the denial of a variance sought by him under the city's Comprehensive Zoning Ordinance for the purpose of constructing within the R-1 or residential zone a church or "Kingdom Hall" for use of said congregation. The basic claim is denial of religious liberty and violation of the First and Fourteenth Amendments to the Constitution of the United States.

The city of Azusa is a municipal corporation organized in 1898 under the General Municipal Act of 1883, St.1883, p. 93, and has a population of about 15,000. Its Comprehensive Zoning Ordinance No. 409 was passed in 1949 and defines numerous zones ranging from single family residential (R-1) to general manufacturing (M-2). It was amended before plaintiff's application for a variance was made, first by Ordinance No. 441 on January 7, 1952, and then by Ordinance No. 455 on August 4, 1952. As thus amended the ordinance provided at the time of plaintiff's application (in August, 1954) that the uses permitted in the R-1 or single family residence zone should be "(a) A one-family dwelling of a permanent character, placed in a permanent location and used by but one family; (b) Agriculture and horticulture, flower and vegetable gardening, nurseries and greenhouses used only for purposes of propagation and culture and not including any sale at retail from the premises nor any signs or displays; \* \* \* (d) Libraries, museums, parks, playgrounds, public schools, and community buildings owned and controlled by the municipality or school district \* \* \*." (Quotations are from § 5.1 of Ordinance No. 455.) Other portions of the section are not material to the present problem. Section 7.1, covering zone R-3 or multiple family residence zones, authorizes "(a) Any use permitted in Zones R-1 and R-2. (b) Any flat building, apartment house, or bungalow court, together with the out-buildings necessary to such use, located on the same lot or parcel of land. (c) Churches and/or parochial schools." (Quotation from Ordinance No. 441.) Sec-

tion 8.1(b) of Ordinance No. 409 (not later amended) also permits churches in the R-4 or apartment house zone.

Appellant brought this action attacking the ordinance as discriminatory on its face and in its administrative application to his congregation through denial of a variance which would permit erection of a church in the R-1 zone. His second amended complaint, to which a demurrer was sustained without leave to amend, seeks mandamus, injunction, declaratory relief, certiorari and prohibition. Having been denied any relief he appeals from the judgment.

[1] The pleading presents first the fundamental issue whether a zoning ordinance can lawfully exclude churches from a residential district. This question is settled in the affirmative so far as California law is concerned. Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App.2d 656, 203 P.2d 823, arose under the zoning ordinance of the city of Porterville which established an R-1 zone wherein buildings were restricted to single family residences. Churches were included in the R-4 or "unlimited residence" zone. The Mormon Church, through its Presiding Bishop, sought mandamus to compel the city authorities to issue a permit for construction of a church upon property owned by plaintiff within the R-1 zone. Demurrer having been sustained without leave to amend, plaintiff appealed from the judgment. "Plaintiff's contention is that the zoning ordinance as applied to plaintiff to prevent its construction of a church for religious worship upon its property is invalid because, as so applied, it bears no substantial relation to the public health, safety, morals and general welfare and thus is beyond the police power of the State to enact, and further, because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such a restriction." 90 Cal.App.2d at page 658, 203 P.2d at page 824. The court said, 90 Cal.App.2d at pages 659-660, 203 P.2d at

page 825: "A single family residence may be much more desirable when not in an apartment house neighborhood or adjacent to a public building such as a church. The municipal legislative body may require that church buildings be erected to conform to health and safety regulations as provided in its building code and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.

"We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. \* \* \* The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose.

"The petition fails to state a cause of action in that the facts alleged do not show that the ordinance in question is unreasonable and void as applied to plaintiff." At page 661 of 90 Cal.App.2d, at page 826 of 203 P.2d: "The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d 332, at page 338, 175 P.2d 542.

"In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. *Jardine v. City of Pasadena*, 199 Cal. 64, 72-73, 248 P. 225, 48 A.L.R. 509. It is presumed that the enactment as a whole is justified under the

police power and adapted to promote the public health, safety, morals, and general welfare. *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 460, 202 P.2d 38.

"There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at page 461, 202 P.2d 38." Our Supreme Court denied a hearing. The United States Supreme Court dismissed an appeal from the judgment "for want of a substantial federal question" (338 U.S. 805, 70 S.Ct. 78, 94 L.Ed. 487) and denied a rehearing (338 U.S. 939, 70 S.Ct. 342, 94 L.Ed. 579). It later explained the philosophy of the ruling as follows: "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of Presiding Bishop, C. J. C. L. D. S. v. Porterville*, 1949, 338 U.S. 805, 70 S.Ct. 78." *American Communications Ass'n v. Douds*, 339 U.S. 382, 397, 70 S.Ct. 674, 683, 94 L.Ed. 925.

The Porterville decision was followed in *City of Chico v. First Ave. Baptist Church*, 108 Cal.App.2d 297, 301, 238 P.2d 587, a case involving the validity of a zoning ordinance requiring the obtaining of a use permit before devoting to church uses property located in the residential zone. The Supreme Court recently recognized Porterville as good law, saying in *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal.2d 325, 334, 289 P.2d 438, 443: "Respondents place reliance upon the case of *Corporation of Presiding Bishop v. City of Porter-*



ville, 90 Cal.App.2d 656, 203 P.2d 823, in which it was held that by ordinance the city could prohibit all churches in a residential area. That case is distinguishable from the one under consideration. Here, only private schools are excluded—not *all* schools as were all churches in the Porterville case.”

Although it did not follow the Porterville doctrine, the Supreme Court of Washington in *State ex rel. Wenatchee Cong. etc. v. City of Wenatchee*, 50 Wash.2d 378, 312 P.2d 195, 197, made pertinent observations concerning the weight of authority and the California ruling: “Generally, zoning ordinances which wholly exclude churches in residential districts have been held to be unconstitutional. \* \* \* However, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823, the California court expressed a view contrary to the prevailing weight of authority. The essence of the reasoning of the California Court seems to be that zoning legislation which prospectively treats all religious groups alike, i. e., prohibits prospectively all churches in certain zones, if otherwise reasonable, may be a valid and a proper non-discriminatory, non-arbitrary exercise of state police power. This viewpoint rejects the reasoning of the weight of authority that churches may be excluded or zoned out of particular areas only on the basis of traffic or other hazards substantially related to public health or safety. The viewpoint of the weight of authority may be an extreme one. It ignores the basic premise of modern day zoning legislation which emphasizes the best and most reasonable land utilization possible, considering the best interests of the entire community. It permits any church group, absent the factor of traffic hazards, substantially related to public health and safety, to acquire land and to establish a church, irrespective of other factors which may be of significant public interest, and normally considered and emphasized in present day community land use planning programs.”

The Porterville case is but a recognition and application of the concept that there can

be no absolutes even in the field of personal freedoms, and that this is and must be a nation of ordered liberties if the fundamental guarantees of the First and Fourteenth Amendments are to survive. Mr. Chief Justice Hughes thus stated the matter in *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (a case which holds that Jehovah's Witnesses were not entitled to conduct a street parade without first procuring the statutorily required special license): “Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.” 312 U.S. at page 574, 61 S.Ct. at page 765. Also: “The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.” 312 U.S. at page 578, 61 S.Ct. at page 767.

In *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 242, 163 P.2d 704, 711, the court said: “‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word [of mouth] or act their faith therein.’ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 147 A.L.R. 674. It does not follow, however, that religious organizations enjoy unlimited freedom in carrying on all activities related to their religious program.” On page 243 of 27 Cal.2d, on page 711 of 163 P.2d it quoted a portion of the above passage from *Cox v. New Hampshire*, *supra*. The case upheld a city ordinance requiring plaintiff to procure a secondhand

dealer's license to conduct its salvage activities through sale in a secondhand goods store operated by it; this notwithstanding that plaintiff was found to be "engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities." 27 Cal.2d at page 233, 163 P.2d at page 706.

In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (upholding the right of Jehovah's Witnesses to solicit from door to door without first procuring a license as required by statute), the court said: "No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." 310 U.S. at page 304, 60 S.Ct. at page 903. Effect was given to this idea of permissible regulation of "the times, the places, and the manner of soliciting upon its streets" by the ruling in *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 171 P.2d 8. The Los Angeles Charities and Relief Ordinance in § 44.09(a) required persons soliciting contributions for charity by means of receptacles in certain specified public places to secure express written permission from the Board of Social Service Commissioners, 28 Cal.2d at page 469, 171 P.2d 8. Upholding this requirement the court said, 28 Cal.2d at page 470, 171 P.2d at page 15: "There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may

be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective. *Gospel Army v. City of Los Angeles*, supra." Explaining that reliance upon *Cantwell v. Connecticut*, supra, was misplaced, it further remarked: "It is clear, however, from what has been said before that the right to the permit required in subdivision (a) of section 44.09 does not depend upon a religious test. \* \* \* As before stated, the authority of the board is limited to regulating the issuance of permits for the solicitation of funds in the designated publicly owned or controlled places *by means of receptacles* for the sole purpose of preventing fraudulent practices and protecting the safety and convenience of the public. \* \* "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." 310 U.S. 304, 305, 60 S.Ct. 903.<sup>1</sup> \* \* \* We conclude, therefore, that the provisions of the ordinance underlying the charges against *Murdock* are constitutional, and that in the absence of admitted or proven facts showing that the ordinance is being unconstitutionally applied, the alternative writ must be discharged and the peremptory writ must be denied." 28 Cal.2d at pages 472, 473, 171 P.2d at page 16.

*Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, referring to *Cox v. New Hampshire*, supra, and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, says: "But that merely illustrates that the rights with which we are dealing are not absolutes." 319 U.S. at page 110, 63 S.Ct. at page 873. Also: "Jehovah's Witnesses are not 'above the law'. But the present ordinance is not directed to the problems with which the police power of the

1. The *Cantwell* case.

state is free to deal." 319 U.S. at page 116, 63 S.Ct. at page 876.

"Although the central issue in determining the validity of an ordinance excluding churches from a zoned area would seem to be whether the restriction interferes with the first-amendment guarantee of freedom of religion as incorporated in the fourteenth, none of the decisions invalidating these ordinances has explicitly rested on this ground. Although the Supreme Court has been strict in its prohibition of prior restraints on freedom of religion or speech, it has held that reasonable regulations of time and place are valid. Whether a zoning ordinance restricting the location of churches is such a reasonable regulation should turn on whether the interference with the free exercise of religion is outweighed by the public interest in restriction. A highly relevant consideration would be the availability to the church of alternative locations." (70 Harv.L.Rev. 1436.)

Appellant's briefs finally come to rest upon the proposition that churches are subject to zoning regulations so long as same are not discriminatory on their face or in their administration. "Appellant admits that churches must comply with the law. This is not gainsaid. But because churches must comply with regulatory, procedural provisions of the zoning law, this does not give unlimited discretion to the administrators so that they can violate the constitutional rights of churches." "It is said on page 2 of the [respondent's] brief that appellant has a 'theory' that zoning laws, as applied to churches, are unconstitutional *per se*. This is not the contention of the appellant. It is the contention of the appellant that this particular zoning law, on its face and especially as enforced, is unconstitutional. \* \* \* The statement in the middle of page 23 that churches are subject to reasonable zoning regulations is admitted."

[2] Our discussion must proceed from this point upon the assumption that an ordinance which excludes churches from residence zones and in consequence classifies them in relation to other activities is valid

unless it discriminates against churches upon its face or is so administered as to accomplish that result.

Appellant argues that the Azusa ordinance is discriminatory upon its face because churches are excluded from zone R-1 which is open not only to single family residences but also to agriculture, horticulture, flower and vegetable gardens, nurseries and greenhouses used only for purposes of propagation and not for sale at retail; also, libraries, museums, parks, playgrounds, public schools and community buildings owned and controlled by the municipality or school district (Ordinance No. 455, § 5.1). Churches are included in zone R-3 which also embraces flat buildings, apartment houses, bungalow courts and parochial schools (Ordinance No. 441, § 7.1).

It being established law that churches can be excluded legally from a residential zone and that they are subject to reasonable zoning regulations, appellant stands, with respect to this claim of unreasonable classification or discrimination on the face of the ordinance, in the same position as any other litigant who raises that issue. In other words, proposed use of property for religious purposes does not give it *per se* a title to any particular zone; a church, like any other property owner, is to be considered on its merits as fitting into the general scheme of a comprehensive zoning, entitled to no preference and subject to no adverse discrimination.

[3-6] The burden rests upon him who asserts invalidity of the zoning ordinance to show "such an abuse of discretion on the part of the zoning authorities as would justify the court in concluding as a matter of law that the ordinance is unduly oppressive and not reasonably necessary to promote the general welfare of the people of the community." *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 467, 202 P.2d 38, 46, 7 A.L.R.2d 990. See, also, *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 338, 175 P.2d 542; *Beverly Oil Co. v. City of Los Angeles*, 40 Cal.2d 552, 559, 254 P.2d 865; *Acker v. Baldwin*, 18



Cal.2d 341, 344-345, 115 P.2d 455; *Otis v. City of Los Angeles*, 52 Cal.App.2d 605, 614-615, 126 P.2d 954. Every intendment favors a valid exercise of the police power in this respect. (*Idem.*) Any "zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship." *Acker v. Baldwin*, supra, 18 Cal.2d 341, 345, 115 P.2d 457. Effect of a particular zoning upon surrounding properties is to be considered by the zoning authorities. *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at page 464, 202 P.2d 38; *Robinson v. City of Los Angeles*, 146 Cal.App.2d 810, 816, 304 P.2d 814), as are existing conditions and probabilities of future developments in the area under consideration. *Acker v. Baldwin*, supra, 18 Cal.2d at page 346, 115 P.2d 455; *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at page 464, 202 P.2d 38. All this adds up to an ultimate rule that the wisdom of the ordinance is not a matter for the courts unless there is apparent a manifestly unreasonable classification. *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at pages 461-462, 202 P.2d 38; *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 886, 264 P.2d 932; *Schumm v. Board of Supervisors*, 140 Cal.App.2d 874, 880, 295 P.2d 934; *Otis v. City of Los Angeles*, supra, 52 Cal.App.2d at pages 605, 613-614, 126 P.2d 954.

[7] Though we might have included churches in the R-1 zone had we drafted the ordinance, that fact alone would not now justify interference with the results achieved by the public body charged with that duty. "The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action." *Lockard v. City of Los Angeles*, supra, 33 Cal.2d 453, 461, 202 P.2d 38, 43. "As stated in *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 222 P.2d 439, 441, a zoning ordinance enacted pursuant to a comprehensive plan of community development, 'when reason-

able in object and not arbitrary in operation,' will be sustained as a proper exercise of the police power; every intendment is in favor of its validity, and a court will not, 'except in a clear case of oppressive and arbitrary limitation,' interfere with the legislative discretion; it is presumed to be adapted to promotion of the public health, safety, morals and general welfare; and though the court may differ with the zoning authorities as to the 'necessity or propriety' of the regulation so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." *McCarthy v. City of Manhattan Beach*, supra, 41 Cal.2d 879, 885, 264 P.2d 932, 935.

That these principles are equally applicable to a claim of discrimination when raised by a religious society is attested by *Corp. Presiding Bishop v. City of Porterville*, supra, 90 Cal.App.2d 656, 203 P.2d 823 (see language quoted above); also by *Roman Catholic Welfare Corp. v. City of Piedmont*, supra, 45 Cal.2d 325, 326, 289 P.2d 438. "The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power." *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at page 461, 202 P.2d at page 42.

Appellant, in arguing unreasonable classification, contends that a church as such is entitled to come within the R-1 zone if libraries, museums, playgrounds and public schools and other buildings owned and controlled by the city or school district are included. He relies somewhat upon *Roman Catholic Welfare Corp. v. City of Piedmont*, supra, 45 Cal.2d 325, 289 P.2d 438, but the case does not fortify his position. That was a matter of discrimination be-

tween school and school,—public and private. It was there said, 45 Cal.2d at page 333, 289 P.2d at page 443: "Each case must be decided on its facts, and before us we have only the question of a private school to be located adjacent to a Catholic Church in the area where public schools are found." At page 334 of 45 Cal.2d at page 443, of 289 P.2d, distinguishing the Porterville case, *supra*: "That case is distinguishable from the one under consideration. Here, only private schools are excluded—not *all* schools as were all churches in the Porterville case." All churches are excluded from R-1 by the Azusa ordinance and hence the Piedmont case, *supra*, does not apply here. Likewise, the many decisions which appellant cites to the effect that churches cannot be excluded from residential zones are of no assistance to his cause for the California law is to the contrary.

[8] It is asserted and asseverated that the ordinance excludes churches from ninety per cent of the area of the city of Azusa and, as more than half of the other ten per cent is now devoted to other uses, the result is that less than five per cent of the total area of the city is actually available for church purposes, that much of that five per cent is located along Santa Fe and Pacific Electric rights of way or adjacent to industrial sites, and therefore "undesirable" for church locations because of obnoxious fumes, noise, smoke and the like. This case comes up as the result of sustaining of demurrer to the second amended complaint; attached thereto or incorporated by reference are the zoning ordinances and map, but they do not show the truth of the asserted facts; so it cannot be said that the face of the ordinance shows the alleged discrimination. In this aspect of the matter the allegation of the complaint must yield to the showing of the exhibits which it undertakes to interpret (39 Cal. Jur.2d, § 62, p. 93). The averment if true is immaterial, for we are now dealing with discrimination and unreasonableness upon the face of the ordinance. When we reach the matter of a variance the question of

truth of these allegations becomes pertinent and it will then appear that there was no substantial proof of the truth of same.

[9] Without attempting to divine and justify the reasoning underlying the Azusa ordinance (not the business of this court), we find no showing on plaintiff's part that good reason did not exist for the classification found in the subject ordinance. "The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 [101 A.L.R. 853]." *Beverly Oil Co. v. City of Los Angeles*, *supra*, 40 Cal.2d 552, 559, 254 P.2d 865, 869. Accord: *Safeway Stores v. City Council, San Mateo*, 86 Cal.App.2d 277, 284, 194 P.2d 720; *Robinson v. City of Los Angeles*, *supra*, 146 Cal. App.2d 810, 818, 304 P.2d 814; *De Luca v. Board of Supervisors*, 134 Cal.App.2d 606, 610, 286 P.2d 395. The *Pacific States* case says, 296 U.S. at page 185, 56 S.Ct. at page 163: "The order here in question deals with a subject clearly within the scope of the police power. [Citation.] When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge, or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.'" The contention that the instant ordinance contains arbitrary and unreasonable classification must be rejected.

[10] The same result flows from another line of thought. Appellant has proceeded in such manner as to preclude his attacking the constitutionality of the ordinance. "[A] 'variance' presupposes the reasonableness of the zone regulation as a whole." *Moriarty v. Pozner*, 21 N.J. 199, 121 A.2d 527, 533. The present controversy

stems from rejection of an application for a variance. Plaintiff did not initially attempt to compel issuance of a permit to him upon the theory that the ordinance is *per se* arbitrary and discriminatory. On the contrary, he applied in the first instance for a variance permitting a church in zone R-1. By so doing he precluded himself from arguing that the zoning board (City Planning Commission) has no power (because of invalidity of the ordinance) to grant the concession, the variance which he seeks.

It is so held in *Rubin v. Board of Directors*, 16 Cal.2d 119, 104 P.2d 1041. The court there said, 16 Cal.2d at pages 124-125, 104 P.2d at page 1043: "Unlike the 'spot zoning' obtained by amendment of the general zoning ordinance, a variance or exception sanctions a deviation from the standard under the dispensing power vested in the administrative body. \* \* \* On the other hand, the grant of dispensation is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body. *People ex rel. Fordham M. R. Church v. Walsh*, supra [244 N.Y. 280, 155 N.E. 575].

"The application for a variance necessarily admits the constitutionality of the ordinance under which the city officials charged with the duty of administering a zoning ordinance are asked to exercise a discretion; therefore, an applicant may not challenge its constitutionality before the administrative body. For if an attack on constitutional grounds was successful, the discretionary power of the board would also fall. In a proceeding to review a decision denying a variance, it has been held that 'the sole question before the court is the propriety of the action of the board upon the application addressed to its discretion, and the petitioner will not be heard upon the question of the constitutionality of the act of the Legislature under which the ordinance was enacted.'" Also, 16 Cal.2d at page 126, 104 P.2d at page 1044: "But the finality of the board of directors' termination does not bar the respondents from asserting in a judicial proceeding that

the zoning law is unconstitutional as applied to their property. \* \* \* When the board of directors of Pasadena denied petitioners' application for a variance it did not take away a property right, but merely refused to grant a favor. Its action left the petitioners' property subject to the zoning restrictions then in force." This decision was applied in *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 272, 148 P.2d 645, and *Hadden, Inc., v. City of Inglewood*, 101 Cal.App.2d 47, 48, 224 P.2d 913. Upon oral argument counsel for appellant conceded that this line of cases leaves open to him only the claim that the denial of a variance amounted to discriminatory application of the ordinance to appellant's property.

The matter of variances is covered by Article XIX of Ordinance No. 409. Section 19.1 authorizes them in the following language: "When practical difficulties, unnecessary [sic] hardships, or results inconsistent with the general purposes of this Ordinance occur through a strict interpretation of its provisions, the Commission, upon its own motion may or upon the verified application of any property owner or owners, shall in specific cases initiate proceedings for the granting of a variance from the provisions of this Ordinance under such conditions as may be necessary to insure that the spirit and purpose of this Ordinance will be observed, public safety and welfare secured, and substantial justice done. \* \* \*" Section 19.2: "Before any variance may be granted, it shall be affirmatively shown: (a) That there are special circumstances attached to the property referred to in the application or motion, which do not apply generally to other properties in the same District; (b) That the granting of such variance is necessary to do substantial justice, and to avoid practical difficulty, unnecessary hardship, or results inconsistent with the general purpose of this Ordinance; (c) That the granting of the variance will not result in material damage or prejudice to other property in the vicinity, nor be detrimental to the public health, safety, or general welfare." The application must be referred immediately



to the Planning Commission for hearing (§ 19.3). Section 19.4 provides that the application shall be accompanied by: "(d) Evidence of the ability and intention of the applicant to proceed with actual construction work in accordance with said plans within ninety (90) days from the date of granting said application." Section 19.5: "The Commission shall cause such investigations of fact bearing on the application to be made as will provide necessary information to insure that the action on each such application is consistent with the intent and purpose of this Ordinance." A public hearing is required and a "verbatim transcript of all testimony offered at a public hearing, together with the names and addresses of all persons testifying shall be recorded and made a part of the permanent files of the case." (§ 19.6.) The commission is required to render "a report and recommendation to the City Council" (§ 19.7) which shall review the same and may confirm, reverse or modify the action of the commission without a hearing after having read the complete verbatim transcript of the commission hearing. The council may also "[s]et the matter for public hearing before itself, make its own findings and grant or deny the application accordingly." (§ 19.8, subd. (3).) "The action of the City Council upon an application for a variance is final and conclusive as to all things involved in the application." (§ 19.8.)

In the present instance there were two hearings, one upon an original application for a variance and the other upon a "verified supplement to petition for variance," which latter document was filed after the commission and the council had denied the original application. The complaint incorporates the complete transcript of each hearing before the commission, also the minutes of the City Council.

[11] A proceeding for a variance is initiated upon motion of the commission or "upon the verified application of any property owner or owners" (§ 19.1). Respondent questions appellant's status as an applicant. The record shows that appellant (who is acting as trustee for the congrega-

tion and pursuant to its authority) never acquired title to the property covered by his application. He entered into an arrangement with the owner by which he agreed to purchase the lot provided he was able to secure a variance for construction of a church thereon. He testified before the commission: "Mr. Minney: We bought it with the understanding that if a church could be erected, the lot would be ours. Mr. Teasley: Then actually you will not lose any money? Mr. Minney: No, we will lose nothing except time and a good location for a church." The reply brief says that "appellant would not lose the deposit of money made on the option to purchase" if the variance is not effectuated. The supplement to petition alleges that "the property is now held in escrow." Oral argument indicated that plaintiff held an option to purchase at the time of the first hearing, that the matter had progressed to an escrow at the time of the second, but that plaintiff has never been in danger of losing anything if the deal is frustrated by denial of a variance. The purchase having been made upon condition of a variance being issued, and plaintiff having paid nothing irrevocably, it can hardly be said that he is the owner within the purview of the ordinance which makes ownership the criterion of a right to file a petition. Cf. 1 Yokley on Zoning Law and Practice (2nd Ed.), 1957 Supp., p. 92, § 134; Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E. 2d 128, 131, 168 A.L.R. 1. This question of Rev. Minney's right to file the application for variance is so closely related to that of hardship that it need be pursued no further.

Section 19.1 predicates the granting of a variance upon "practical difficulties, unnecessary hardships, or results inconsistent with the general purposes of this Ordinance." Section 19.2(b) requires an affirmative showing inter alia that a variance is required to avoid unnecessary hardship. It appears that plaintiff did not canvass the area for other church sites but took an option on this one with full knowledge of the zoning and upon condition that he could obtain a variance. Self-induced hardship is

not within the purview of the ordinance. Only that type of hardship which inheres in the particular property is recognized,—such as inability to use it for purposes of its existing zoning caused by the prevailing uses of surrounding property. Examples of cognizable hardship are given in *Wilkins v. City of San Bernardino*, supra, 29 Cal. 2d 332, 340, 175 P.2d 542. "A 'variance' for undue hardship is grounded in conditions peculiar to the particular lot as distinguished from other property in the use district." *Beirn v. Morris*, 14 N.J. 529, 103 A.2d 361, 364. See, also, *Preye v. Board of Adjustment*, 22 N.J.Super. 161, 91 A.2d 597, 602; *In re Michener's Appeal*, 382 Pa. 401, 115 A.2d 367, 371. Subdivision (a) of § 19.2 of the Azusa ordinance so provides: "That there are special circumstances attached to the property referred to in the application or motion, which do not apply generally to other properties in the same District."

[12] One who purchases property in anticipation of procuring a variance to enable him to use it for a purpose forbidden at the time of sale cannot complain of hardship ensuing from a denial of the desired variance. *Gleason v. Keswick Improvement Ass'n*, 197 Md. 46, 78 A.2d 164, 165-166; *Preye v. Board of Adjustment*, supra, 91 A.2d at page 604; *Union Free School Dist. v. Village of Hewlett Bay Pk.*, 198 Misc. 932, 102 N.Y.S.2d 81, 83; affirmed, 278 App.Div. 706, 103 N.Y.S.2d 831; *Selligman v. Von Ailmen Bros.*, 297 Ky. 121, 179 S.W.2d 207, 210; *Beirn v. Morris*, supra, 103 A.2d at page 364; *Clark v. Board of Zoning Appeals of Hempstead*, 301 N.Y. 86, 92 N.E.2d 903; 1 Rathkopf, *The Law of Zoning and Planning*, § 3, p. 748.

[13] The burden of appellant's main attack upon the city's denial of a variance is that of alleged discrimination growing out of the fact that other churches have been granted variances permitting them to build in the R-1 zone. The specifications are *Concordia Lutheran Church* on September 28, 1949; *First Christian Church*, August 31, 1950; *Church of Christ*, May

10, 1951; *Church of the Nazarene*, August 29, 1951; *Emanuel Baptist Church*, January 7, 1954. The Emanuel parcel lies immediately south of plaintiff's lot; the variance was in effect at the time of the first hearing and denial but had lapsed before hearing was had upon appellant's supplemental application. It also appeared at the hearing that the Catholic, Presbyterian and Friends churches are located outside the R-1 zone, but when they were erected is not shown. That the commission and the council have not discriminated against churches as such is witnessed by the five variances just mentioned.

[14] Appellant centers upon the Emanuel Baptist Church variance for a lot in the same block with plaintiff's and insists that that of itself proves unwarranted discrimination as matter of law. The authorities are to the contrary. "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." *Potts v. Board of Adjustment*, 133 N.J.L. 230, 43 A.2d 850, 854. "The nonconforming uses do not justify the variance sought. If the rule were otherwise, one variation would sustain if it did not compel others, and thus the general regulation would in time be rendered abortive. [Citations.] A variant use of plaintiff's lands would necessarily be the basis for others and thus the disintegrating process would be set in motion." *Beirn v. Morris*, supra, 14 N.J. 529, 103 A.2d 361, 364. To the same effect are *Moriarity v. Pozner*, supra, 21 N.J. 199, 121 A.2d 527, 534; *Scaduto v. Town of Bloomfield*, 127 N.J. 1, 20 A.2d 649, 651; *Ventresca v. Exley*, 358 Pa. 98, 56 A.2d 210, 212; *Chudnov v. Board of Appeals of Town of Bloomfield*, 113 Conn. 49, 154 A. 161, 164; *Young v. City of Abilene*, Tex.Civ.App., 195 S.W.2d 838,

840; *Van Meter v. Westgate Oil Co.*, 168 Okl. 200, 32 P.2d 719, 721-722; *Brous v. Town of Hempstead*, 272 App.Div. 31, 69 N.Y.S.2d 258, 261; *O'Connor v. Mayor and Council of Borough*, 1 N.J.Super. 638, 65 A.2d 127, 129; *Hay v. Board of Adjustment of Borough of Fort Lee*, 37 N.J.Super. 461, 117 A.2d 650, 653; 58 Am. Jur. § 205, p. 1052; Annotation 168 A.L.R. 42. This is also the California Law. "It was not a denial of plaintiffs' constitutional right to the equal protection of the laws for the city of Los Angeles to discriminate against plaintiffs by granting variances to some property owners and refusing a variance grant to plaintiffs in the same district." *Otis v. City of Los Angeles*, supra, 52 Cal.App.2d 605, 613, 126 P.2d 954, 958. "If an owner could compel the extension of the boundaries of the 'island,' by any such showing, then the next adjoining owner in turn could likewise make the same kind of a showing and obtain another extension of the 'island' to his property, and in a short time there would be an end to the effectiveness of all zoning legislation." *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d 332, 341, 175 P.2d 542, 549. "The fact that variances may have been granted to some owners and denied to others, however, does not establish unreasonable discrimination. The granting or denial of variances rests largely in the discretion of the body designated by the zoning ordinance for that purpose, and a denial of a variance will not be disturbed in the absence of a clear showing of abuse of discretion." *County of San Diego v. McClurken*, 37 Cal.2d 683, 691, 234 P.2d 972, 978.

[15] Appellant insistently claims that there was prejudice against Jehovah's Witnesses which controlled the decision of the zoning authorities. The only evidence to which counsel can point is the statement of one objector at the first hearing who testified: "Stemrich: I am not prejudiced, but if people know that there is a Witness church in the neighborhood they

would just as soon move out. Hawkins: Would any other church do it? Stemrich: As far as I am concerned all religions are the same but there are some people that have different outlooks." There is nothing in the record to raise an inference that the committee or the city council adopted Stemrich's view. The inference from the hearing record seems plain that petitioner and his associates sought to ride through the hearing upon the emotional issue of prejudice against Jehovah's Witnesses, buttressed by the claim of absolute right of a church to have a variance when and where it desires. Rev. Minney's showing at this original hearing was little more than pro forma.

It consisted of submission of plans and drawings of the proposed church building, simple in design, finished with stucco outside and plaster inside, to occupy 2,500 square feet, and cost approximately \$12,000; assurance was given that the portion of the lot not occupied by the building would be blacktopped for off-street parking. Days and hours of customary services were stated, the congregation was said to have as members 70 residents of Azusa, and the meetings were declared to be orderly and not noisy. No evidence was adduced by applicant on the subjects of special circumstances surrounding the particular property, necessity of avoiding practical difficulties, unnecessary hardship or results inconsistent with the purpose of the ordinance; no evidence was presented concerning damage or prejudice to other property in the zone and no attention given orally to the general welfare. All of this seems to have been proffered or omitted upon the assumption of a legal right to a variance for a church. Petitions opposing the variance, signed by 47 residents of the immediate neighborhood, were presented and various persons spoke in opposition to the application, each assigning his own reasons as would be expected. They concern mainly a desire for a quiet neighborhood and objection to increased traffic. The commission was required to make a factual investigation before the hearing



and presumptively did so. As the decision had to be reached in the light of the comprehensive zoning plan and of existing and future conditions, the members of the commission necessarily had to supplement the testimonial showing by resort to their own knowledge. (See, 1 Yokley, *Zoning Law and Practice* (2nd ed.), § 127, p. 308.) The application was denied because of "approximately 47 names being presented in protest and representation in the audience protesting another church in this area." While objections of property owners cannot control the decision they are not to be disregarded. *City of Stockton v. Frisbie & Latta*, 93 Cal.App. 277, 281, 295, 270 P. 270. On September 7, 1954, the council denied the application: "Due to the number of protests filed with the Council by people in the immediate vicinity."

In January, 1955, appellant filed his "Verified Supplement to Petition for Variance" claiming prejudice against Jehovah's Witnesses and breathing defiance to the zoning authorities. It does pay formal obeisance to constituted authority, saying in paragraph XV: "I am making this application for a variance so as to render 'unto Caesar that which belongs to Caesar', for the purpose of orderliness and complying with the regulations and ordinances of the City of Azusa." It seems unfortunate that that other precept of the Master was not kept in mind: "And whosoever shall compel thee to go a mile,<sup>2</sup> go with him twain." (Matthew 5:41.)

Immediately following the sentence above quoted, paragraph XV continues: "I contend, however, under the Constitution of the United States and the Constitution of the State of California, that the ordinances of the City of Azusa above quoted, which require a variance for a church to be built in any neighborhood, except in an R-3 zone \* \* \* are void because no city or political subdivision or state authorities thereof have the right

to require a variance before a piece of property can be used for a church." Paragraph XIX: "I anticipate that the Planning Commission of the City of Azusa and the City Council will deny this application, as the Planning Commission and the City Council previously denied my application." Paragraph XXX: "Said sections of the code have been enforced by the Planning Commission and the City Council so as to authorize many of the orthodox and popular religions to build church buildings or repair or add additions thereto in the City of Azusa since the passage of said measures, while discriminating against the Jehovah's Witnesses."

This petition was followed by a hearing before the Planning Commission on February 2, 1955, at which additional evidence was taken. It was devoted largely to the traffic question. A new objectors' petition was presented containing some 109 names, and "setting forth various reasons such as depreciation of property values, noise and traffic, improper zoning in that it was all R-1 originally." Concerning this latter point Mr. Stemrich testified: "The only thing that I have against buildings going in that area is that if one is granted then there will be more granted. There is quite a bit of vacant property there and if the variance is granted, more buildings and apartments will be built." Photographs attached to the complaint show this neighborhood to be largely undeveloped. But a "growing residential area is as reasonable an object of protection as one which is fully built up." *Jones v. City of Los Angeles*, 211 Cal. 304, 309, 295 P. 14, 17.

Plaintiff said that a church would not "devalue" his own residence property within the zone nor would it add to its value. Asked if there were any special circumstances applicable to this property, he said: "Yes, the property next door and then, of course, the church across the street are R-3 and R-4. The land is not generally developed. The street is black topped half

2. Referring to impressment by Caesar's soldiers (see, Barklay on *The Gospel of Luke*, p. 295).

the distance." The "property next door" seems to refer to the Baptist parcel, and "the church across the street" is non-existent.

The supplemental application says: "I desire to state, also, that we will plant suitable plants, trees and shrubs, and our congregation is fully prepared to carry the financial burden, and are able to do so, necessary to complete construction." Section 19.4, subdivision (d), requires proof of ability and intention to proceed with actual construction work within 90 days from granting of application. No affirmative evidence to this effect was offered by applicant. When interrogated by the chairman of the board he testified: "Teasley: According to the ordinance you have to start work within 90 days after the ordinance is granted, and you have a right to request an extension of time—can you start your work within 90 days? Minney: We can start before 90 days. Teasley: Can you show us proof that you can? Minney: We are prepared to go ahead with this matter. We can't show you any financial statement but we have the money available. Shier [attorney for petitioner]: There is a party that is going to loan the money to the congregation—it will be paid for completely." The showing went no further. In the first hearing plaintiff testified the building would cost \$12,000; in the second he said the cost would be \$15,000. The price of the lot (as yet unpaid) was not given. The name of the prospective lender was not disclosed; his ability to perform was not shown; whether he had legally bound himself to make the loan does not appear. Certainly the commission was justified in rejecting this as proof of one of the matters which must be shown affirmatively upon such an application.

As a result of this hearing the commission found that the Baptist permit was no longer outstanding, many protests from residents residing within 300 feet from the property had been received, many residents in the locality had purchased homes because they were situated in an R-1 zone,

these homes were built some years before appellant's application for variance was made, the erection of a church in the locality "would be detrimental to and reduce valuation of properties in said vicinity"; also that a variance "would be inconsistent with the general purposes of the ordinance"; that applicant had failed to show that he had the ability to proceed with actual construction within 90 days. It was therefore recommended that the variance be denied. The matter came before the council on February 21st and it denied the application "upon all the ground[s] as set forth in the resolution of the Planning Commission."

[16] At none of the hearings before the commission or council was any proof made in support of the claim that the ordinance excludes churches from 90 per cent of the area of the city, that less than 5 per cent thereof is actually available for church purposes and that much of that 5 per cent is located along railroad rights of way and other industries. This matter was inherent in the issues of practical hardship etc. which the planning commission was required by ordinance to consider at the hearing before it. The ordinance and zoning map do not support the allegation,—not without the aid of oral explanation and application to the city's entire area. Of course, the application for variance is not evidence of the truth of its own averments. The complaint makes these allegations, but averments of the pleading cannot fill any hiatus in the proof before the commission and City Council for the courts have no jurisdiction to grant a hearing *de novo*. *Wheeler v. Gregg*, 90 Cal.App.2d 348, 361, 203 P.2d 37; *Steiger v. Board of Supervisors*, 143 Cal.App.2d 352, 356, 300 P.2d 210.

[17] A clear showing of abuse of discretion is essential to a successful attack upon the granting or denial of a variance (*Wilkins v. City of San Bernardino*, *supra*, 29 Cal.2d 332, 338, 343, 175 P.2d 542; *County of San Diego v. McClurken*, *supra*, 37 Cal.2d 683, 691, 234 P.2d 972; *Beverly Oil Co. v. City of Los Angeles*, *supra*, 40

Cal.2d 552, 559, 254 P.2d 865; *Otis v. City of Los Angeles*, supra, 52 Cal.App.2d 605, 614, 615, 126 P.2d 954; *Steiger v. Board of Supervisors*, supra, 143 Cal.App.2d 352, 357, 300 P.2d 210), for every intendment favors a valid exercise of the police power by the zoning authorities (*Wilkins v. City of San Bernardino*, supra, 29 Cal.2d 338-339, 175 P.2d 542; *Lockard v. City of Los Angeles*, supra, 33 Cal.2d 453, 461, 467, 202 P.2d 38; *Acker v. Baldwin*, supra, 18 Cal.2d 341, 344, 115 P.2d 455; *Otis v. City of Los Angeles*, supra, 52 Cal.App.2d 613, 126 P.2d 954), and there is a presumption that the necessary facts have been ascertained and found by the zoning commission. *Bartholomae Oil Corp. v. Seager*, 35 Cal.App.2d 77, 80, 94 P.2d 614; *Wheeler v. Gregg*, supra, 90 Cal.App.2d 348, 360, 203 P.2d 37; *Steiger v. Board of Supervisors*, supra, 143 Cal.App.2d 356, 300 P.2d 210; *North Side Property Owners Ass'n v. County of Los Angeles*, 70 Cal.App.2d 598, 608, 161 P.2d 613; *Schumm v. Board of Supervisors*, supra, 140 Cal.App.2d 874, 880, 295 P.2d 934; *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 323, 144 P.2d 4. Moreover, it is manifest that failure to prove any of the matters required by the ordinance must result in a denial of a variance application. Appellant failed to make the necessary proof under the ordinance and there has been no showing of abuse of discretion on the part of the commission or the City Council.

[18-20] Appellant's attorneys argue, however, that the discretion here exercised was an arbitrary one because the ordinance did not prescribe sufficiently definite standards for the exercise of discretion by the commission. It is apparent from the ordinance that the commission does not decide but merely recommends appropriate action to the City Council. It is settled that such power to hear and recommend may be delegated validly to the commission. *Johnston v. Board of Supervisors*, 31 Cal.2d 66, 73, 187 P.2d 686; *Hopkins v. MacCulloch*, 35 Cal.App.2d 442, 450, 95 P.2d 950; *Meyers v. Board of Supervisors*, 110 Cal.App.2d 623, 630, 243

P.2d 38; *Wheeler v. Gregg*, supra, 90 Cal. App.2d 348, 363, 203 P.2d 37; *Steiger v. Board of Supervisors*, supra, 143 Cal.App.2d 352, 355-356, 300 P.2d 210. Of course, reasonably definite standards must be prescribed as a basis for board action, but the degree of definitiveness must be tested according to the inherent uncertainties in the subject matter. "A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections or other special considerations. Consequently, almost every zoning ordinance, including the one under consideration, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use." *Metcalf v. County of Los Angeles*, supra, 24 Cal.2d 267, 270, 148 P.2d 645, 647. "The statutory rule of 'unnecessary hardship' as a guide for variances, has been generally upheld as adequate." (20 Law and Contemporary Problems, p. 291.) See, also, 1 *Yokley, Zoning Law and Practice* (2nd ed.) § 135, p. 327. Standards no more specific than those at bar have been held adequate in *Hilton v. Board of Appeals of City of Geneva*, Sup., 18 N.Y.S.2d 213, 217; *Maxwell v. Klaess*, 192 Misc. 939, 82 N.Y.S.2d 588, 590, 592; *Bishop v. Board of Zoning Appeals*, 133 Conn. 614, 53 A.2d 659, 662; *Potts v. Board of Adjustment*, 133 N.J.L. 230, 43 A.2d 850, 853-854, supra. See, also, standards prescribed by the Legislature of this State in § 65853, Government Code. This record does not warrant the conclusion that arbitrary power was conferred upon the commission or that the power delegated to it was arbitrarily exercised.



Do all of the foregoing principles fall into the discard when a religious organization asserts a right to a variance? This question has been answered in the negative in *West Hartford Meth. Ch. v. Zoning Board of Appeals*, 143 Conn. 263, 121 A.2d 640, 643; *Galfas v. Ailor*, 81 Ga.App. 13, 57 S.E.2d 834, 836; *Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, Fla.*, 82 So.2d 880. In the last cited case it is said, at page 882: "It seems that the appellant bought the property with knowledge of the zoning restrictions when, as we understand the record, sites for churches were available in other parts of the city. The restrictions were imposed by an ordinance that was presumptively valid, so the appellant in this suit assumed the 'extraordinary' burden of alleging and proving that the ordinance was invalid. \* \* \* It is commonly known that generally the activities of the present-day churches are wide and varied as, indeed, they should be. The use of church buildings and facilities is not confined to worship periods on Sunday and mid-weekly prayer meetings. They are often used as places of instruction and entertainment. We do not frown upon these activities; on the contrary we think they should be promoted and encouraged. But we do not agree that because of the merits of these activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted, and which the appellee in this instance knew had been restricted, primarily to homes to be occupied by individual families." With this we agree.

*City of Chico v. First Ave. Baptist Church*, supra, 108 Cal.App.2d 297, 238 P.2d 587, involved the assertion of church immunity to an ordinance requirement of obtaining a special use permit for a church in a residential zone, and it was held that "*Corporation of Presiding Bishop of the Church of Jesus Christ v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823,

seems to be a complete answer to appellant's contentions." 108 Cal.App.2d at page 301, 238 P.2d at page 589.

It also appears from the record in the *Porterville* case, supra, that the litigation actually arose out of the city's denial of a variance requested by the church and the court's ruling necessarily recognized application of the presumptions and other principles therein discussed to a variance proceeding.

It is apparent that the complaint could not be successfully amended and hence the demurrer was properly sustained without leave.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



164 Cal.App.2d 108

**STANDARD IRON WORKS, a corporation,**  
Plaintiff and Respondent,

v.

**GLOBE JEWELRY & LOAN, INC., a corporation, et al., Defendants and Appellants.**

Civ. 5873.

District Court of Appeal, Fourth District,  
California.

Oct. 10, 1958.

Action by seller of steel against builders to recover damages for claimed breach of contract. The Superior Court, San Diego County, William P. Mahedy, J., entered judgment for seller and buyers appealed. The District Court of Appeal, Griffin, P. J., held that acceptance of contract to furnish steel for construction of building in consideration of stipulated payments, including plans for three story building by reference and subject to possibility that buyers would notify seller within two or three days that two story instead of three story building

would be built, established binding contract subject to possible delay of two or three days, and when buyers did not notify seller of change of plans within two or three days and took out building permit in their name and examined plans and specifications for steel work and seller was allowed to proceed with negotiations for purchase of steel without objection, buyers acquiesced in and ratified seller's action in proceeding with fulfillment of contract.

Affirmed.

#### 1. Sales ⚡23(3)

Acceptance of contract to furnish steel for construction of building in consideration of stipulated payments, including plans for three-story building by reference and subject to possibility that buyers would notify seller within two or three days that two-story instead of three-story building would be built, established binding contract subject to possible delay of two or three days.

#### 2. Estoppel ⚡90(2)

Where buyers were to notify seller of structural steel within two or three days as to possible change of plans if two-story instead of three-story building was to be erected, but no notification of change was made, buyers took out building permit in their name and examined plans and specifications for steel work and seller was allowed to proceed with negotiations for purchase of steel without objections, buyers acquiesced in and ratified seller's actions in attempting to fulfill contract respecting three-story building.

#### 3. Contracts ⚡22(1)

The conduct of an offeree may constitute acceptance.

#### 4. Contracts ⚡199(1)

If reference in contract to plans and specifications indicate intention to incorporate them generally, they become part of contract for all purposes.

#### 5. Contracts ⚡1

Public policy is subserved by leaving parties and their rights to be measured by terms of their engagements and, although

they may have made unfortunate arrangement, when they have entered into it voluntarily they are bound by it in absence of equitable grounds for avoidance and they must be presumed to have contracted with reference to existing conditions known to them.

#### 6. Contracts ⚡303(1, 2)

Mere difficulty or unusual or unexpected expense will not excuse party for failing to comply with terms of his contract, nor is it defense that law had rendered performance difficult or expensive.

#### 7. Contracts ⚡170(1)

Parties to contract, in all fairness, should be bound by construction they themselves have placed upon their agreement, particularly where they have acted thereunder for considerable period of time.

#### 8. Damages ⚡45

Contractor may recover his expenses incurred in part performance as well as his anticipated profit upon completed job basis.

#### 9. Sales ⚡383

In action by seller of steel against buyers to recover damages for claimed breach of contract, where work was not done, but seller had purchased steel and had shown reasonably substantial basis for loss of profit and damage, evidence supported award for loss of profit and damage.

#### 10. Contracts ⚡316(1)

Where seller was to furnish steel for construction of building in return for stipulated payments, but buyers breached contract after seller had entered upon performance, seller's offer to extend time if buyers would pay additional sum of money was not waiver of breach since buyers did not accept offer which did not appear to have been unreasonable.

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Edgar B. Hervey and James Edgar Hervey, San Diego, Henry F. Walker, Los Angeles, of counsel, for appellant.

Stickney & Stickney and Edward Strop, San Diego, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff-respondent Standard Iron Works, a corporation (hereinafter referred to as Standard) brought this action for damages against defendants and appellants Globe Jewelry and Loan, Inc., a corporation, (hereinafter referred to as Globe), Globe Properties, and Harold Steckel, for claimed breach of contract. It was stipulated at the trial that in all dealings by defendant Steckel he was acting as agent and as an officer of defendant Globe and Globe Properties, and that said businesses were owned by Steckel and his wife.

Plaintiff corporation is engaged in the structural steel fabricating business in San Diego. Defendants owned unimproved property at the northwest corner of Fifth and Date streets, and in the latter part of 1955 they contemplated constructing a three-story office building thereon. They employed a Mr. Wheeler, an architect, to prepare architectural drawings for such a building, and he in turn employed one Ruskin, a structural engineer, to prepare the structural drawings. In January, 1956, these plans and drawings, providing for a three-story steel frame building with concrete basement were released for bid to certain general contractors, including one C. S. Larsen, who was the lowest bidder. Plaintiff had previously been furnished with the architectural and structural drawings for bidding on the steel work.

On February 10, 1956, when it was still contemplated by defendants that a general construction contract would be let to Larsen, a meeting, wherein Mr. Ruskin, Larsen, Steckel and his wife, one Seltzer, attorney for defendants, and one Dearth, Vice President and representative of plaintiff were present, was held for the purpose of obtaining a contract for the structural steel necessary for the building. At that time there existed a steel shortage, and a threatened strike in the steel plants. Defendant Globe had a lease agreement with an insurance company to lease one-third of the floor space of the building, when completed, with a deadline of June, 1956. Its loaning agency

required that at least 70 per cent of all space be leased by that time. Dearth had been requested by Larsen to attend this meeting. Based upon the architectural and structural drawings he was asked to submit two separate prices for the steel contract, one price for three floors and the other for two floors. Expecting that the contract would be entered into with Larsen as general contractor, plaintiff's proposal (Exhibit 1) was originally made out for Larsen's acceptance. At the meeting Dearth then learned that Larsen had not, as yet, been given the general construction contract. Apparently Steckel was reluctant to sign plaintiff's proposal but because of the urgency for commencing construction of the building, and to be assured that the steel would be available as needed, he did, upon the advice of his counsel, sign the proposal at this meeting. Although Dearth claims that after he arrived he heard nothing about uncertainty in securing a loan to finance the entire contract, it appears that the question did arise. The necessity of obtaining the steel for a three-story building was uppermost in their minds and a conversation ensued as to the proper method of obtaining it. Apparently defendants agreed that plaintiff could go into the open market and obtain it at warehouse prices (a higher price) rather than at the mill (at lower prices with considerable delay in filling orders) and that plaintiff was authorized by the agreement signed to do so. The only question which remained in any doubt was a possible oral change in their plans as to whether plaintiff would proceed with the contract on the agreed basis of a three-story building or on the basis of a two-story building, and whether defendants were to notify plaintiff of their election "within a few days" (two or three). There is considerable confusion in the evidence on this subject and it is one of the principal arguments of defendants that the contract was uncertain and indefinite because defendants never informed plaintiff of their election, and that accordingly the contract (Exhibit 1) could not be a basis for a cause of action for claimed breach since its effectiveness was conditioned upon defendants' determining



"within a few days" whether a two-story or a three-story building was to be erected. They cite such authority as *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 151, 180 P.2d 888; *Avalon Products, Inc., v. Lentini*, 98 Cal.App.2d 177, 179, 219 P.2d 485; *Talmdge v. Arrowhead Reservoir*

Co., 101 Cal. 367, 35 P. 1000; *Lawrence Block Co. v. Palston*, 123 Cal.App.2d 300, 308, 266 P.2d 856; and *Mainieri v. Magnuson*, 126 Cal.App.2d 426, 428, 272 P.2d 557.

The original contract (Exhibit 1) reads in part as follows:

"Standard Iron Works

.....

"Proposal Date February 10, 1956

"Estimate No. 9374 — 1 & 2

"Job Globe Properties

"Architect R. G. Wheeler and  
John Ruskin

Globe Properties, Inc.

"To ~~C. A. Larsen~~ 228 Broadway

~~"2057 Kurtz~~ D. G. Dearth

"San Diego, California

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"We agree to furnish, subject to the conditions  
on reverse side of this proposal:

"Structural steel framing on the following basis:

"3 Floors steel framing, no basement ...

Erected in place Tax included sum of \$56,400.00

"2 Floors steel framing, no basement ...

Erected in place Tax included sum of 43,871.00

"These prices are based on quick delivery and all material coming from  
warehouses as source of supply.

"The foregoing pre-architectural sheets 1-9  
dated 1/11/56; structural sheets S. — S11  
dated 1/11/56 prepared by R. G. Wheeler  
(Signed) D. G. Dearth

"Terms: Progressive monthly payments, Net, 10th of month following  
date of invoice.

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"I (we) hereby accept the above Proposal this 10 day of Feb., 1956.

"Standard Iron Works

"By Don G. Dearth

"Sales Manager

"Globe Properties

"By Harold Steckel, Secy."

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The conditions referred to, on the reverse side of the proposal, are:

"This proposal contemplates the furnishing of steelwork in strict accordance with and by the conditions and terms of the specifications and code of

standard practice as adopted by the American Institute of Steel Construction.

"All agreements are contingent upon strikes, accidents, delays of carriers and other delays unavoidable or

beyond our control. All quotations are made for prompt acceptance and are subject to change without notice.

"When erection is included, the purchaser shall provide adequate foundations of proper height, shall set anchor bolts, and shall establish all levels and datum lines.

"By erection (when included) is meant the setting in place of the Structural Steel proper but does not cover the placing of Lintels or other material weighing less than 500 pounds, nor the setting of wall plates, anchor bolts, pipe railing, work of a similar nature, or other setting of material not stipulated in this proposal.

"Purchaser agrees to notify the seller when the building is to be ready to receive steelwork and also to have the building ready at the time stated.

"This proposal expires in 30 days.

"No charges for labor or material furnished by the purchaser shall be allowed as a credit on this agreement, unless authorized in writing by the Standard Iron Works.

"All payments shall be made as stipulated and are payable at the office of Standard Iron Works. When not so paid, then the entire contract price shall become due and payable.

"This proposal, when signed by the purchaser or his duly authorized representative, implies an acceptance of the above conditions and terms, and the proposal becomes a contract in full force and effect, subject to the approval of the Standard Iron Works."

[1] It should be noted that the contract, instead of being with C. A. Larsen was changed to Globe Properties, Inc., during the meeting, with the consent of the parties because Larsen had not yet been awarded the general contract. It should also be noted that through the advice of defendants' counsel, there was written across the face of it: "The foregoing pre-architectural sheets 1-9 dated 1/11/56; structural sheets S.—S11 dated 1/11/56 prepared by

R. G. Wheeler". These sheets and general plans referred to are in evidence and show a general and detailed plan for a three-story building, and there is no alternative indicated. The acceptance of this contract, which by reference included the accompanying plans, sufficiently established a binding contract in accordance with its terms, subject to the possible delay of two or three days in determining whether it should be a three-story or a two-story structure.

In respect to this subject Dearth testified that at the meeting of February 10 it was "The consensus" of opinion or "it was stipulated" that it would be a three-story building but at the time they left, the information would be that "they would let us know very quickly.—When I say 'they', either through Mr. Wheeler or John Ruskin—and they would let us know as to *whether it was going to be a two-story*, but in a very few days, because the tooling would have to be started". (Emphasis added.) On cross-examination the witness testified that "they were to let you know within two or three days whether it was to be a two or three-story building", and that he didn't hear from them one way or the other during that time. The evidence clearly shows that defendants instructed Dearth to proceed with the performance of his contract and obtain the steel at once and that a determination would be made immediately as to the necessary amount to be ordered. Shortly after February 10th Larsen obtained a building permit for the proposed three-story building at defendants' request, and the permit was paid for by defendants. Larsen was authorized to clear the lot and erect barricades. Not hearing from defendants plaintiff, in conformity with the contract, started negotiations with Golden Gate Iron Works of San Francisco to obtain and fabricate the steel for a three-story building, in accordance with the plans referred to in the agreement. He went to San Francisco for this purpose with a work sheet for a three-story building, and ordered the necessary steel. On March 16th, he signed a written contract for it. Golden

Gate sent form notices to all steel warehouses in an endeavor to locate sufficient steel. They purchased the necessary steel and reserved it for Standard under their contract. Golden Gate's engineers took off their own drawings and estimates of fabricated steel required and sent these drawings and estimates to Standard, who in turn delivered them to Ruskin for examination and appraisal. Some changes were made by Ruskin and they were returned to Golden Gate without his approval because Larsen had not, as yet, been selected as the general contractor. During this time Dearth had endeavored to contact Steckel in reference to the approval of the plans of Golden Gate but was told he was out of the city or not available. A representative of Golden Gate came to San Diego and conversed with Ruskin about the plans. There is testimony by Ruskin that Steckel knew Golden Gate had a subcontract with Standard to furnish and fabricate the required steel for a three-story building which contract was for the price of \$42,500, and he was possessed of this knowledge between three weeks to two months after the contract was signed on February 10th. He also testified he discussed this matter with Steckel a dozen times on occasions between said dates. Neither then nor at any time after February 10th did Ruskin or Steckel express any surprise or raise any objections because plaintiff was proceeding in part performance of his contract with defendants pertaining to the fabrication of steel for a three-story building, and no objections were ever made by defendants or their engineers or architect about plaintiff's order being made for a three-story building, as called for therein, and no request was ever made for a two-story building.

It does appear that in the latter part of March 1956, Dearth did finally get Steckel on the telephone and told him of the demands of Golden Gate for further particulars and for the approval of the plans submitted to Ruskin, and the urgency of the situation in reference to completion within the time limit agreed upon for the

completion of the building. He said Steckel then, for the first time, indicated he was having some difficulty in obtaining a loan, and suggested that plaintiff obtain two other bids for a one or two story building in lieu of the three-story building planned; that he asked Steckel as to the date he wanted delivery on the steel purchased and Steckel said he would let him know in two or three days and that he never did respond; that thereafter he telephoned to Steckel and told him of the seriousness of the situation in respect to delivery and he agreed to meet with Dearth and Steckel's attorney on a day certain; that Steckel's secretary called and said he was out of town; that he notified Golden Gate of the attitude of Steckel by letter dated April 23, 1956, and suggested dissolution of the original plan and an endeavor to negotiate a new one. About June 1, 1956, defendants' attorney called plaintiff and informed it that defendants were having difficulty with financing and although they hoped to complete the building contemplated, they might not be in a position to do so, and suggested that an amicable settlement could be arrived at by the parties under their obligation. It appears that plaintiff, in response to a request for an extension of time, made an offer to extend the time within which they would proceed upon the condition that plaintiff receive an additional \$810 to cover increased labor expenditures. This offer was never accepted.

After some conversations plaintiff Standard was faced with an action for breach of contract by Golden Gate, seeking damages and loss of profit under their contract. The sum sought was \$10,754.19, which included \$6,504.19 costs and expenses in part performance and for \$4,250 loss of anticipated profits. A settlement with that company was effected just before trial for \$6,660.

Plaintiff then retained legal counsel to recover damages against defendants for breach of contract. The trial court found generally that the allegations of plaintiff's complaint were true; that plaintiff, on



February 10th, agreed to furnish steel framing for a three-story building, erected in place, in accordance with the plans and specifications indicated, for the sum of \$56,400, and defendants promised to pay this amount; that in compliance therewith plaintiff commenced upon the performance of said contract and entered into a written subcontract with Golden Gate for the supply, engineering and fabrication of all steel required for \$42,500; that without plaintiff's consent and against its wishes, defendants wilfully prevented plaintiff from further performing its contract, which amounted to a material breach; that plaintiff suffered damage for costs and expenses incurred by its subcontractor Golden Gate in the sum of \$6,660, and plaintiff's loss of anticipated profits which it would have received if it had been permitted to completely perform said contract, amounting to \$7,290. Judgment was entered accordingly.

[2, 3] The trial judge did give particular consideration to the claim that the agreement was not complete nor effective because two or three days delay was orally granted, in which time defendants could inform plaintiff as to whether it would be a three or two-story building. The evidence, when considered as a whole, might be susceptible of the interpretation that they all agreed on February 10th that a three-story building was contemplated by the agreement, and if there was to be any change to a two-story building plaintiff would be so informed within two or three days and that no such information was imparted. The trial judge in his oral decision, after casting some doubt as to the proper interpretation of the evidence, stated, in effect, that if he was in error as to that interpretation, there was no doubt in his conclusion that defendants knew that a three-story building was contemplated and agreed upon by the contract, when considered in connection with the accompanying specifications; that defendants knew that if a two-story building was later contemplated they should

have informed plaintiff of that fact and failed to do so; that defendants allowed plaintiff to proceed as if a three-story building had subsequently been agreed upon, by taking out a permit in their name for such a building, by examining plans and specifications for structural steel work furnished by the known subcontractor and by allowing plaintiff to proceed without any objection being made about a three-story structure, and accordingly defendants acquiesced in and ratified plaintiff's action in proceeding, to his detriment, in attempting to fulfill the contract respecting a three-story building. We are in accord with these conclusions. The conduct of an offeree may constitute acceptance. *Wood v. Gunther*, 89 Cal.App.2d 718, 201 P.2d 874; *Beatty v. Oakland Sheet Metal etc. Co.*, 111 Cal.App.2d 53, 244 P.2d 25; 12 Cal.Jur.2d 208, sec. 18; 12 Cal.Jur.2d 212, sec. 22.

[4] The authorities in California are clear that if the reference in a contract to the plans and specifications indicates an intention to incorporate them generally, they become a part of the contract for all purposes. *Valley Construction Co. v. City of Calistoga*, 72 Cal.App.2d 839, 841, 165 P.2d 521; 12 Cal.Jur.2d p. 333, sec. 123.

[5-7] The evidence clearly shows that the parties understood they were contracting for steel framing for a three-story building and it was a binding contract to purchase that much steel. It was even offered as a joke at the time of the signing that if defendants did not go ahead with the building defendants would be in the steel business. The facts show defendants clearly authorized plaintiff to proceed with its portion of the building contract at once because of a contemplated steel strike, the rising price of steel, and the urgency to complete the building by June to permit defendants' tenants to take possession. It probably was lack of financial backing that caused defendants to breach the agreement. It is further apparent that plaintiff's proposal to do the

job expired in 30 days. Parties should be careful about making contracts, for once made the courts will not relieve them for light or trivial reasons. Public policy is subserved by leaving the parties and their rights to be measured by the terms of their engagements. They may have made an unfortunate arrangement, but when they have entered into it voluntarily they are bound by it in the absence of equitable grounds for avoidance. They must be presumed to have contracted with reference to existing conditions known to them. Mere difficulty or unusual or unexpected expense will not excuse a party for failing to comply with the terms of his contract. Nor is it a defense that the law has rendered performance difficult or expensive. Defendants were surrounded at the time of the making of the contract by their agents and their own attorney who then advised them, and no undue advantage of defendants is indicated. They operated under the contract until the financial question arose. Parties to a contract, in all fairness, should be bound by the construction they themselves have placed upon their agreement, particularly where they have acted thereunder for a considerable period of time. 12 Cal.Jur.2d 343, sec. 131; Weaver v. Grunbaum, 31 Cal.App.2d 42, 87 P.2d 406.

[8,9] As to the element of damages, it is a general rule that a contractor may recover his expenses incurred in part performance as well as his anticipated profit upon a completed job basis. Buxbom v. Smith, 23 Cal.2d 535, 145 P.2d 305; Secs. 1512 and 3300, Civ.Code; 14 Cal.Jur.2d 664, sec. 35. A reasonably substantial basis for such loss of profit and damage was shown and the evidence supports the award. McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.,N.S., 1171; 14 Cal.Jur.2d 665, sec. 35.

[10] The offer of plaintiff to extend the time if defendants would pay an additional \$800 cannot be said to be a waiver of the breach since defendants did not

accept the offer, and it does not appear to have been unreasonable.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.



164 Cal.App.2d 77

**Marilyn H. HARDY, Plaintiff, Respondent  
and Appellant,**

**v.**

**John C. HARDY and Eugene D. Hardy,  
Defendants, Appellants and  
Respondents.**

**Eugene D. HARDY, Cross-complainant and  
Cross-defendant,**

**v.**

**Marilyn H. HARDY, Cross-defendant and  
Cross-complainant.**

**Civ. 9321.**

**District Court of Appeal, Third District,  
California.**

**Oct. 7, 1958.**

**As Modified on Denial of Rehearing  
Nov. 6, 1958.**

**Hearing Denied Dec. 3, 1958.**

Divorce proceeding, wherein the Superior Court, Siskiyou County, James M. Allen, J., rendered a decree granting wife a divorce from beneficiary of Illinois spendthrift trust, and from portion of decree imposing a lien upon trust to secure payment of sums allowed as alimony, child support, court costs and attorney fees, the beneficiary and trustee appealed, and from portion of decree holding assignment of trust property by beneficiary to wife invalid, wife cross-appealed. The District Court of Appeal, Peek, Acting P. J., held, inter alia, that court exceeded its jurisdiction in attempting to affect title to land or movables located in and held by trust having its situs in another state by imposing a lien upon trust and that to that extent decree was of no force or effect.

Decree reversed in part and, in all other respects, affirmed.

See also 319 P.2d 380; 330 P.2d 281.

**1. Courts ⇨18**

A court cannot directly affect title to land in another state.

**2. Courts ⇨29**

Through its coercive powers, a court, in a proper case, can compel parties before it to act in relation to property not within territorial jurisdiction of court.

**3. Courts ⇨18, 19**

To the extent that divorce decree attempted to affect title to land or movables located in and held by trust having its situs in another state by imposing a lien upon spendthrift trust for benefit of divorced husband to secure payment of sums allowed as alimony, child support, court costs and attorney fees, court acted in excess of its jurisdiction, and to such extent decree was of no force or effect.

**4. Trusts ⇨113**

Whether interest of beneficiary in spendthrift trust may be reached to pay attorney fees charged to beneficiary in divorce suit by wife is a matter governed by law of state of situs of trust, regardless of whether corpus of trust consists of land or movables.

**5. Trusts ⇨152**

Where trustee of spendthrift trust, having its situs in Illinois, was made a party defendant and was before California court in divorce suit against beneficiary, and will creating trust provided that trustee should pay to beneficiary such sums as were reasonably necessary for his care and maintenance and authorized trustee to make such payments from corpus of trust, if income proved insufficient, California court had jurisdiction to order that attorney fees and costs charged to beneficiary be paid by trustee out of income or, if necessary, corpus of trust.

**6. Trusts ⇨147(1)**

In divorce suit against beneficiary of spendthrift trust, having its situs in Illinois, finding that notes and lease of realty held in trust, allegedly distributed to beneficiary and assigned by him to wife, had not been delivered to bene-

ficiary but remained a part of corpus of trust, was supported by substantial evidence.

**7. Trusts ⇨147(1)**

Where notes and lease of realty, allegedly distributed to beneficiary of Illinois spendthrift trust, had not been delivered to beneficiary but remained part of corpus of trust, under spendthrift provisions of trust, assignment by beneficiary of notes and his interest in lease to wife was void.

**8. Divorce ⇨184(1)**

What might be the best solution of domestic and financial problems of parties to divorce suit was a matter essentially within the province of trial court and not for reviewing court to determine.

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John G. Robertson, Long Beach, and Tebbe & Correia, Yreka, for plaintiff-appellant.

Eugene D. Hardy, Santa Ana, and George G. Tyler, Yreka, for defendants-appellants.

PEEK, Acting Presiding Justice.

Defendant husband, John C. Hardy, and his father, defendant Eugene D. Hardy, appeal from that portion of a decree of divorce imposing a lien upon an Illinois spendthrift trust to secure payment to plaintiff of certain sums as alimony, child support, court costs and attorney fees. By reason of his status as trustee, Eugene was made a party defendant by amendment to plaintiff's complaint. The plaintiff wife, Marilyn H. Hardy, cross-appeals from that portion of the judgment wherein the court held that the assignment by John to her of certain notes, and his interest in a lease of real property held in trust, were invalid.

The trust was established by the will of John's deceased mother which named John as beneficiary, Eugene as trustee and certain others as contingent beneficiaries. The trust provides that the trustee shall pay to John such sums as are reasonably



necessary for his care, support and maintenance, and if the income prove insufficient, the trustee may make such payments from the corpus of the trust. It further provides for periodic disbursements of the corpus to John upon the attainment of certain designated ages. It also contains the customary clauses relative to payment and transfer of money or property by the trustee only to a beneficiary in person and prohibits any assignment or transfer by a beneficiary of his interest in the trust.

None of the issues raised by the appeals of either of the parties concern the marital status as affected by the decree; nor is any question raised concerning the reasonableness of the award for support and maintenance, attorney fees and costs.

[1-3] We are entirely in accord with defendants' first contention that a court of one state cannot directly affect title to land in another. However it is equally true that a court having the parties before it can, in a proper case, through its coercive powers, compel them to act in relation to property not within the territorial jurisdiction of the court. *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65; *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074. In the present case the purported imposition of the lien can in no way be considered other than as an attempt by a court of this state to affect title to land in Illinois. It necessarily follows that the trial court herein acted in excess of its jurisdiction and that the order, at least to that extent, is of no force or effect. *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11. And under the facts as shown by the record herein, the enunciated rule is equally applicable to the movables located in and held by the trust in Illinois. 1 Beale, *Conflict of Laws*, sec. 52.1, pp. 302-03; and sec. 99.1, p. 436.

[4,5] It is defendants' further contention that the court also acted in excess of its jurisdiction in ordering that attorney fees and costs charged to John be paid by Eugene as trustee out of income or if necessary the corpus of the trust. Wheth-

er John's interest in the trust may be reached to pay the award of attorney fees is a matter governed by the law of Illinois, the situs of the trust (*Century Indemnity Co. v. Woodruff*, D.C., 119 F.Supp. 581, 586), and this is true whether the corpus is of land or movables. *Restatement, Conflict of Laws*, sections 243, 298. In support of their contention that attorney fees may not be paid out of a spendthrift trust, defendants cite and rely exclusively upon *McKeown v. Pridmore*, 310 Ill.App. 634, 35 N.E.2d 376. That case involved a contingent fee contract which the court held to be an assignment by the beneficiary and hence barred by the spendthrift provisions of the trust. The court did not say that any award of attorney fees and costs would be invalid, but to the contrary specifically held that in a proper case the court could award attorney fees and costs to be paid out of a spendthrift trust.

Neither can we agree with defendants' argument wherein they attempt to distinguish an award for attorney fees from an award for support. As noted in 16 Cal. Jur.2d, *Divorce and Separation*, sec. 191, page 482, courts make no attempt to distinguish between alimony and attorney fees. While no case, either California or Illinois, has been brought to our attention, it would appear that *In re Stewart's Estate*, 334 Pa. 356, 5 A.2d 910, is directly in point. There, at page 915 of 5 A.2d, it is stated:

"It is argued that Mrs. Stewart should not be permitted to recover the counsel fees allowed by the Florida Court in the divorce proceeding out of the income of the spendthrift trust. This contention is without merit. Under the circumstances, counsel fees are an essential part of the wife's maintenance and support. To deny her counsel fees would, in many cases, be to render her defenseless and prevent her from asserting her right to support."

The reasoning of the Pennsylvania court applies equally to the award of court costs as it does to the award of attorney fees.

Equally without merit is the further contention of defendants that the trial court had no power to order the sums so charged against John to be paid by Eugene as trustee. As noted in *Griswold, Spendthrift Trusts*, sec. 334, page 390, the effect of the Illinois cases (*Keller v. Keller*, 284 Ill.App. 198, 1 N.E.2d 773, and *England v. England*, 223 Ill.App. 549) is to make the wife and child beneficiaries of the trust estate with direct rights against the trustee.

[6,7] Turning now to the appeal of Marilyn, it is her contention that certain notes, constituting a part of the res of the trust, were validly assigned to her by John, as was his interest in a lease of real property, also a part of the trust. This she says is true since the documents evidencing such transactions had been distributed to John, and therefore he could validly assign the same. The trial court, however, found on substantial evidence there had been no delivery to him; that the property remained a part of the corpus of the trust, and therefore under the spendthrift provisions thereof, the purported assignment by John was void. These holdings of the trial court must be sustained. *Congress Hotel Co. v. Martin*, 312 Ill. 318, 143 N.E. 838, 33 A.L.R. 562.

[8] It is further contended by Marilyn that even though the assignments were invalid, they were sufficient to transfer to her an equitable interest in the properties assigned; that the notes should not be allowed to be retained in Illinois; and that the trustee should be ordered to bring the same within the jurisdiction of this court. What may be the best solution of the domestic and financial problems of the parties is not for this court to determine, but rather is one essentially within the province of the trial court under the facts of the particular case.

That portion of the decree purporting to impress a lien on the property of the trust estate in Illinois to secure payment of the sums so awarded is reversed. In

all other respects the judgment is affirmed. The parties shall bear their own costs.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

Hearing denied; TRAYNOR, J., dissenting.



164 Cal.App.2d 87

**Marilyn H. HARDY, Plaintiff  
and Respondent,**

**v.**

**John C. HARDY et al., Defendants,  
Eugene D. Hardy, Defendant and Appellant.**

**Eugene D. HARDY, Cross-complainant,**

**v.**

**Marilyn H. HARDY, Cross-defendant.**

**Civ. 9448.**

**District Court of Appeal, Third District,  
California.**

**Oct. 7, 1958.**

Divorce proceedings against beneficiary of Illinois spendthrift trust. From an order of the Superior Court, Siskiyou County, James M. Allen, J., awarding to plaintiff attorney fees and costs on appeal to be paid by trustee from beneficiary's interest in trust estate, the trustee appealed. The District Court of Appeal, Peek, Acting P. J., held that trial court had jurisdiction to order that attorney fees and costs on appeal be paid from beneficiary's interest in trust estate and that under West's Ann.Code Civ.Proc. § 956a, any modification of order necessary to make such fees and costs payable by trustee as such, and not individually, could be made by District Court of Appeal.

Order modified in accordance with opinion and, as modified, affirmed.

#### **I. Trusts ☞152**

Where trustee of Illinois spendthrift trust was made a party defendant and was

before the court in divorce suit against beneficiary, trial court had jurisdiction to award to plaintiff, to be paid by trustee out of beneficiary's interest in trust estate, attorney fees and costs on appeal from portion of divorce decree imposing a lien upon trust to secure payment of sums allowed as alimony, child support, court costs and attorney fees.

## 2. Divorce ⚡186

Where trustee of spendthrift trust appeared only in his capacity as trustee and not individually in divorce suit against trust beneficiary, any modification of order of trial court necessary to make attorney fees and costs on appeal from divorce decree payable by trustee as such, and not individually, could be made by District Court of Appeal under statute relating to its appellate jurisdiction in cases in which trial by jury is not a matter of right or has been waived. West's Ann.Code Civ.Proc. § 956a.

Eugene D. Hardy, Santa Ana, and George G. Tyler, Yreka, for appellant.

John G. Robertson, Long Beach, and Tebbe & Correia, Yreka, for respondent.

PEEK, Acting Presiding Justice.

The facts and circumstances out of which this appeal arises are set forth in detail in *Hardy v. Hardy*, Cal.App., 330 P. 2d 278, and hence it is unnecessary to restate the same.

[1] The first contention of defendant, Eugene D. Hardy, who alone appeals, is that it was beyond the jurisdiction of the trial court to award attorney fees and costs to plaintiff on appeal. In the prior appeal we held that the order of the trial court awarding attorney fees and costs to plaintiff to be paid by Eugene as trustee out of John's interest in the trust estate was reasonable and proper. The rationale of our conclusion in the prior appeal relative to attorney fees and costs in the divorce proceeding is likewise applicable to the question of such fees and costs on appeal.

[2] Defendant makes one further contention—that in any event the order of the trial court was against Eugene as an individual and hence improper. There can be no question that Eugene appeared in all of the proceedings only in his capacity as trustee and not individually. If it be necessary to modify the judgment as entered, then it would appear that this is a proper case for the application of section 956a of the Code of Civil Procedure.

It is therefore ordered that the order heretofore entered by the trial court be modified by adding the words, "as Trustee under the Will of Mary C. Hardy, Deceased," following the name Hardy as it appears on page 54, line 5, of the clerk's transcript on appeal. As so modified, the order is affirmed. The plaintiff is to recover costs.

SCHOTTKY, J., and WARNE, J. pro tem., concur.



164 Cal.App.2d 41

**CITY OF LONG BEACH**, a municipal corporation, Plaintiff,

v.

**Dagmar AISTRUP**, a widow, **F. Walter Bergmann**, a single man, **Victor K. Hart**, **John Gerald Quirk**, a single man, County of Los Angeles, and **All Persons Unknown Claiming Any Title Or Interest In Or To The Property**, Defendants,

**COUNTY OF LOS ANGELES** of the State of California, Defendant and Appellant,

v.

**Victor K. HART**, **F. Walter Bergmann** and **John Gerald Quirk**, Defendants and Respondents.

Civ. 22872.

District Court of Appeal, Second District,  
Division 3, California.  
Oct. 3, 1958.

Action presenting for determination question as to amount, if any, county was



entitled to receive for taxes from an award for land condemned by a city. From adverse judgment of the Superior Court, Los Angeles County, Ralph K. Pierson, J., the county appealed. The District Court of Appeal, Vallée, J., held that where lien for county taxes attached to realty prior to time title to the realty passed to a city in condemnation proceeding, full amount of taxes was required to be paid from condemnation award and taxes could not be apportioned to the date of taking of possession by the city.

Judgment reversed in part.

#### 1. Eminent Domain ⇨320

When a condemner obtains an order for possession of property prior to judgment and actually takes possession of the property, evicting the owners therefrom, such action constitutes a "taking" as of date condemner goes into actual possession.

#### 2. Taxation ⇨509

Liens for general taxes and liens for special assessments stand on an equal footing before the law.

#### 3. Eminent Domain ⇨152(1)

Where city, immediately on taking possession of land, demolished and removed all improvements thereon and immediately constructed extensive public improvements on land, the taking was of sufficient consequences to be deemed to have effect of finality of transfer for specific purposes as does passage of title and taking of possession by city, which was tax exempt, prior to date of attachment of county tax liens rendered such property tax exempt and property owners were entitled to compensation without deduction on account of taxes for those fiscal years following the taking. West's Ann.Code Civ.Proc. § 1253; West's Ann.Rev. & Tax.Code, §§ 405, 2187, 2192, 2605, 2606; West's Ann.Streets & High.Code, § 10000 et seq.

#### 4. Eminent Domain ⇨152(1)

Where lien for county taxes attached to realty prior to time title to realty passed to a city in condemnation proceeding, full

amount of taxes was required to be paid from condemnation award and taxes could not be apportioned to date of taking of possession by city. West's Ann.Code Civ.Proc. §§ 1246.1, 1247, subd. 3, 1248, subds. 1, 8, 1253; West's Ann.Rev. & Tax.Code, §§ 405, 2186, 2187, 2192-2194(a, b), 4986 (e, g), 2605, 2606.

#### 5. Taxation ⇨508

Tax liens attach on first Monday of March regardless of date assessment is made, and later fixation of amount of taxes by levy and assessment is but a step in the enforcement of an already established lien. West's Ann.Code Civ.Proc. § 1253; West's Ann.Rev. & Tax.Code, §§ 405, 2187, 2192 2605, 2606.

#### 6. Taxation ⇨501

- When amount of taxes is ascertained, it relates back to time that tax lien is fixed and lien constitutes an encumbrance on title to land and is security for payment of tax and enforcement of the property owner's obligation to pay the tax arising on the lien date. West's Ann.Code Civ.Proc. § 1253; West's Ann.Rev. & Tax.Code, §§ 405, 2187, 2192, 2605, 2606.

#### 7. Taxation ⇨573½

A property tax operates in rem against the property. West's Ann.Code Civ.Proc. § 1253; West's Ann.Rev. & Tax.Code, §§ 405, 2187, 2192, 2605, 2606.

#### 8. Eminent Domain ⇨152(1)

Where an award in a proceeding in eminent domain is paid into court, tax lien on land attaches to award and is removed from condemned land and lien remains a vested interest in award, which interest must be determined by trial court. West's Ann.Code Civ.Proc. §§ 1246.1, 1247, subd. 3, 1248, subds. 1, 8, 1253; West's Ann.Rev. & Tax.Code §§ 405, 2187, 2192, 2605, 2606.

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Harold W. Kennedy, County Counsel, Los Angeles, and Robert A. Von Esch, Jr., Deputy County Counsel, Whittier, for appellant.

Hodge L. Dolle and Thomas G. Baggot, Los Angeles, for respondents.

VALLÉE, Justice.

The city of Long Beach brought this proceeding to condemn several parcels of realty. Defendants Victor K. Hart, F. Walter Bergmann, and John Gerald Quirk each owned in fee one of the parcels sought to be condemned. The County of Los Angeles was named a defendant as it claimed that by reason of liens for taxes for the tax years 1955-56, 1956-57, and 1957-58 it had an interest in various parcels, including those of Hart, Bergmann, and Quirk. An interlocutory judgment was entered on June 5, 1957 and the award was deposited in court. Final order of condemnation was entered July 10, 1957.

The issue here is the amount, if any, the County of Los Angeles is entitled to receive from the award for taxes.

On December 22, 1955, an order was made authorizing plaintiff to take immediate possession and use of the Hart parcel. On February 28, 1956, plaintiff took actual possession of that parcel, demolished all improvements on the property, and immediately thereafter constructed extensive public improvements thereon. Hart paid the first installment of taxes for 1955-56, consisting of half the amount levied for that fiscal year. No taxes were paid for the second half of 1955-56 or for 1956-57 or 1957-58. The trial court apportioned the second installment for 1955-56 to February 28, 1956, the date plaintiff took possession, and denied the county's claim for the tax years 1956-57 and 1957-58. The judgment provides that the county shall receive from the award that part of the second installment of 1955-56 taxes that the period of time from January 1, 1956, to February 28, 1956 (the date of actual possession by plaintiff), bears to the period of time from January 1, 1956, to June 30, 1956, and that no taxes shall be deducted from the award for the fiscal years 1956-57 and 1957-58.

On April 29, 1955, pursuant to the court's order of that date, plaintiff took actual possession of the Bergmann parcel and

removed or demolished all improvements on the property and immediately thereafter constructed extensive public improvements thereon. No taxes were paid for the tax years 1955-56, 1956-57, or 1957-58. The trial court denied the claims of the county for taxes for those years for the reason that plaintiff went into possession prior to the beginning of the 1955-56 fiscal year.

On March 9, 1956, pursuant to order therefor, plaintiff took actual possession of the Quirk parcel and immediately removed or demolished all improvements on the property and immediately thereafter constructed extensive public improvements thereon. Quirk paid the first installment of the taxes for 1955-56. The second installment was not paid. No taxes were paid for the tax years 1956-57 or for 1957-58. The trial court apportioned the second installment of taxes for the tax year 1955-56 and denied the county's claim for the tax years 1956-57 and 1957-58. The judgment provides that the county shall receive from the award that part of the second installment of 1955-56 taxes that the period of time from January 1, 1956, to March 9, 1956 (the date of actual possession by plaintiff), bears to the period of time from January 1, 1956, to June 30, 1956, and that no taxes shall be deducted from the award for the fiscal years 1956-57 and 1957-58.

On the first Monday in March 1955, 1956 and 1957 taxes of the County of Los Angeles for the fiscal years 1955-56, 1956-57, and 1957-58, respectively, became a lien on the properties of defendants Hart, Bergmann, and Quirk. By November 1 of 1955, 1956, and 1957 assessment of the properties had been made and the taxes for each fiscal year had been levied.

The county appeals from those parts of the interlocutory judgment which in effect deny its claims for all the unpaid taxes for the fiscal years 1955-56, 1956-57, and 1957-58.

The questions are these:

1. In a proceeding in eminent domain where the condemner is a tax-exempt public corporation, does the taking of possession

by the condemner prior to the date of attachment of tax liens render such property tax-exempt?

2. In a proceeding in eminent domain where the condemner is a tax-exempt public corporation, may real property taxes be apportioned to the date of taking of possession by the condemner when such taxes became a lien on the property prior to the date of taking possession?

The county asserts that in all proceedings in eminent domain by a tax-exempt public corporation it is the date of actual passage of title to the condemner, and not the date of taking of possession, which determines the tax status of the property. Section 1253 of the Code of Civil Procedure provides that the property condemned shall vest in the plaintiff on the filing of a copy of the final order of condemnation in the office of the recorder of the county.

In all cases of taxation of realty a lien attaches annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. Rev. & Tax. Code, §§ 2187, 2192. Between the lien date and the first Monday in July the assessor must assess all taxable property. Rev. & Tax. Code, § 405. Subsequently the taxes are levied against the property. The levy usually occurs in September of each year. The first installment of such taxes is due on November 1 following the levy, and the second installment is due on February 1 of the year following. Rev. & Tax. Code, §§ 2605, 2606.

[1] When a condemner obtains an order for possession of property sought to be condemned prior to judgment and actually takes possession of the property, evicting the owners therefrom, such action constitutes a "taking" as of the date the condemner goes into actual possession. In *People v. Joerger*, 12 Cal.App.2d 665, 55 P.2d 1269, quoted from with approval in *People By and Through Department of Public Works v. Peninsula Title Guaranty Co.*, 47 Cal.2d 29, 32, 301 P.2d 1, the condemner went into possession pursuant to an order therefor prior to judgment and per-

formed extensive work upon the premises. The Joergers were the owners at the time the condemner went into possession, but at the time the final order of condemnation was entered the purchaser at a trustees' sale was the owner. The trial court ordered the award which the condemner had paid into court to be paid over to the purchaser at the trustees' sale. Reversing, with directions that the award be paid to the Joergers, the court stated (12 Cal.App. 2d at page 670, 55 P.2d at page 1272):

"In the ordinary proceeding the property is not 'taken' until the final decree is entered. Code Civ.Proc. § 1253. It is the divesting of the title of the owner and the vesting of the title in the condemnor which constitutes the 'taking' in such cases. But where, as under *our* Constitution, provision is made for a 'taking' prior to the divestiture of title, the party who owns the property at the time of such 'taking' is entitled to the compensation, under the universal rule found in *Corpus Juris*, and to which we have referred.

"It thus appears that where there is no prior physical 'taking' the property is deemed to have been 'taken' when title is divested, as possession follows the title. Where there has been a prior physical 'taking,' the subsequent divestiture of title is merely a confirmation of the original 'taking'. The effect of the constitutional amendment was merely to accelerate the 'taking'. To hold otherwise would, in effect, nullify that provision of the Constitution which provides that 'private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the *owner*'. As appellants were the owners of the property when it was so 'taken', they are entitled to the award."

We are of the opinion that *People By and Through Department of Public Works v. Peninsula Title Guaranty Co.*, supra, 47 Cal.2d 29, 301 P.2d 1, is decisive of the first question. In a proceeding in eminent



domain the state acquired for highway purposes a parcel of realty in San Mateo which had been owned by the defendants Arthur. The judgment awarded \$25,500 to the Arthurs and to the tax collector of San Mateo "as their interests may appear." The state paid the full amount into court. Later the court ordered that \$612.20 be paid from this fund to the city to satisfy a claimed assessment lien against the property. The proceeding, which culminated in the assessment lien asserted against the Arthurs' property, was commenced by San Mateo in 1952 pursuant to the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.) for the purpose of completing a drainage project affecting and benefiting the lands involved. The assessment was a special benefit assessment. On April 20, 1953, an order was made authorizing the state to take immediate possession. On June 21, 1953, the owners were required to vacate, and the state commenced the removal of buildings and the construction of an overpass thereon. On August 19, 1953, San Mateo recorded its special benefit assessment lien against the property. Judgment was entered on December 2, 1953. Holding that the assessment lien became effective after the Arthurs were deemed to have been divested of their rights in the property and that they were entitled to compensation without reduction on account of the assessment lien, the court stated (47 Cal.2d at page 31, 301 P.2d at page 3):

"The theory on which the trial court ordered payment of the city's assessment out of the award was that such an assessment is a levy on the interest of the owner; that title to the property does not pass in a condemnation proceeding until judgment is entered and recorded (§ 1253, Code Civ.Proc.); that the mere taking of possession of land prior to judgment pursuant to the provisions of article I, § 14 of the Constitution does not accelerate the passing of title; that the title was therefore in the Arthurs at the time the assessment was levied, and that the lien

attached to the award in condemnation. \* \* \*

"[47 Cal.2d at page 32, 301 P.2d at page 3.] In situations where it can be said that in addition to a mere taking of possession by the condemnor there is also such a substantial change in the status of the land taken and the condemnee's relation to it as to constitute, in effect, a divestiture for all practical purposes of all of the former owners' interest, the strict rule should not apply. \* \* \*

"[47 Cal.2d at page 33, 301 P.2d at page 4.] It should be clear from the foregoing that a distinction is drawn between the legal effect of passage of title and the 'taking' of the property involved. There is no passage of title in condemnation proceedings until an award has been made and the final judgment in condemnation filed in the office of the county recorder. § 1253, Code Civ.Proc.; Metropolitan Water Dist. [of Southern California] v. Adams, 16 Cal.2d 676, 107 P.2d 618. However, as an exception to the strict application of the law, it is recognized that a 'taking' of sufficient consequences is deemed to have the same effect of finality of transfer for specific purposes as does the passage of title. \* \* \*

"[47 Cal.2d at page 34, 301 P.2d at page 4.] It is also claimed by the city that here the acts of appropriation of the land by the state were not final and conclusive; that the state could restore the lands to their original status which would not have been possible in the Joerger case. In the present case it appears from an agreed statement of facts that pursuant to the order for possession the state 'acting through the Department of Public Works took possession of the real property \* \* \* and required the appellants to remove themselves from the premises. Immediately thereafter the State removed the buildings which had belonged to the appellants and

started construction on additions to Bayshore Highway.'

"There is no justification for a holding that the test of 'taking' is whether the lands thereafter may be restored to their original condition. In *Steinhart v. Superior Court*, supra, 137 Cal. 575, 70 P. 629 [59 L.R.A. 404], the court held that there would be a taking where the condemnor exercised a right to 'take possession of and use the land and premises sought to be condemned, during the pendency and until the final conclusion of the proceedings.' In any event it appears in the present case that the dispossession of the defendants and the acts of appropriation, destruction and damage brought about by the state prior to judgment constitute a 'taking' as contemplated by the constitutional provision."<sup>1</sup>

[2] The county seeks to distinguish the Peninsula case from the present one on the ground the lien in that case was for a special assessment rather than for general taxes. There is no difference in result between a lien on property for a special assessment benefit which cannot be enjoyed and a lien for general taxes on property which likewise cannot be enjoyed. It is well settled in this state that liens for general taxes and liens for special assessments stand on an equal footing before the law. *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 613, 197 P.2d 537.

In the case at hand, in addition to a mere taking of possession by the condemnor, there was also such a substantial change in the status of the land taken and the condemnees' relation to it as to constitute, in effect, a divestiture for all practical purposes of all of the former owners' interest. The takings in each instance were of sufficient consequences to be deemed to have the same effect of finality of transfer for

specific purposes as does the passage of title. The lands condemned were improved with substantial buildings and other improvements. Immediately on the taking of possession the city of Long Beach in each instance commenced to, and did, demolish and remove all of those improvements and immediately thereafter constructed extensive public improvements thereon.

[3] It will be noted that in Peninsula the assessment lien became effective after the condemnees were deemed to have been divested of their rights in the property by the taking of possession by the condemnor and that as a consequence the condemnees were entitled to compensation without deduction on account of the assessment lien. Thus, Peninsula disposes of the county's contention with respect to the instances at bar in which the liens for taxes became effective after the condemnor took possession. The tax lien on the Hart and Bergmann properties with respect to the fiscal years 1956-57 and 1957-58 became effective after they are deemed to have been divested of their interests in the properties, and they were entitled to compensation without deduction on account of taxes for those years. The tax lien on the Quirk property with respect to the fiscal year 1957-58 became effective after he is deemed to have been divested of his interest in the property, and he was entitled to compensation without deduction on account of the taxes for that year.

[4] There remains the question whether taxes which became a lien prior to the date the condemnor took possession are to be deducted from the compensation awarded. We are cited to numerous authorities expounding various theories on the question.

In some jurisdictions it is held that the lien is not effective until the levy is made, and that if title passes in eminent domain

1. Also see *In re Mayor, etc., of City of New York*, 59 App.Div. 603, 69 N.Y.S. 742, affirmed 167 N.Y. 627, 60 N.E. 1116; *Newman v. Blake & Knowles Steam Pump Works*, 41 App.D.C. 449; *State v.*

*Floyd*, 204 N.C. 291, 168 S.E. 222; *Milmar Estate, Inc., v. Borough of Fort Lee*, 36 N.J.Super. 241, 115 A.2d 592; *Annotation*, 45 A.L.R.2d 522, 527.

before the levy the property is not subject to taxation.<sup>2</sup> Some authorities hold that passage of title is deemed to occur on the filing of the petition to condemn on the theory that title, when vesting, relates back to the time of the filing of the petition.<sup>3</sup> Other authorities hold that a grantor-grantee relation exists between the condemnee and the condemner, and the law has been applied accordingly in determining rights with respect to apportioning real property taxes.<sup>4</sup>

In a few cases the question has arisen as to whether real property taxes for the year in which the property was taken should be apportioned, with the award or the condemnee liable for the taxes in the ratio that the part of the year passing prior to the vesting of title bore to the whole year, but not for the whole year's taxes. Under some statutes it has been held that taxes should be thus apportioned.<sup>5</sup> Many other cases hold that the taxes may not be apportioned so as to make the award liable only for that proportion of the tax year

which preceded the date title passed or was deemed to have passed.<sup>6</sup>

It is the general rule that the subjection of the award in a proceeding in eminent domain to the payment of real property taxes depends on whether such taxes became a lien prior or subsequent to the time title passed or is deemed to have passed. See cases collected 45 A.L.R.2d 529, 555. The majority view is that where the taxes became a lien prior to the passage of title or prior to the time title is deemed to have passed to the condemner, they are to be deducted from the award. Annotation, 45 A.L.R.2d 529, 555.

The variations reached in different jurisdictions seem to be due in large part to the variances in the applicable statutes. The answer to the second question at bar depends on the effect of the California statutes.

"Generally the statutes [in this state] regulating eminent domain procedure make it evident that the lienholder's interest

2. *State v. Snohomish County*, 71 Wash. 320, 128 P. 667; *City of Portland v. Multnomah County*, 135 Or. 469, 296 P. 48, 49, overruled in *City of Salem v. Marion County*, 171 Or. 254, 137 P.2d 977; *Territory v. Perrin*, 9 Ariz. 316, 83 P. 361, 362; *State v. Locke*, 29 N.Mex. 148, 219 P. 790, 791, 794, 30 A.L.R. 407; *City of Laurel v. Weems*, 100 Miss. 335, 56 So. 451; *Gachet v. City of New Orleans*, 52 La. Ann. 813, 27 So. 348, 349.

3. *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill.2d 54, 115 N.E.2d 223, 45 A.L.R.2d 518; *Sherwin v. Wigglesworth*, 129 Mass. 64.

4. *Petition of City of Seattle*, 43 Wash.2d 445, 261 P.2d 416; *Independent-Consolidated School Dist. No. 27 of Mower County v. Waldron*, 241 Minn. 326, 63 N.W. 2d 555; *Allen v. Henshaw*, 197 Okl. 123, 168 P.2d 625.

5. *Rutsen Estates v. Hudson County*, 102 N.J.L. 265, 131 A. 637; *Borough of Edgewater v. Corn Products Refining Co.*, 136 N.J.L. 664, 57 A.2d 39; *Yara Engineering Corp. v. City of Newark*, 136 N.J.Eq. 453, 42 A.2d 632; *United States v. 266.25 Acres of Land, D.C.S.C.*, 43 F. Supp. 633; *United States v. Certain Land in City of St. Louis, Mo.*, D.C.Mo., 29

F.Supp. 92; *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P.2d 236.

6. *United States v. Certain Parcels of Land in Philadelphia*, 3 Cir., 130 F.2d 782; *United States v. Alberts*, D.C.Wash., 55 F.Supp. 217; *St. Louis Provident Ass'n v. Gruner*, 355 Mo. 1030, 199 S.W.2d 409; *United States v. Certain Lands, etc.*, D.C.Wis., 49 F.Supp. 225; *United States v. 909.30 Acres of Land, etc.*, D.C.N.D., 114 F.Supp. 756; *United States v. Certain Parcels of Land, etc.*, D.C.Cal., 44 F.Supp. 936; *Collector of Revenue, etc. v. Ford Motor Co.*, 8 Cir., 158 F. 2d 354; *United States v. Certain Lands, etc.*, D.C.Mo., 69 F.Supp. 565; *United States v. Certain Land, etc.*, D.C.Mo., 86 F.Supp. 297; *United States v. 44.549 Square Feet of Land, etc.*, D.C.N.Y., 41 F.Supp. 523; *People of Puerto Rico v. Palo Seco Fruit Co.*, 1 Cir., 136 F. 2d 886; *United States v. State of Alabama*, 313 U.S. 274, 61 S.Ct. 1011, 85 L. Ed. 1327; *Thibodo v. United States*, 9 Cir., 187 F.2d 249; *United States v. Certain Parcels of Land, etc.*, D.C.Md., 61 F.Supp. 164; *United States v. 412.715 Acres of Land, etc.*, D.C.Cal., 60 F.Supp. 576; *United States v. 150.29 Acres of Land, More or Less in Milwaukee County, Wis.*, 7 Cir., 135 F.2d 878. See 2 Ops. Atty.Gen. 103.



should be protected in some manner." *Wilson v. Beville*, 47 Cal.2d 852, 855, 306 P.2d 789, 790. Revenue and Taxation Code, section 2186, reads:

"Every tax has the effect of a judgment against the person."

Section 2187 reads:

"Every tax on real property is a lien against the property assessed."

As we have seen, all tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. Rev. & Tax.Code, § 2192. Section 2193 reads:

"Every lien created by this division has the effect of an execution duly levied against the property subject to the lien."

Section 2194 reads:

"Except as otherwise provided in this chapter, the judgment is satisfied and the lien removed when, but not before,

"(a) the tax is paid or legally canceled or,

"(b) for nonpayment of any taxes, the property is sold to a private purchaser or deeded to the State."

[5-7] The lien attaches on the first Monday of March regardless of the date the assessment is made; the later fixation of the amount of taxes by levy and assessment is but a step in the enforcement of an already established lien. *County of San Diego v. County of Riverside*, 125 Cal. 495, 500, 58 P. 81; *Couts v. Cornell*, 147 Cal. 560, 564, 82 P. 194; *In re Knox-Powell-Stockton Co.*, 9 Cir., 100 F.2d 979, 983. When the amount is ascertained it relates back to the time the lien is fixed. *In re Estate of Backesto*, 63 Cal.App. 265, 270, 218 P. 597. The lien constitutes an encumbrance on the title to the land. Civ. Code, § 1114. It is security for the payment of the tax and the enforcement of the property owner's obligation to pay the tax arising on the lien date. *East Bay Municipal Utility Dist. v. Garrison*, 191 Cal. 680, 692-693, 218 P. 43; *County of San Diego*

*v. County of Riverside*, 125 Cal. 495, 500, 58 P. 81. A property tax operates *in rem* against the property. *Helvey v. Sax*, 38 Cal.2d 21, 24, 237 P.2d 269.

In *City of Santa Monica v. Los Angeles County*, 15 Cal.App. 710, 115 P. 945, the court held that property acquired by the city after the lien date but prior to the levy and assessment was not exempt from taxation as the lien attached on the first Monday in March. The court stated (15 Cal.App. at page 712, 115 P. at page 946):

"[A] lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement."

In *County of San Diego v. County of Riverside*, 125 Cal. 495, 58 P. 81, the court held that although the right of the county of San Diego to the payment of certain taxes assessed on railroad tracks did not accrue until a valid assessment had been made, the right to taxes arose on the lien date. The court stated (125 Cal. at page 500, 58 P. at page 83):

"The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but when that has been done, and the amount of the tax ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached."

[8] Where the award in a proceeding in eminent domain is paid into court, the lien attaches to the award and is removed from the condemned land. *Wilson v. Beville*, 47 Cal.2d 852, 855, 306 P.2d 789; *Pomona College v. Dunn*, 7 Cal.App.2d 227, 232, 46 P.2d 270. The lien remains a vested interest in the award, which interest must be determined by the trial court. *City of Vallejo v. Superior Court*, 199 Cal. 408, 416-418, 249 P. 1084, 48 A.L.R. 610. After the amount of award has first been determined, the court is empowered in the

same proceeding to determine the respective rights of the defendants having divided interests in the property and to apportion the award accordingly. Code Civ. Proc. §§ 1246.1, 1247(3).

We have no law which authorizes the division of the annual lump-sum taxes where the lien attaches prior to the date title passes or is deemed to pass. Section 1248(1) of the Code of Civil Procedure provides in part that the court must ascertain and assess the value of each and every separate estate or interest in the property sought to be condemned. Section 1246.1 directs the court to apportion the award in accordance with the "respective rights" therein. Also see Code Civ. Proc. § 1248 (8). The effect of the statutes, mandatory in their terms, is to direct payment to a lienor from the award of the full value of his separate estate or interest in the property condemned.

The statutory scheme would seem to leave no doubt that it was the intention of the Legislature to prevent a lien which attached on the first Monday in March of any year from being extinguished by reason of the fact that after the lien has attached title to the property passes or is deemed to pass to a tax-exempt public corporation in a proceeding in eminent domain. The obligation to pay the taxes accrues the date the lien attaches. The lien has the effect of a judgment and of an execution duly levied. The judgment is not satisfied or the lien removed until the tax is paid or legally canceled. The lien attaches to the award in the proceeding in eminent domain. A levy of an execution

results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his judgment creditor, to the exclusion of others whose rights are inferior. 19 Cal. Jur.2d 449, § 81. The purpose sought to be accomplished by the Legislature is clear and we must give effect to it.

Respondents cite *Yara Engineering Corporation v. City of Newark*, 136 N.J.Eq. 453, 42 A.2d 632, and *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P.2d 236, in support of their claim that the court properly apportioned the taxes which became a lien prior to the time title is deemed to have passed. These are two of the few cases holding that the taxes should be apportioned from the date the condemner takes possession.

Respondents contend that between the condemnee and the taxing agency the taxes which were a lien prior to the time title is deemed to have passed should be considered canceled under section 4986 of the Revenue and Taxation Code.<sup>7</sup> The contention is without merit. The procedure prescribed by the statute was not followed. No application for cancellation was ever filed. *County of San Diego v. United States*, 9 Cir., 251 F.2d 534, cited by respondents, is not in point. In that case the condemner applied for cancellation. The application was denied. The county of San Diego then sought to satisfy its tax lien from the award in condemnation. The court held the taxes were in fact canceled; that application to cancel having been made, the board of supervisors and the district attorney had no alternative but to can-

7. Revenue and Taxation Code, section 4986, in part reads: "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged: \* \* \*

"(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public

ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it.  
\* \* \*

"(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of this public ownership is not subject to sale for delinquent taxes."

cel the taxes. City of Los Angeles v. Ford, 12 Cal.2d 407, 84 P.2d 1042. Cf. United States v. State of Alabama, 313 U.S. 274, 61 S.Ct. 1011, 85 L.Ed. 1327.

We conclude that with respect to the taxes as to which a lien attached prior to the time title is deemed to have passed, the full amount of the taxes must be paid from the award.

The parts of the judgment appealed from are reversed for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



**ROHR AIRCRAFT CORPORATION, a**  
California Corporation, Plaintiff  
and Appellant,

v.

**COUNTY OF SAN DIEGO, a body Corporate,**  
and City of Chula Vista, a Municipal Corporation, Defendants and Respondents. \*

Civ. 5492.

District Court of Appeal, Fourth District,  
California.

Oct. 9, 1958.

Rehearing Denied Nov. 5, 1958.

Hearing Granted Dec. 3, 1958.

Action to recover taxes paid under an alleged illegal assessment. The Superior Court of San Diego County, Arthur L. Mundo, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Coughlin, J. pro tem., held that any title to, rights in, control over, or use of real property of Reconstruction Finance Corporation had been subject to termination, transfer, regulation or limitation by whatsoever method Congress designated, and held that whatever had been left after that corporation declared, pursuant to federal legislation,

that property was "surplus," did not constitute "real property of the corporation," within statute making such property subject to state, territorial, county, municipal or local taxation; and held that even though such corporation had never executed deed transferring title to surplus property to War Assets Administration and even though General Services Administrator purported to act for such corporation in making lease of surplus property, county and city could not assess such property for taxation.

Judgment reversed with directions.

# 1. Taxation ⇨5, 6

As a general rule, lands owned by United States or its corporate instrumentalities are immune from state or local taxes; but excepted from such immunity are those lands which Congress has consented may be subject to such taxation. Reconstruction Finance Corporation Act, § 8 as amended 15 U.S.C.A. § 607; West's Ann.Const. art. 13, § 1.

## 2. Counties ⇨190(1)

### Municipal Corporations ⇨956(1)

Any title to, rights in, control over, or use of the real property of the Reconstruction Finance Corporation was subject to termination, transfer, regulation or limitation by whatsoever method Congress designated, and whatever was left after that corporation declared, pursuant to federal legislation, that property was "surplus" did not constitute "real property of the corporation," within statute making such property subject to state, territorial, county, municipal or local taxation; and even though that corporation had never executed deed transferring title to surplus property to War Assets Administration and even though General Services Administrator purported to act for that corporation in making lease of surplus property, county and city could not assess such property for taxation. Reconstruction Finance Corporation Act, § 8 as amended 15 U.S.C.A. § 607; Joint Resolution June 30, 1945, 15 U.S.C.A. § 611 note; Surplus

\* Opinion vacated 336 P.2d 521.



Property Act of 1944, § 1 et seq. as amended 50 U.S.C.A. Appendix, § 1611 et seq.

Glenn & Wright, San Diego, for appellant.

James Don Keller, Dist. Atty. and County Counsel of San Diego County, San Diego, Carroll H. Smith, Deputy Dist. Atty., San Diego, and Manuel L. Kugler, City Atty., of the City of Chula Vista, San Diego, for respondents.

COUGHLIN, Justice pro tem.

This is an action to recover taxes paid by appellant, Rohr Aircraft Corporation, to the respondents, County of San Diego and City of Chula Vista, under an alleged illegal assessment.

During the years 1951 to 1955, inclusive, appellant occupied certain land and improvements, adjoining its plant in Chula Vista, under a written lease dated September 1, 1949, between "Reconstruction Finance Corporation \* \* \* and the United States of America, both acting by and through the General Services Administrator" as lessor, and said Rohr Aircraft Corporation, as lessee. By the provisions of this lease the lessee agreed to pay "all taxes, assessments and similar charges \* \* \* taxed, assessed or imposed upon lessor or lessee with respect to or upon the leased premises." For the fiscal years 1951-1952, through 1954-1955, the Rohr Aircraft Corporation paid taxes levied by respondents upon the leased premises, pursuant to assessments thereon against Reconstruction Finance Corporation, which was a federal agency.

Thereafter, Rohr Aircraft Corporation duly presented to the proper authorities claims for a refund of the amounts so paid, contending that the taxes levied against the property were illegal and void; the claims were denied; this action was instituted to recover the payments; judgment denying recovery was rendered; and from this judgment the corporation has appealed.

This case does not involve the taxation of the possessory interest of the lessee under the aforesaid lease. At the trial it was stipulated that any refund would be subject to an offset for taxes against such possessory interest, in accord with a formula agreed upon by the parties.

[1] Appellant contends that the taxes in question were illegal and void under the general rule that, lands owned by the United States of America, or its corporate instrumentalities, are immune from State or local taxes. *McCulloch v. State of Maryland*, 4 Wheat. 316, 4 L.Ed. 579; *Van Brocklin v. Anderson*, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845; *Clallam County, Wash. v. United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328; *Gottstein v. Adams*, 202 Cal. 581, 584, 262 P. 314. Excepted from this immunity are those lands which Congress has consented may be subject to such taxation. *Western Lithograph Co. v. State Bd. of Equalization*, 11 Cal.2d 156, 158, 78 P.2d 731, 117 A.L.R. 838. Respondents contend that the property in question comes within the exception; that it was owned by the Reconstruction Finance Corporation; that the Reconstruction Finance Corporation Act expressly subjects it to local taxation (Act Jan. 22, 1932, sec. 8, as amended, 47 Stat. 10, 15 U.S.C.A. § 607); and that it was legally taxed. Art. XIII, Sec. 1, Calif. Const.; *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash.2d 652, 171 P.2d 838, 842, 845, 168 A.L.R. 539.

The congressional waiver of immunity in question was expressed in the following terms: "*\* \* \* any real property of the Corporation shall be subject to \* \* county, municipal, or local taxation to the same extent according to its value as other real property is taxed.*" Act Jan. 22, 1932, sec. 8, 47 Stat. 8 as amended, 15 U.S.C.A. § 607. (Italics ours.)

The issue for determination on appeal is whether the premises described in the aforesaid lease constituted real property "of the" Reconstruction Finance Corporation, within the meaning of said section 8

of the Act, during the time the taxes in question were levied. A decision upon this issue necessitates a consideration of the factual and legal background involved.

In 1942 and 1943, a former Rohr Aircraft Corporation, the predecessor of appellant, by grant deeds, conveyed the real property in question to the Defense Plant Corporation, a federal agency. This agency improved the property and leased it to the grantor corporation for use during World War II. In June, 1945, the Defense Plant Corporation was dissolved and all of its assets were transferred to Reconstruction Finance Corporation, another federal agency. Joint Resolution June 30, 1945, c. 215, 59 Stat. 310, 15 U.S.C.A. § 611 note. It does not appear that the transfer of title to the real property was effected by the execution of a deed. On October 15, 1945, the lease by Defense Plant Corporation to Rohr Aircraft Corporation was terminated; the premises were vacated by the lessor; and the property was turned over to the Reconstruction Finance Corporation. On May 29, 1946, the latter corporation declared the premises to be surplus property under the Surplus Property Act of 1944. Act October 3, 1944, c. 479, 58 Stat. 765, 50 U.S.C.A. Appendix, § 1611 et seq. In the latter part of the same year the War Assets Administration, a federal instrumentality designated as a disposal agency to accept property declared to be surplus under that Act, took possession of the premises and thereafter used them as a storage facility and sales center for surplus property. No deed was executed transferring title.

The declaration by the Reconstruction Finance Corporation and acceptance of the property by War Assets Administration were done pursuant to the provisions of the Surplus Property Act of 1944, as amended and then existing, under which that corporation, and similar government agencies, had "the duty and responsibility continuously to survey the property in its control and to determine which of such property (was) surplus to its needs and

responsibilities" (Act October 3, 1944, c. 479, sec. 11, 58 Stat. 769, 50 U.S.C.A. Appendix, § 1620); and was required to promptly report to the War Assets Administration, which then was the appointed disposal agency, all such surplus property in its control not disposed of under a specific authorization inapplicable to the present situation. 50 U.S.C.A. Appendix, § 1620(c). The report in question was filed on a prescribed form entitled "Declaration of Surplus Real Property." When any surplus property was so reported the disposal agency had the "responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the War Assets Administrator." 50 U.S.C.A. Appendix, § 1620(d). The statute also provided that the "disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the War Assets Administrator". Act October 3, 1944, c. 479, sec. 15, 58 Stat. 772, as amended, 50 U.S.C.A. Appendix, § 1624(b).

The War Assets Administration occupied the premises in question exclusively during the year 1947 and the first part of 1948. The Rohr Aircraft Corporation did not occupy the property from October 15, 1945, when its lease with Defense Plant Corporation was terminated, until May, 1948, when it began renting parts thereof on a month to month basis. Subsequent negotiations with the War Assets Administration resulted in extending the areas of occupancy from time to time, and the execution of interim leases on a month to month basis, to cover such extensions. Further negotiations with War Assets Administration culminated in the execution of the lease of the whole property to appellant, the present Rohr Aircraft Corporation, by the General Services Adminis-

trator acting for the Reconstruction Finance Corporation and the United States of America. This is the lease of September 1, 1949, under which the tax payments in question were made.

In the meantime Congress had repealed parts of the Surplus Property Act of 1944, and enacted the Federal Property and Administrative Services Act of 1949 (Act June 30, 1949, c. 288, 63 Stat. 378, 41 U.S.C.A. § 201 et seq., which, in 1950, were transferred to titles 5 and 40 U.S.C.A. and renumbered) which created a General Services Administration and an Administrator of General Services (Act June 30, 1949, Title I, sec. 101, 63 Stat. 379, 41 U.S.C.A. § 211, 5 U.S.C.A. § 630); transferred the functions, property and commitments of War Assets Administration to the General Services Administration, and the functions of the War Assets Administrator to the Administrator of General Services (Act June 30, 1949, c. 288, Title I, sec. 105, 63 Stat. 381, 41 U.S.C.A. § 215, 5 U.S.C.A. § 630c); authorized the Administrator to delegate his functions, or those of the administration, to other executive agencies (Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. § 235, 40 U.S.C.A. § 486); directed that all policies, procedures and directives theretofore prescribed, with respect to surplus property, should remain in full force and effect until superseded (Act June 30, 1949, c. 288, Title VI, sec. 601, 63 Stat. 399, 41 U.S.C.A. § 203, 40 U.S.C.A. § 473); provided that "The Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter. \* \* \* The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined, by the Administrator, (or) by the executive agency in possession thereof \* \* \*

any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange (or) lease \* \* \* upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property, \* \* as it deems necessary \* \* \*." (Act June 30, 1949, c. 288, Title II, sec. 203, 63 Stat. 385, 41 U.S.C.A. § 233, 40 U.S.C.A. § 484); also provided that where disposition of surplus property "has been by lease \* \* \* the Administrator shall administer and manage such \* \* \* lease \* \* \* and may enforce, adjust, and settle any right of *the Government* (not of the Reconstruction Finance Corporation) with respect thereto in such manner and upon such terms as he deems in the best interest of *the Government*" (Act June 30, 1949, c. 288, Title II, sec. 204, 63 Stat. 388, 41 U.S.C.A. § 234, 40 U.S.C.A. § 485); and directed the Administrator to "advise and consult with interested Federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this chapter." Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. § 235, 40 U.S.C.A. § 486. (*Italics ours.*)

The lease of September 1, 1949, states that the lessors, Reconstruction Finance Corporation *and* the United States of America are "both acting by and through the General Services Administrator under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949, and the Surplus Property Act of 1944"; recites that the premises therein described have been declared "surplus property of *the Government* of the United States", and are included "in the types of surplus property which *have been assigned* to War Assets Administration for disposal"; and that the "Department of Air Force had determined that the use of the leased premises by the lease herein is necessary for the production of military equipment for the National Defense"; and



is signed by a director of disposals of War Assets Administration under a delegation of authority from War Assets Administration, which authorized him "to execute \* \* \* any \* \* \* lease \* \* \* or other instrument in writing in connection with the care, handling and disposal of surplus real property \* \* \* and do \* \* \* any other act necessary to effect the transfer of title to any such surplus real \* \* \* property \* \* \*" (*Italics ours.*)

On March 17, 1955, which was after levy of the taxes under consideration in this case, the Reconstruction Finance Corporation, by a quitclaim deed, conveyed any interest it might have in the property in question to the United States of America.

Appellant contends that, upon the filing of the surplus property declaration and the entry into possession by War Assets Administration, the land and improvements under discussion ceased to be "real property of the" Reconstruction Finance Corporation within the meaning of the statute subjecting such property to taxation by local governments.

Respondents contend that this land and improvements continued to be subject to local taxation until execution of the quitclaim deed on March 17, 1955, and cite the case of *Continental Motors Corporation v. Township of Muskegon*, 1956, 346 Mich. 141, 77 N.W.2d 370, in support of their contention. The facts of the cited case, although similar, are not identical to those in the case at bar. In the Michigan case the Defense Plant Corporation built a plant which was transferred to Reconstruction Finance Corporation by operation of law; the latter corporation declared the property surplus and it was accepted by War Assets Administration in June, 1948. Upon the dissolution of its subsidiary, which was some considerable time prior to the surplus property declaration, the Continental Motors Corporation had commenced its occupation of the property under a lease to the subsidiary from

the Defense Plant Corporation and, as related by the court, "such use and occupancy has continued to the present time. The record does not indicate that any material change in operations has taken place." *Ibid.*, 77 N.W.2d 370, 372. Although a lease dated April 1, 1949, by Reconstruction Finance Corporation, acting "by and through the War Assets Administrator", to Continental Motors Corporation, was surrendered as of November 1, 1950, from the foregoing statement by the court, and the fact that the latter corporation sought a refund of taxes assessed for the years 1953, we must conclude that it remained in continuous possession. In holding that the property there in question was subject to local taxation under section 8 of the Reconstruction Finance Corporation Act, the Michigan Supreme Court relied upon its finding that Congress consented to local taxation of federal property for the public good; "to prevent prejudice to local economic conditions" and a realization of the hardship resulting from the removal of such property from the tax rolls which is "embarrassing to the functioning of local governments, and results in throwing a heavy burden on taxpayers generally", (*Ibid.*, 77 N.W.2d 370, 374) and, respecting the case before it, stated that "Declaring the property in question to be surplus did not operate to change the general purpose or character of its use. It continued to be occupied by Continental Motors as lessee, and that corporation continued to carry out the operations indicated by the agreements made by it with the Federal government through the latter's agencies. No reason is apparent why the waiver of immunity should have been terminated at that time. From the standpoint of local economy and well-being precisely the same reasons existed as during the prior years when it was assessed under the State law and taxes were paid without question". *Ibid.*, 77 N.W.2d 370-374. The same argument would support the obviously untenable contention that the property was taxable even though, coincidentally with its surplus property declaration, the

Reconstruction Finance Corporation had executed a deed conveying it to the United States of America. The real question for determination in the cited case, as in the case at bar, was whether the property had ceased to be "real property of the corporation", within the meaning of the Act which subjects it to local taxation at the time of the levy under consideration.

Equally nonresponsive to the determinative issue was the Michigan court's consideration of the intention of Congress concerning the effect of the Surplus Property Act of 1944 on the provisions of said section 8 of the Reconstruction Finance Corporation Act, and its conclusion that "The waiver of immunity from taxation involved in the instant case came into being by express action of Congress. It is, we think, inconceivable that that body contemplated the revocation of such waiver by mere implication". Ibid., 77 N.W. 2d 370, 376. Respondents, relying on the cited case, contend that this court must determine whether or not there is an implied repeal of the express congressional consent to levy a local tax on real property of the Reconstruction Finance Corporation when it is declared surplus and custody thereof transferred to the War Assets Administration. It is our opinion that no question of an "implied repeal" is involved in the decision of this case.

The tax levies under consideration here were made against surplus real property which had been disposed of by a lease made pursuant to the provisions of the Federal Property and Administrative Services Act; the terms and conditions of which were those agreed upon in accordance with the procedure prescribed by that Act; a lease executed under the authority of the Liquidator of War Assets, a federal official acting under a delegation of authority from the Administrator of General Services, who was vested with supervision and direction over the disposition of surplus property; and a lease subject to the administration and management of

said Administrator who had authority to enforce, adjust, and settle any right of *the Government*—not of the Reconstruction Finance Corporation—with respect thereto, in such manner and upon such terms as he deems in the best interest of *the Government*.

The Department of Air Force had determined that the use of the leased premises was necessary for the production of military equipment. This was not a function of Reconstruction Finance Corporation.

It will be noted that, during the negotiations for the execution of, or occupancy under the lease, Reconstruction Finance Corporation neither was entitled to, under the law, nor did it actually control or manage the property in any way whatsoever. Prior to this lease, that corporation had declared the property "surplus to its needs and responsibilities". Thereupon War Assets Administration entered into exclusive possession of the premises; used them for its needs; and subsequently negotiated for and executed interim leases respecting the same.

The War Assets Administration, General Services Administration, and officials acting for them referred to the premises as "surplus property of *the Government*" (not of the Reconstruction Finance Corporation), and as included in the types of surplus property which *have been assigned* to War Assets Administration for disposal. (Italics ours.)

[2] The fact that the corporation did not execute a deed, quitclaiming any interest it had in the property to the United States of America, until March 17, 1955, is inconsequential to a determination of the issue at bar when compared with other facts in the case. The only title in the Reconstruction Finance Corporation was that vested by an Act of Congress transferring to it all assets of the Defense Plant Corporation Pub.Law 109, 79th Congress, i. e., Joint Resolution June 30, 1945, c. 215, 59 Stat. 310. See note 15 U.S.C.A. § 611. It does not appear that any instrument

evidencing such transfer of title ever was placed of record in this state. None was necessary. The corporation was a government agency. "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes." *Cherry Cotton Mills, Inc., v. United States*, 327 U.S. 536, 539, 66 S.Ct. 729, 730, 90 L.Ed. 835. Any title to, rights in, control over, or use of the "real property of the corporation" was subject to termination, transfer, regulation or limitation by whatsoever method Congress designated. *United States v. Allegheny County, Pa.*, 322 U.S. 174, 64 S.Ct. 908, 913, 88 L.Ed. 1209. By the Surplus Property Act of 1944, and the Federal Property and Administrative Services Act of 1949, Congress decreed that property of the corporation might be declared surplus and thereupon another agency of government would take custody and control thereof, with exclusive authority to dispose of the same, and to execute such documents as it deemed necessary to transfer title. Whatever was left after such a declaration, within reason or the intent of Congress, may not be described as "real property of the corporation". (Italics ours.) This residue was referred to as a "barren title" in the case of *United States v. Shofner Iron & Steel Works*, 9 Cir., 168 F.2d 286, 287, which involved the right of the government to bring an action for possession of real property declared surplus by the Reconstruction Finance Corporation, where the court said: "Having declared the property surplus to its needs and responsibilities, that corporation retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct." Pertinent, but not mentioned by the court, was the fact that Congress, in the Surplus Property Act, had designated an agent other than the Corporation to transfer the title, in substance reducing the status of the latter in relation

to the property to that of a fictitious entity.

If the Reconstruction Finance Corporation had been a private corporation and as such, subject to local taxation, having only that interest in the property in question which the evidence in this case shows it did have, i. e., a bare legal title subject to transfer by an agent over which it had no control, the primary rights of ownership therein being vested in the Government, as was the fact in this case, that property would not have been subject to local taxes. *Johns Hopkins University v. Board of County Commissioners of Montgomery County*, 185 Md. 614, 45 A.2d 747. It is unreasonable to believe that Congress intended to subject property to local taxation because the bare legal title thereto was vested in a governmental agency, instead of in a private corporation.

The only reasonable conclusion which may be drawn from the facts and the law in this case is that the property in question, during the years 1951 through 1955, was not "real property of the corporation" within the meaning of section 8 of the Reconstruction Finance Corporation Act, but rather, was surplus property of the United States of America.

This conclusion is in accord with the decision of the Court of Claims in *Board of County Commissioners of Sedgwick County, Kansas v. United States*, 105 F. Supp. 995, 123 Ct.Cl. 304, cited by appellant. The facts in the cited case are substantially similar to those of the case at bar except that in the former the lessee was in continuous possession before as well as after the surplus property declaration, and War Assets Administration did not dispose of the surplus property until after the levy of the taxes which were the subject of the action. The facts in the case at bar more firmly support our conclusion. In the cited case the court said (*Ibid.*, at page 1001):

"The waiver of constitutional immunity from taxes of 'real property



of the corporation' \* \* \* was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the August 21, 1946, declaration of the property as surplus \* \* \* the RFC declared that the property was surplus to its 'needs and responsibilities', and by the acceptance of April 16, 1947, was divested of all control and responsibility. At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator, 32 CFR, 1946 Supp. 8301.15(b)." And also that "The purpose of the waiver provision had been fully served when the property passed to the control of the WAA.

"Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to 'real property of the corporation' to extend to the lands in question after they passed to the responsibility and authority of WAA."

The taxes under consideration in this case were levied illegally. Appellant is entitled to recover the difference between the taxes paid and those which it should have paid on its possessory interest. *Parr-Richmond Industrial Corporation v. Boyd*, 43 Cal.2d 157, 169, 272 P.2d 16.

The judgment is reversed with instructions to the trial court to enter judgment in favor of appellant in such amount as that court may determine in accord with this decision, the stipulation of the parties respecting appellant's possessory interest, and the law in the premises.

GRIFFIN, P. J., and MUSSELL, J., concur.

164 Cal.App.2d 119

Paul L. ESTEP, Plaintiff and Respondent,

v.

BUDGER MANUFACTURING COMPANY,  
Inc., a corporation, Defendant and  
Appellant.

Civ. 5888.

District Court of Appeal, Fourth District,  
California.

Oct. 10, 1958.

Action for damages resulting from a gas explosion. From an order denying its motion for a change of venue in the Superior Court of San Diego County, Bonsall Noon, J., the defendant appeals. The District Court of Appeal, Mussell, J., held that the cause of action stated was in contract rather than in tort as respects the defendant's right to a change of venue and that the record did not establish that defendant waived its right to object to the order made on the ground of acquiescence therein, and that where the affidavits filed by defendant merely created a conflict with complaint as to the place where the contract was made and the trial court resolved the conflict in favor of the plaintiff, the reviewing court would not interfere.

Order affirmed.

#### 1. Corporations ⇨503(3)

Upon a motion for change of venue by a corporation, the burden rests upon it to show that the action has not been brought in the county authorized by the Constitution. West's Ann.Const. art. 12, § 16.

#### 2. Venue ⇨72

The right to change of the place of trial must be determined from the pleadings of record at the time a motion for change is filed. West's Ann.Const. art. 12, § 16.

#### 3. Appeal and Error ⇨1024(3)

Where affidavits filed by defendant on motion for change of venue merely created a conflict with the allegations of the complaint as to the place where the contract was made and the trial court resolved conflict in favor of plaintiff, reviewing court

would not interfere with its ruling. West's Ann.Const. art. 12, § 16.

#### 4. Action ⇨27(1)

If a cause of action arises from a breach of promise set forth in the contract, the action is "ex contractu", but if it arises from a breach of duty growing out of the contract, it is "ex delicto".

See publication Words and Phrases, for other judicial constructions and definitions of "Ex Contractu" and "Ex Delicto".

#### 5. Corporations ⇨503(3)

Where the plaintiff based its cause of action for injuries on breach of contract in that corporate defendant failed to cap a gas line ending in a water heater cabinet as agreed in the contract, the cause of action was stated in contract rather than in tort, as respects right of corporate defendant to change of venue to county of its residence. West's Ann.Const. art. 12, § 16.

#### 6. Pleading ⇨214(1)

On demurrer, the allegations of a complaint must be accepted as true.

#### 7. Appeal and Error ⇨883

One who by his conduct accepts a ruling of the trial court under circumstances amounting to acquiescence therein may not complain thereof on appeal.

#### 8. Appeal and Error ⇨883

Record did not establish as a matter of law that appellant waived its right to object to order made on its motion for change of venue by acquiescence therein. West's Ann.Const. art. 12, § 16.

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Crider, Tilson & Ruppe and Henry E. Kappler, Los Angeles, for appellant.

William F. Reed, San Diego, for respondent.

MUSSELL, Justice.

In this action for damages filed in San Diego county it is alleged in the first cause of action in the complaint that on or about March 18, 1957, plaintiff and defendant entered into a certain written contract in San

Diego county, California, whereunder defendant undertook to manufacture or alter to the specifications of plaintiff a certain Expando-Home trailer, and undertook and agreed to plumb the trailer for a water heater and to cap the lines, including the gas lines; that defendant breached the terms of the agreement in that it did not cap the gas line ending in the water heater cabinet and that as a result of said breach of the contract, when plaintiff was in said trailer, it became filled with gas and exploded, severely injuring plaintiff. In the second cause of action it is alleged that defendant expressly and impliedly represented and warranted that said trailer would be safe to use for the purposes of residing therein, including the operation of the gas stove and equipment; that when plaintiff attempted to operate the gas system in said trailer, gas escaped as a result of the failure of defendant to cap the gas line ending in the water heater cabinet, with the result that an explosion occurred. In the third cause of action it is alleged that defendant negligently and carelessly designed, constructed, inspected and manufactured said trailer; that it was delivered without the gas line leading to the water heater being capped, resulting in serious injury to plaintiff.

On March 14, 1958, defendant Budger Manufacturing Company, Inc., filed a demurrer to said complaint and a notice of motion to change venue to the County of Los Angeles. This motion was made on the ground that said defendant's principal place of business was in Los Angeles county; that the accident referred to in plaintiff's complaint occurred in San Bernardino county; and that the alleged contract referred to was made and performed in Los Angeles county. The motion was supported by the affidavit of Marvin Wolfe, sales representative of defendant corporation at Los Angeles, in which he stated that on March 18, 1957, he received a telephone call at Los Angeles from the plaintiff in San Diego in which plaintiff placed an order for the trailer involved; that the order was accepted and a copy of the con-

firmation thereof, which is the same as the alleged contract attached to plaintiff's complaint, was sent by him to plaintiff in San Diego, and that said confirmation of the order incorporated certain changes which were made as the original order had been placed by telephone. An affidavit of merits was filed by the president of the defendant company in which he included the statement that all sales by the defendant company and all deliveries were made in the County of Los Angeles.

The demurrer and the motion for change of venue were heard by the court on March 27, 1958, at which time the court signed an order denying the motion for a change of the place of trial and overruled the demurrer. Defendant Budger Manufacturing Company appeals from the order denying its motion.

[1] Appellant's rights with reference to venue are governed by section 16 of Article 12 of the State Constitution and upon a motion for change of venue by the corporation, the burden rests upon it to show that the action has not been brought in the county authorized by said section. *Pacific Bal Industries v. Northern Timber*, 118 Cal.App.2d 815, 826, 259 P.2d 465. Said section 16 of the Constitution reads as follows:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

In *Liera v. Los Angeles Finance Co.*, 99 Cal.App.2d 254, 258, 221 P.2d 737, 740, it was held that

"In considering an appeal from an order denying a motion for change of place of trial, for the purpose of the motion, the allegations of the complaint must be taken as true. *Coley v. Hecker*, 206 Cal. 22, 272 P. 1045; *Yolo County Consolidated Water Co. v.*

*Adamson*, 22 Cal.App. 493, 135 P. 48." See also *Rutherford v. New York Hanseatic Corp.*, 153 Cal.App.2d 462, 464, 314 P.2d 560.

[2, 3] In *Hayutin v. Rudnick*, 115 Cal. App.2d 138, 141, 251 P.2d 707, it is said that the right to a change of the place of trial must be determined from the pleadings of record at the time a motion for a change is filed. The affidavits filed herein by the defendant merely created a conflict with the allegations of the complaint as to the place where the contract was made. The trial court resolved this conflict in favor of plaintiff and a reviewing court will not interfere with its ruling. *Hayutin v. Rudnick*, supra, 115 Cal.App.2d at page 141, 251 P.2d at page 708; *Ward Mfg. Co. v. Miley*, 131 Cal.App.2d 603, 611, 281 P.2d 343.

Appellant asserts that "The gravamen of all three causes of action sounds in tort and the injury having occurred in San Bernardino county, the appellant corporation was entitled to a change of venue to the county of its residence."

[4] In *Eads v. Marks*, 39 Cal.2d 807, 811, 249 P.2d 257, it is held that it has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex delicto*; that where the cause of action arises from the breach of a contractual duty, the action is *delictual* notwithstanding that it also involves a breach of contract; that contractual negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the contract and sue in tort; or waive the tort and base his action on the contract alone.

In *Peterson v. Sherman*, 68 Cal.App.2d 706, 711, 157 P.2d 863, it was held that in seeking a determination as to whether an action is one in contract or in tort, the general rule is that the character of the action is to be determined by the nature of the grievance rather than by the form of the pleading; that when it is not clear to which



class the action belongs, it will ordinarily be construed in contract rather than in tort; and that the court must accept as true the allegations of the complaint.

In the instant case plaintiff bases his first cause of action on the breach of the contract in that defendant failed to cap the gas line ending in the water heater cabinet as specifically agreed in said contract, thereby alleging "a breach of a promise set forth in the contract." In *Jones v. Kelly*, 208 Cal. 251, 255, 280 P. 942, 943, it is said:

"The law imposes the obligation that 'every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.' Section 1708, Civ.Code. This duty is independent of the contract and attaches over and above the terms of the contract. This being so, the plaintiffs may treat the injury as a tort or as a breach of contract at their election. 1 Page on Contracts (2d Ed.) § 57."

The court further said, quoting from *Rich v. New York Cent. & H. R. R. Co.*, 87 N.Y. 382: "It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. \* \* \*"

[5] In the first cause of action herein plaintiff has elected to sue on the contract and the allegations of the complaint must be accepted as true. Where it is not clear to which class the action belongs it would ordinarily be construed in contract rather than in tort. We conclude that plaintiff stated a cause of action in contract rather than in tort in his first cause of action.

[6-8] Respondent herein argues that the clerk's transcript clearly indicates that after the court denied defendant's motion for change of venue, defendant argued the merits of its demurrer and submitted points and authorities therewith, and that such conduct amounted to a waiver of defendant's right to object to the order denying its motion for change of venue. In support

of this contention respondent cites *Jones v. Blonder*, 159 Cal.App.2d 316, 323 P.2d 1015. However, in that case the motion for change of venue was heard and denied on July 5, 1957, and on July 19, 1957, the demurrer was submitted and overruled, appellant being granted fifteen days to answer. Appellant did not file an answer but instead, on August 9, 1957, 21 days after the ruling on the demurrer and 35 days after the order was entered denying a change of venue, filed a notice of appeal from the latter order. In the instant case the motion for change of venue and the demurrer were set for hearing and heard on March 27, 1958. The court in its order denied the motion and overruled the demurrer, giving defendant 10 days within which to answer. The defendant filed its notice of appeal on April 1, 1958. While the court's order recites that it was made after hearing arguments of counsel, it does not state whether the arguments were on the motion or on the demurrer. It is said in *Allin v. International Alliance of Theatrical Stage Employes, etc.*, 113 Cal.App.2d 135, 138, 247 P.2d 857, that one who by his conduct accepts a ruling of the court under circumstances amounting to acquiescence therein, may not complain of it on appeal. However, in *Gallo v. Boyle Mfg. Co.*, 30 Cal. App.2d 653, 655, 86 P.2d 1067, it is said that it is true that the privilege to have the place of trial changed may be waived impliedly as well as expressly, but in order to do so there must be some act of the moving party tending to show his intent to invoke the jurisdiction of the court of first instance for the trial of questions of the fact or of law. Under the circumstances shown by the record in the instant case we cannot hold as a matter of law that appellant waived its right to object to the order made on the motion for change of venue.

The order denying the motion for change of place of trial is affirmed.

GRIFFIN, P. J., and COUGHLIN, J.  
pro tem., concur.

164 Cal.App.2d 146

In the Matter of the ESTATE OF George G.  
MUNSON, deceased.

DIVISION OF WORLD MISSIONS of the  
BOARD OF MISSIONS of the METHO-  
DIST CHURCH, Appellant and Contestant,

v.

Carrle Olive CLINE, Petitioner and  
Respondent,

Thomas T. Anderson, Petitioner and  
Respondent.

Civ. 23215.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 14, 1958.

Proceeding with respect to order determining heirship of testator who left will specifically disinheriting all his heirs and leaving his entire estate to charitable corporations with provision that if any of his heirs objected to gift to charity such heir should receive \$10 as a substitutional bequest. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment from which charity appealed. The District Court of Appeal, White, P. J., held that attempt to exclude legal heirs from participation in estate was successful only as to such property as was disposed of by will and property subject of a voidable gift to charity must be distributed under the laws of succession to heirs named in statute.

Affirmed.

#### 1. Descent and Distribution Ⓒ48

Wills Ⓒ535

Attempt to exclude legal heirs from participation in estate of testator leaving will disinheriting them was successful only as to property disposed of by will, and property which was the subject of a voidable gift to charity and not subject of substitutional gift in event of such avoidance must be distributed under laws of succession to heirs named in statute. West's Ann.Prob.Code, § 41.

#### 2. Wills Ⓒ865(3)

Where will specifically attempted to disinherit all of testator's heirs and to give

the entire estate to charity, contrary to statute permitting no more than a third of estate to go to charitable organizations in the event that certain heirs survived testator, fact that testator provided that if any heir should object to the gift to charity he should receive \$10 as a substitutional gift did not constitute such a substitutional gift as would preclude legal heirs from participation in testator's estate. West's Ann.Prob.Code, § 41.

Tanner, Odell & Taft, Los Angeles,  
for appellant.

Iverson & Hogoboom, Los Angeles, for  
respondent Cline.

Carroll & Anderson, Indio, for respondent  
Thomas T. Anderson.

WHITE, Presiding Justice.

Division of World Missions of the Board of Missions of the Methodist Church, a corporation, one of the devisees and legatees under the will of decedent, appeals from the order determining heirship, by which it was awarded only one-twelfth of the distributable estate.

George G. Munson died December 18, 1956. By his will executed August 22, 1956, he left his entire estate in equal parts to four corporate charities, of which appellant is one.

It was adjudged that said bequests are valid only as to one-third of the distributable estate. Consequently, two-thirds of decedent's estate was distributed by said judgment to the legal heirs of decedent, who are an adopted sister and the children of a deceased natural sister, the respondents herein.

The stipulation of the parties as to the charitable nature of the corporate beneficiaries under the will, and that respondents are decedent's next of kin and heirs-at-law, left no factual matter to be determined by the court.

It is urged by appellant that, despite respondents' relationship to decedent, they cannot be heard to object to decedent's

gift of his estate to charitable corporations for the reason that, included in decedent's said will which was executed more than one month and less than six months before his death are the following provisions:

"Fifth: Feeling that I have sufficiently remembered my adopted sister, Carrie Olivia Cline, aka Olive Cline, through insurance on my life, and specifically remembering the children of my deceased sister, Edith M. Davis, I have intentionally omitted all of my heirs and persons who are not specifically mentioned herein, and I hereby generally and specifically disinherit each and every such person whomsoever claiming to be or who may be lawfully determined to be my heirs at law, and if any such person or any person claiming under them or their heirs shall lawfully become entitled to any part of my estate, I hereby give and bequeath to such person or his heirs the sum of Ten Dollars (\$10.00) and no more, in lieu of any share and interest in my estate.

"Sixth: If any devisee, legatee or beneficiary under this will shall contest it or any of its parts or provisions, any share or interest given to that person or association shall be revoked and augment proportionately the shares of such of the beneficiaries hereunder as shall not have joined or participated in said contest. I further direct that any expense incurred by my executor in defending any contest in or about, or in respect to this Will, or the provisions thereof, shall be paid from my estate." Section 41, Probate Code of California, provides:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise

have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

The question raised on appeal is whether, under the provisions of testator's will, said Section 41 precludes respondents from taking by succession the residue of the estate over and above the one-third awarded to the charities named in the will.

Appellant, in its opening brief, states that "the gifts are not rendered invalid but are merely voidable, as was said in the decision of the Court in the Estate of



Haines, 76 Cal.App.2d 673, 679, 173 P.2d 693: 'at the instance of an aggrieved heir of a designated class; but such heir is not aggrieved unless he would have been entitled to take the property had it not been willed to charity.' "

In re Estate of Haines, *supra*, 173 P.2d 693, 695, however, concerns a will in which the heirs listed in section 41 had no interest in the residuary estate because of a substitutional clause naming a non-relative as legatee in case the code section should prevent the charity from taking the whole estate. The judgment therein awarded the estate to a non-relative of the decedent under the substitutional bequest and was reversed with directions that the estate be awarded to the named charity, because there was no intestacy as to any portion of the estate and the heirs were excluded from participation therein by the substitutional gift to the friend, in whom none of said estate "shall be deemed or construed to vest."

To the same effect, see In re Estate of Davis, 74 Cal.App.2d 357, 361, 168 P.2d 789, quoted with approval in In re Estate of Randall, 86 Cal.App.2d 422, 427, 194 P.2d 709, 712, as follows:

"By said language [Section 41] the Legislature has declared that where, as in this case, charitable gifts in a will are voidable, the portion of the estate represented thereby shall pass to a surviving relative only to the extent that such relative takes the same under a substitutional or residuary bequest or devise or, if there be no such substitutional or residuary bequest or devise, under the laws of succession if there be no other effective disposition thereof in the will."

Respondents cite and rely upon the rule that "a testator must do more than merely evince an intention to disinherit before the heir's right of succession can be cut off—he must make a valid disposition of his property," followed in In re Estate of Fritze, 85 Cal.App. 500, 505, 259 P. 992, 994. Appellants, however, urge that In re Estate of

Fritze, *supra*, is inapplicable to the facts of the instant action because of the provision in decedent's will in the proceeding now under consideration that anyone determined to be his heir entitled to object to his gift to charity shall receive \$10.00 "as a substitutional bequest."

[1] An attempt to exclude legal heirs from participation in the estate of decedent is successful only as to such property as is disposed of by the will. Property which is the subject of a voidable gift to charity, and not the subject of a substitutional gift in the event of such avoidance, must be distributed under the laws of succession to the relatives named in said Section 41. In re Estate of Davison, 96 Cal. App.2d 263, 267, 215 P.2d 504; In re Estate of Dunn, 120 Cal.App.2d 294, 296, 260 P.2d 964.

In re Estate of Clippinger, 75 Cal.App.2d 426, 171 P.2d 567, was an appeal by decedent's half sister from a judgment determining heirship, by which, notwithstanding the provisions of section 41 that only one-third of an estate may be given to charity by a will made less than six months before death, the trial court awarded only \$25 to appellant, because decedent's will gave \$25 each to her brother and her sister describing them as "practically strangers," and left the "balance" to an Eastern Star Home. At page 433 of 75 Cal.App.2d, at page 572 of 171 P.2d, Mr. Justice Wilson, speaking for the District Court of Appeal, said: "\* \* \* The death of the testator having occurred within six months after the execution of the will, the home is entitled to only one-third of the residue of the estate, and the testator died intestate as to the remaining two thirds." The judgment was reversed, and, 75 Cal.App.2d at page 436, 171 P.2d at page 573 the trial court was directed to amend its findings and conclusions to show that decedent died intestate as to two-thirds of her estate and that appellant should receive that two-thirds.

[2] It is appellant's contention that decedent's gift in the instant action of \$10

only, to any heir who objects to the testator's gift to charity is such a substitutional gift as to preclude the legal heirs from participation in decedent's estate. Under the Dunn and Davison decisions, *supra*, if in addition to decedent's conditional bequest of the \$10 to each of his heirs he had, as in *In re Estate of Haines*, *supra*, added to the substitutional clause a gift of the residue to a non-relative, then appellant's position might be sustained. However, in the instant action, the gift to the charities is valid (as against the respondents) only as to one-third of decedent's estate; as to the other two-thirds the substitutional clause disposes of \$10 only, to each of the respondents; and as to the balance of the estate, decedent died intestate.

In *Re Estate of Heney*, 66 Cal.App.2d 867, 869, 153 P.2d 427, Mr. Justice McComb, speaking for the District Court of Appeal, said that where the will disposed of only a portion of the estate and included the provision that "anyone not mentioned in this will and who is related to me will receive not more than (\$10.00) Ten Dollars each," nevertheless testator's brothers were entitled to succeed to the estate. Hearing was denied by the Supreme Court.

In *Re Estate of Lefranc*, 38 Cal.2d 289, 295, 239 P.2d 617, 620, Mr. Justice Schauer, speaking for the Supreme Court, had this to say:

"Under the provisions of various contest clauses heretofore considered by the courts it has been held that whether one in the position of Adele is entitled to succeed as an heir at law to any portion of the legacy \* \* \* which she forfeited depends upon whether the testatrix made other valid disposition thereof. It has been said that 'A testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property.' (citing cases) Thus, in *In re Estate of Mathie*, [64 Cal.App.2d 767, 781, 149 P.2d 485], it is held that inasmuch as the entire estate, after payment of

debts and expenses, was left in equal shares to two persons without other bequests, the will contained no residuary clause, and a legatee who had forfeited his legacy by contesting the will was nevertheless entitled to receive a share of such legacy under the laws of intestate succession. \* \* \*

In *re Walkerly's Estate*, 108 Cal. 627, 652, 41 P. 772; *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 207, 92 P. 184.

The will in the instant action gives to respondent relatives only \$10 each, and expresses the intention to disinherit them in the event that all the property is disposed of as attempted by the will. Since, under the circumstances here shown, appellant can take only one-third of the estate, and no disposition is made of the residue, it must be presumed that the testator expected his next of kin named in said Section 41 to take the other two-thirds of his estate under the laws of succession.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



164 Cal.App.2d Supp. 853

ARC INVESTMENT CO., a California corporation, Plaintiff and Appellant,

v.

Fred TIFFITH et al., Defendants,  
Fred Tiffith, Defendant and Respondent.

C. A. 9567.

Appellate Department, Superior Court,  
Los Angeles County, California.

Oct. 1, 1958.

Action to recover upon note wherein judgment debtor filed motion for order restraining judgment creditor from executing any further attachments or writs of execution upon debtor's wages pending further

order of court. The Municipal Court, Los Angeles Judicial District, Lucius P. Green, J., sustained debtor's motion and creditor appealed. The Appellate Department of the Superior Court, Los Angeles County, David, J., held that order restraining judgment creditor from executing any further attachments or writs of execution upon judgment debtor's wages pending further order of court, did not restrain creditor's right to execution generally, did not curtail proceedings for examination of judgment and was not too broad.

Order affirmed.

#### 1. Exemptions ☞127

Affidavit contesting claim of wages as exempt on information and belief, is hearsay, and court may dispose of exemption claim on affidavit of debtor alone if there is no other evidence. West's Ann.Code Civ.Proc. § 690.11.

#### 2. Execution ☞459

Wrongful levy is regarded as tort, and levy is wrongful where it is made on property of judgment debtor which is exempt.

#### 3. Process ☞168

Wrongful use made of process rightfully issued may constitute an abuse of process.

#### 4. Courts ☞189(4)

As court of record established by Constitution, municipal court shares in power of all courts to control and prevent abuses in use of their process, and this power does not depend upon constitutional or legislative grant, but is inherently necessary to orderly and efficient exercise of jurisdiction. West's Ann.Const. art. 6, §§ 1, 11.

#### 5. Process ☞18

Power to control its process does not depend upon court's equitable jurisdiction, but is incident to jurisdiction to hear, decide, and give effect to judgments of all kinds.

#### 6. Courts ☞188(3)

If order restraining judgment creditor from executing any further attachments or

writs of execution upon judgment debtor's wages in absence of further order of court was equitable in character, it was consistent with statute which vests municipal court with jurisdiction over equitable matters asserted defensively. West's Ann.Code Civ.Proc. § 89 and subd. 2.

#### 7. Execution ☞172(5)

Order restraining judgment creditor from executing any further attachments or writs of execution upon judgment debtor's wages pending further order of court, did not restrain creditor's right to execution generally, did not curtail statutory proceedings for examination of judgment debtor and was not too broad. West's Ann.Code Civ.Proc. § 714.

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Paris & Paris, Los Angeles, for appellant.

Ellery E. Cuff, Public Defender, Los Angeles, for respondent.

DAVID, Judge.

Plaintiff holds a default judgment against defendant upon a promissory note for indebtedness, not incurred for a necessary of life. Defendant's wages in the hands of his employer were garnished on three successive occasions, and since judgment, one execution levy was made upon them. In each instance, defendant claimed full exemption under C.C.P. § 690.11 by verified affidavits, and a corporate officer of the plaintiff corporation filed a counteraffidavit, in a stock form, asserting "that affiant is informed and believes and therefore alleges that the moneys claimed exempt by defendant are not necessary for his support or that of his family."

The defendant's verified affidavits established that the earnings garnished were his weekly wages as a janitor, earned within the 30 days prior thereto, urgently needed for the support of himself and his family, consisting of a wife and seven minor children. The needs listed in each instance far exceeded the levy. Except upon the last levy, the parties did not set the contested



claim of exemption for hearing, whereupon pursuant to C.C.P. sec. 690.26(7) the sum held each time by the County Marshal was released to defendant after the statutory delay. Upon the last levy, affidavits were filed as in the previous instances, but defendant brought on the hearing on the exemption claim, and in addition, moved the court for an order restraining plaintiff from executing any further attachments or writs of execution upon defendant's wages, pending further order of the court.

Defendant's motion was supported by an affidavit whose statements were sufficient to support the conclusion that further writs against defendant's wages will not reach any sums not exempt under C.C.P. sec. 690.11, and that the only purpose of further writs would be to prejudice defendant in his employment, and to persecute, annoy, harass and inconvenience him, and put him to expense in asserting over and over again the exempt character of the wages; and that there are no circumstances at the present time or in the foreseeable future which would alter the exempt status of defendant's wages as janitor. This affidavit was not controverted; the plaintiff did not appear at the hearing; other testimony was received on defendant's behalf, and the order requested was granted, and all of the claims of exemption asserted to the various levies were allowed.

[1] (1) Under C.C.P. sec. 690.26(9), the affidavits claiming exemption, and any contesting it, are the pleadings on the motion to determine the claim of exemption. That is not all, for the code provides "both shall be received in evidence." An affidavit contesting the exemption on information and belief, being hearsay (*Enter v. Crutcher*, 1958, 159 Cal.App.2d Supp. 841, 323 P.2d 586), a trial court may dispose of the exemption claim on the affidavit of the debtor alone, if there is no other evidence. Continued use of contesting affidavits made only on information and belief, with no revelation what the information is, with consequent delay in release of sums in the hands of the Marshal to defendant, is a

relevant circumstance in determining whether there has been an abuse of process.

[2,3] (2) "Successive seizures of exempt property such as the earnings of the debtor may give rise to an action for abuse of process." (21 Cal.Jur.2d 536; 1 Am. Jur. Abuse of Process, sec. 16.) A wrongful levy is regarded as a tort; and a levy is wrongful where it is made on property of the judgment debtor which is exempt. 33 C.J.S. Executions § 453, p. 836. Abuse of process is a contempt of court. C.C.P. sec. 1209, subd. 4. Wrongful use made of process rightfully issued may, as here, constitute an abuse of process. *Tranchina v. Arcinas*, 1947, 78 Cal.App.2d 522, 525, 178 P.2d 65, 67.

[4] (3) As a court of record, established by the Constitution, Art. VI, secs. 1, 11, a municipal court shares in "the inherent power [of all courts] to control and prevent abuses in the use of their process." (Italics added.) *Golden Gate Candy Products Co. v. Superior Court*, 1934, 1 Cal.App.2d 426, 432, 36 P.2d 834, 836; cf. *Hart Brothers Co. v. County of Los Angeles*, 1938, 31 Cal.App.2d Supp. 766, 771-772, 82 P.2d 221, 224. This power does not depend upon constitutional or legislative grant but is inherently "necessary to the orderly and efficient exercise of jurisdiction." *Corum v. Hartford Acc. & Indem. Co.*, 1945, 67 Cal.App.2d 891, 897, 155 P.2d 710, 713, 14 Am.Jur. p. 370, par. 171. For other declarations of the inherent powers of courts of record, consult: *Millholen v. Riley*, 1930, 211 Cal. 29, 34, 293 P. 69, 71; *Barton v. State Bar*, 1930, 209 Cal. 677, 680-681, 289 P. 818, 819; *Brydonjack v. State Bar*, 1929, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; *Kirstowsky v. Superior Court*, 1956, 143 Cal.App.2d 745, 753, 300 P.2d 163; *Lincoln v. Didak*, 1958, 162 Cal. App.2d 625, 328 P.2d 498.

[5,6] (4) Appellant contends the Municipal Court exercised equitable jurisdiction without right, citing C.C.P. § 89. The power to control its process does not depend upon a court's equitable jurisdiction; it is incident to the jurisdiction to hear,

decide, and give effect to judgments of all kinds. In this case, the request for the restraining order was made in defense against the repeated assertion that the wages of defendant were subject to plaintiff's claim. If the order is equitable in character, it is consistent with C.C.P. § 89(2) which vests the Municipal Court with jurisdiction over equitable matters asserted defensively.

[7] (5) Appellant contends the order was "too broad". The "further order of the court" is available to the plaintiff at

any time that it may be made to appear reasonably possible that a proposed levy will reach non-exempt wages. The right to execution generally is not restricted by the order. Proceedings for examination of the judgment debtor are available (C. C.P. sec. 714.).

The order of February 5, 1958, granting the claims of exemption filed by the defendant, and ordering that further levies on personal earnings be restrained, except on order of court first obtained, is affirmed.

BISHOP, P. J., and SWAIN, J., concur.

51 Cal.2d 1

**R. W. AGNEW, Appellant,**  
v.

**CITY OF LOS ANGELES (a Municipal Corporation) et al., Respondents.**

**L. A. 24734.**

Supreme Court of California,  
In Bank.

Oct. 17, 1958.

As Modified on Denial of Rehearing

Nov. 14, 1958.

Proceeding to enjoin city from enforcing sections of Municipal Code and Electrical Code of city. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment in favor of defendants, and plaintiff appealed. The Supreme Court, McComb, J., held that state has occupied field of licensing electrical contractors and city ordinances requiring registration of electrical contractors and defining regulations to which such certificates of registration should be subject were invalid to extent that they conflicted with Business and Professions Code.

Reversed.

Shenk and Spence, JJ., dissented.

Opinion, 323 P.2d 165, vacated.

See also 156 Cal.App.2d 238, 319 P.2d 400.

### 1. Appeal and Error ⇨100(1)

Where minute order denying motion for temporary restraining order and for preliminary injunction dealt solely with right to preventive relief pending final judgment and denied such relief, entry of judgment rendered question of right to interim relief moot and order was not appealable.

### 2. Municipal Corporations ⇨592(1)

A local municipal ordinance that is in conflict with general law adopted by Legislature is invalid if it attempts to impose additional requirements in a field that is pre-empted by the general law. West's Ann.Const. art. 11, § 11.

### 3. Municipal Corporations ⇨592(1)

State has occupied field of licensing electrical contractors and city ordinances requiring registration of electrical contrac-

tors and defining regulations to which such certificates of registration should be subject were invalid to extent they conflict with Business and Professions Code. West's Ann.Bus. & Prof.Code, §§ 155, 7000-7145, 7026, 7028, 7030, 7072, 7090-7122, 7110, 7137; West's Ann.Const. art. 11, § 11.

### 4. Municipal Corporations ⇨592(1)

A municipality may tax electrical contractors, but, in view of fact that state had occupied field of licensing electrical contractors, city could not require fees that were exacted not as a business tax but as price of license that city could not require. West's Ann.Bus. & Prof.Code, §§ 155, 7000-7145, 7026, 7028, 7030, 7072, 7090-7122, 7110, 7137; West's Ann.Const. art. 11, § 11.

R. W. Agnew, in pro. per., for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Ralph J. Eubank, Deputy City Atty., Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment denying him an injunction that would restrain defendants from enforcing certain sections of the Municipal Code and the Electrical Code of the City of Los Angeles.

The trial court sustained defendants' demurrer to the complaint without leave to amend and entered judgment in favor of defendants.

[1] Plaintiff also appeals from a minute order denying his motion for a temporary restraining order and for a preliminary injunction. Since this order dealt solely with the right to preventive relief pending final judgment and denied such relief, the entry of judgment rendered the question of the right to interim relief moot. The appeals from the order must therefore be dismissed.

*Facts:* Plaintiff is an electrical contractor, duly licensed by the state pursuant to the provisions of sections 7000-7145 of the Business and Professions Code. The Business and Professions Code (div. 3, ch. 9), sometimes called the "Contractors' License



Act," creates a "Contractors' State License Board," referred to as the board (Bus. & Prof. Code, § 7000); defines those coming within the jurisdiction of the board, including electrical contractors (§ 7026); prohibits any person from engaging in the business or acting in the capacity of a contractor without first having obtained a state license, and makes it a misdemeanor to do so (§§ 7028, 7030); provides for investigation and examination of applicants for license (§ 7072); requires the payment of an application fee, annual renewal fees, and penalties (§ 7137); makes elaborate provision for investigation of the acts of contractors, accusations against them, causes for disciplinary action, hearings, review, discipline, prosecution of violations of any law, and renewal or reissuance of suspended or revoked license (§§ 155, 7090-7122); and vests broad powers in the board relative to the licensing and regulation of contractors (§§ 7000-7145).

Wilful or deliberate disregard and violation of the building laws of the state, or of any political subdivision thereof, constitutes a cause for disciplinary action. (§ 7110.) Section 7071.5 provides that before reinstatement after disciplinary action the board may require the applicant to give a surety bond or make a cash deposit conditioned upon his compliance with the provisions of the act. Every person injured by the unlawful acts or omissions of such contractor may maintain an action on the bond or a claim on the deposit.

The action instituted by plaintiff challenges the constitutionality of, and seeks to obtain an injunction restraining defendants from enforcing against him, the provisions of sections 93.0201, 93.0204, 93.0205 (2), 93.0501, 93.0504 and 93.0505 of the Electrical Code of the City of Los Angeles and sections 11.00, 21.03, 21.06, 21.08, 21.09, 21.12(a), 21.12(b), 21.188 and 21.190 of the Municipal Code of defendant city.

Section 93.0201 provides that no person shall install, alter, reconstruct or repair any electric wiring regulated by defend-

ant city's Electrical Code without a permit from the Department of Building and Safety, hereinafter referred to as the department.

Section 93.0204 requires that an application for such permit shall be made to the department on a form furnished by the latter. The required information consists of a description of the proposed electric wiring, plans and specifications and a suitable diagram, and "such additional information as may be considered necessary by the Department for the proper enforcement of the provisions of this Code."

Section 93.0205 enumerates those to whom permits may be issued, including (subsection (a)-2) electrical contractors "registered" with the department.

Section 93.0501 is entitled "Contractor Registration" and provides in subsection (a) that "Before any contractor licensed by the State of California shall be issued any permits, he shall be registered with the Department. The applicant shall provide sufficient information to enable the Department to determine if there is compliance with all applicable City and State Laws.

"(b) To register as a contractor, the responsible managing officer or responsible managing employee shall personally appear at an office of the Department and provide the following information:

"1. The business name and address as listed by the Contractors State License Board; and

"2. The names of the owners or officers of a corporation; and

"3. The Contractors State License with the number and classification; and

"4. The signature of the responsible managing officer or the responsible managing employee as listed by the Contractors State License Board; and

"5. License Tax Registration Certificate number.

"(c) The registrant shall notify the Department within 10 days of any change in the facts required by Subsection (b).

"(d) No registration shall authorize any person to do work which is not within the specific classification of the registration.

"(e) Every such registration shall expire on June 30 of each year."

Section 93.0504 defines the regulations to which the foregoing certificate of registration shall be subject:

"1. Certificates of Registration shall not be transferable.

"2. Certificates of Registration shall become void 30 days after the holder who qualified by examination or experience ceases to have effective control over the work performed.

"3. Every Certificate of Registration shall expire on June 30 of each year unless sooner revoked or suspended by the Board. A Certificate of Registration may be renewed within 30 days after expiration without examination upon the payment of the annual registration fee as prescribed in this Code.

"4. The Board may revoke or suspend any Certificate of Registration for failure, refusal, or neglect of the holder to comply with the provisions of this Code or any provision of Section 98.00 of the Municipal Code as set forth therein.

"5. No Certificate of Registration shall authorize any person to do work which is not within the specific classification of the Certificate of Registration."

Section 93.0505 has no application to the issue presented on this appeal.

[2] *The Law.* A local municipal ordinance that is in conflict with a general law adopted by the Legislature is invalid if it attempts to impose additional requirements in a field that is preempted by the general law. Cal.Const. art. XI, § 11; Tolman v. Underhill, 39 Cal.2d 708, 712 [4], 249 P.2d 280; Pipoly v. Benson, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 663 [2], 262 P. 334; Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 9 et seq., 134 P. 985, 47 L.R.A.,N.S., 892;

James v. Myers, 68 Cal.App.2d 23, 27 [1], 156 P.2d 69.

*Question: Has the state, by the adoption of division 3, chapter 9, sections 7000-7145, of the Business and Professions Code, preempted the field of regulating contractors?*

*Yes.* The sections of the Electrical Code of defendant city provide:

i. No person shall install wiring without a permit from the Department of Building and Safety. (The Business and Professions Code prohibits any person from engaging in the business or acting in the capacity of a contractor without first having obtained a license and makes it a misdemeanor to do so [§§ 7028, 7030].)

ii. To obtain a permit, one must submit proposed plans and "such additional information as may be considered necessary by the Department for the proper enforcement of the provisions of this Code." (The Business and Professions Code provides for investigation and examination of applicants for licenses [§ 7072].)

iii. To obtain a permit, the contractor must have registered with the department, and in order to register the contractor must appear personally at an office of the department and provide certain information, including his "License Tax Registration Certificate number." (The Business and Professions Code, in addition to prohibiting a person from engaging in the business or acting in the capacity of a contractor without first having obtained a state license, provides for investigation and examination of applicants for licenses.)

iv. In order to obtain a license tax registration certificate number, the contractor must pay the city clerk a fee based on the amount of his gross receipts. (The Business and Professions Code requires the payment of an application fee, annual renewal fees, and provides for certain penalties [§ 7137].)

v. The registration certificate of the contractor can be revoked or suspended for "failure, refusal, or neglect of the holder

to comply with the provisions of this Code or any provisions of Section 98.00 of the Municipal Code as set forth therein." (The Business and Professions Code makes elaborate provision for investigation of the acts of contractors, accusations against them, causes for disciplinary action, hearings, review, discipline, prosecution for violations of any law, and renewal or reissuance of suspended or revoked license [§§ 155, 7090-7122], and vests broad powers in the board relative to the licensing and regulation of contractors [§§ 7000-7145].)

[3] It clearly appears from the foregoing that the state has occupied the field of licensing electrical contractors and that therefore the ordinances here under attack are invalid to the extent that they conflict with the Business and Professions Code. *Agnew v. City of Culver City*, 147 Cal.App. 2d 144, 304 P.2d 788; *Lynch v. City of Los Angeles*, 114 Cal.App.2d 115, 249 P.2d 856; *City & County of San Francisco v. Boss*, 83 Cal.App.2d 445, 189 P.2d 32.

The only material difference between the ordinance held invalid in *Agnew v. City of Culver City*, *supra*, and the ordinance here involved is that the former imposed a fee of \$100, while in the instant case the fee varies according to the amount of the contractor's gross receipts, the minimum being \$12.

In *City & County of San Francisco v. Boss*, *supra*, the fee was only \$10, but the court, in holding the ordinance invalid, pointed out, 83 Cal.App. at page 446, 189 P.2d at page 33 that the ordinance said: "Any certificate of registration may be revoked for any act of the person so registered showing said person to be *dishonest* or guilty of the violation of any rule or regulation, either *state* or municipal, regulating or governing contractors." (Italics added.) In such case, the court held that the state law had preempted the field. The only differences between the language just quoted and the corresponding language in the ordinance under attack are, in effect, the foregoing italicized words.

The foregoing cases are directly in point and lead to the inescapable conclusion that

the state has preempted the field here involved and that defendant city's ordinances are therefore invalid.

[4] Of course, as contended by defendants, a municipality may tax electrical contractors, as other trades, professions and businesses are taxed. The fees in the present case, however, are exacted not as a business tax but as the price of a license that the city cannot require.

The judgment is reversed. The purported appeals from the order denying motions for a temporary restraining order and for a preliminary injunction are dismissed. Plaintiff is to recover his costs on appeal.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

SHENK, Justice (dissenting).

The questions involved in this case are whether the City of Los Angeles can impose a business license tax on a person conducting an electrical contracting business within the city, and whether the city can establish and enforce local regulations as to the quality and character of installations by one who is licensed to conduct that business within the state.

It is conceded that insofar as the state has occupied the field the city cannot impose regulations which are conflicting or even concurrent therewith. *Tolman v. Underhill*, 39 Cal.2d 708, 712, 249 P.2d 280. We are required then, to determine the extent to which the state purports to regulate in these areas.

First, directing attention to the imposition of the business license tax alone, there can be no question but that the state in providing for the licensing of electrical contractors does not purport to levy a license tax on the doing of business by an electrical contractor. Also, the decisions in this state are uniform in holding that the imposition of a license tax by a municipality is not a preemption of the state-wide licensing provisions. In *re Galusha*, 184 Cal. 697, 699, 195 P. 406; *City of San Mateo v. Mullin*, 59 Cal.App.2d 652, 654, 139



P.2d 351. The challenged sections which impose the license tax (Municipal Code of the defendant city, §§ 11.00, 21.03, 21.06, 21.08, 21.09, 21.12(a), 21.12(b), 21.188 and 21.190) are, on their face, the usual type of license tax. They provide generally that the tax be paid by every person who is engaged within the city in any one of a great variety of business activities, including electrical contractors; that the minimum tax is \$12 (representing 0.1% of the first \$12,000 of gross receipts); that the minimum tax is paid in advance annually, and that upon payment a "License Tax Registration Certificate" is issued.

It is established that freeholder charter cities are empowered to exact business license taxes for revenue purposes. This court has recently held: "It is well settled that the power of a municipal corporation operating under a freeholders' charter \* \* \* to impose taxes 'for revenue purposes, including license taxes, is strictly a municipal affair' pursuant to the direct constitutional grant of the people of the state, Const. art. XI, sec. 6; *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal.2d 516, 524, 95 P.2d 138, 143, and that 'the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and in the charter itself.'" *Ainsworth v. Bryant*, 34 Cal.2d 465, 469, 211 P.2d 564, 566; see also *City of Glendale v. Trondsen*, 48 Cal.2d 93, 99, 308 P.2d 1; *Ex parte Braun*, 141 Cal. 204, 213, 74 P. 780. From the foregoing it is apparent that the State Contractors Licensing Act (Bus. & Prof. Code, § 7000 et seq.) not only was not intended to, but could not limit the city's power to levy and collect a proper business license tax. In *Franklin v. Peterson*, 87 Cal.App.2d 727, 197 P.2d 788, the court had before it the same provisions of the Los Angeles Municipal Code that are now before this court. In refuting the contention of an attorney licensed to practice law under a general statute that the imposition of the license tax was a preemption of the state-wide statute, the court stated 87 Cal. App.2d at pages 731-732, 197 P.2d at page Cal.Rep. 329-330 P.2d-51

790: "Conceding that a license requirement cannot be imposed upon a lawyer, nor his business be regulated by ordinance, the tax provided for in the ordinance here under consideration is levied upon the business of practicing law, rather than upon a person because he is an attorney at law. A license to practice law does not carry with it exemption from taxation. \* \* \* The Los Angeles ordinance does not attempt to regulate the professions, business or occupations which are subject to the tax. It provides only for a license for revenue purposes, and is not a regulatory measure affecting the business or profession so taxed." The *Peterson* case was cited with approval by this court in *City of Los Angeles v. Rancho Homes, Inc.*, 40 Cal.2d 764, 771, 256 P.2d 305.

In spite of the foregoing uniform and overwhelming holdings to the contrary the majority of this court has, without mention of the established law and the many decisions pertaining thereto, declared the invalidity of the license tax provisions, as well as the regulatory provisions of the Electrical Code of the City of Los Angeles. The majority's conclusion that license taxes in the present case "are exacted not as a business tax but as the price of a license that the city cannot require," is definitely contrary to the settled law of this state. It is urged in support of such a conclusion that the city's License Tax Registration Certificate is nothing more than the city's permit to engage in business, but such a contention can be made only upon the failure to recognize the purpose and effect of the certificate. That purpose is required by section 21.08 to be stated on the face of each certificate as follows: "This license tax registration certificate signifies that the person named on the face hereof has fulfilled the requirements of section 21.03 L.A.M.C., by registering with the City Clerk for the purpose of paying license taxes for the classification of business for which the certificate is issued. \* \* \*" Thus, it must be conceded that the certificate is not a permit to do business, and that the exaction of the license

tax revenue purposes is not an encroachment upon the state's exclusive right to determine who shall engage in electrical contracting. Conversely, no one will argue that the State Contractors Licensing Act is a revenue raising measure which prohibits a proper local revenue measure. The purpose of the act is "for the safety and protection of the public" against imposition, *Gatti v. Highland Park Builders, Inc.*, 27 Cal.2d 687, 690, 166 P.2d 265, 266. \* \* \* *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628, 632, 204 P.2d 37, 40. Obviously, the collection of fees for administrative costs pursuant to such an exercise of the state's police power is not intended as a revenue raising measure.

In addition to the authority vested in the City of Los Angeles to enact revenue raising measures, power is also vested in the city to enact, under its police power, measures for the protection of its citizens, their lives and property. The challenged provisions of the electrical code are proper exercises of that power. An examination of the provisions in question discloses that they only regulate the quality and character of electrical installations, and do not attempt to determine the qualifications of those persons who may make such installations.

Among others the plaintiff relies on the case of *Horwith v. City of Fresno*, 74 Cal. App.2d 443, 168 P.2d 767, for the proposition that a local ordinance is in conflict with general law if it attempts to impose requirements in a field fully occupied by the general state-wide law. Nevertheless it was said in that case, 74 Cal.App.2d at page 449, 168 P.2d at page 770: "This does not limit the right of local governmental agencies to protect property and life through the enforcement of local regulations as to the quality and character of the installations. The right to enforce local ordinances is still in the hands of municipalities through the power of inspections and permits."

In the present case it appears that objection is primarily made to the use of the term "permit"; but it is apparent that the permit required by the electrical code is one for which every state licensed elec-

trical contractor may qualify. No fee is required to be paid, no bond is required to be posted, no examination is made, no investigation is conducted and no suspension is provided for upon a showing of lack of good character or a violation of general or local law. Nevertheless the majority concludes that the provisions constitute an invasion of the general licensing statutory provisions, and cite in support thereof decisions of the District Court of Appeal all of which, on examination, are distinguishable and not in point.

In *Lynch v. City of Los Angeles*, 114 Cal.App.2d 115, 249 P.2d 856, 858, the then existing provisions of the Los Angeles Electrical Code were declared invalid on the ground that: "The ordinance regulations \* \* \* requiring payment of the so-called 'permit service fee' and the posting of a bond, are clearly objectionable as an attempt 'to legislate upon a subject intended to be fully covered by an act of the legislature.'" The present provisions of the city's electrical code were adopted following the decision in the *Lynch* case and contain none of the provisions held to be objectionable in that case. In *City & County of San Francisco v. Boss*, 83 Cal.App.2d 445, 189 P.2d 32, 33, it appears that state-licensed contractors were required by the local ordinance to acquire a registration certificate; that an application fee of \$10 was required; that an investigation of the factual matter was to be conducted and the certificate issued only "if the facts set forth in said application are found to be true," and that the certificate was to be revoked upon showing "said person to be dishonest or guilty of the violation of any rule or regulation, either state or municipal, regulating or governing contractors." In the third decision relied on by the majority, *Agnew v. City of Culver City*, 147 Cal.App.2d 144, 304 P.2d 788, 790, it appears that an ordinance of the City of Culver City provided "for licensing and regulating electrical contractors and fixing fees to be charged electrical contractors as a condition precedent to engaging in electrical contracting in Culver City. \* \* \*" A license fee of \$100 was required to obtain a business license to do work as an electrical contractor in the city.

**Ernest N. SOWELL, Plaintiff and Appellant,**  
**v.**

**Marleen L. SOWELL, Defendant and Respondent.**

**Civ. 18096.**

District Court of Appeal, First District,  
Division 2, California.

Oct. 20, 1958.

The provisions of the city's electrical code here challenged have none of the objectionable features of the foregoing cases. They represent reasonable measures to insure compliance with the municipality's endeavors to protect the lives and property of its citizens and other inhabitants. Certainly it should not be said that a municipality cannot determine that one who professes to be a state-licensed contractor is in fact in good standing as such and is licensed in a particular category; that the installations such a contractor proposes to make will conform both to his license and to applicable building codes; that statistical information concerning the contractor be recorded and made available to those who may be damaged by his failure to comply with applicable local regulations, and that the contractor has complied with proper local business license tax provisions. The challenged provisions in the present case provide only for the foregoing determinations, and the required permit is nothing more than evidence that such determinations have been made or will be made by the municipality.

The decision in this case will create great confusion in freeholder charter cities as to what is and what is not a municipal affair. The distinction between the two for the purposes of this case is adequately dealt with by Mr. Presiding Justice White in his opinion in this case in the District Court of Appeal, in which his associates concurred. I adopt that opinion as a further expression of my views. It is found in 323 P.2d at page 165. The judgment should be affirmed.

SPENCE, J., concurs.

On Petition for Rehearing and on Order of Modification.

Rehearing denied and opinion modified.

SHENK and SPENCE, JJ., dissenting.

On petition for rehearing we are of the opinion that the modification of the original opinion ordered by this court on denial of petition for rehearing does not adequately cure the defects pointed out in the dissenting opinion and that the petition for rehearing should be granted.

Husband brought suit for divorce, and a default decree was entered in favor of the husband. The Superior Court, County of Alameda, Donald K. Quayle, J., entered an order setting aside the default decree, and the husband appealed. The District Court of Appeal, Kaufman, P. J., held that Superior Court properly granted motion of wife to set aside default decree on ground of mistake, inadvertence, surprise, or excusable neglect, where there was some indication of confusion between counsel because of attempted reconciliation and a separate maintenance action pending in another county.

Order affirmed.

### **1. Appeal and Error ⇨770(1)**

Failure of respondent on appeal to file a brief at least raised inference that respondent conceded that appeal was meritorious.

### **2. Appeal and Error ⇨957(1)**

**Divorce ⇨184(5)**

Reviewing courts generally are more inclined toward upholding orders vacating defaults, in order to dispose of cases on their merits wherever possible, particularly in divorce actions. West's Ann.Code Civ. Proc. § 473.

### **3. Divorce ⇨161**

Even in a case where showing on motion to set aside default divorce decree is not strong, or where there is any doubt as to the setting aside of the default, doubt should be resolved in favor of the motion. West's Ann.Code Civ.Proc. § 473.



**4. Divorce ☞161**

Superior Court properly granted wife's motion to set aside default divorce decree granted in favor of husband, on ground of mistake, inadvertence, surprise, or excusable neglect, where there was some indication of confusion between counsel because of attempted reconciliation and a separate maintenance action pending. West's Ann.Code Civ.Proc. § 473.

**5. Divorce ☞186**

Where no prejudicial error appeared in granting motion of wife to set aside default divorce decree in favor of husband, order was required to be affirmed on appeal.

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Oswald G. Ingold, Henry Poppic, Berkeley, for appellant.

Leo J. Todd, Grass Valley, for respondent.

KAUFMAN, Presiding Justice.

This appeal is taken from an order setting aside the respondent's default and the interlocutory decree of divorce granted to the appellant. The sole ground urged for reversal is that, in granting respondent's motion, the trial court abused its discretion as the affidavits fail to show that the default was entered through mistake, inadvertence, surprise or inexcusable neglect and the record itself indicates that the respondent could have filed her answer and cross-complaint any time after July 29, 1957. No respondent's brief having been filed, the case is submitted on the clerk's transcript and appellant's brief pursuant to Rule 17(b) of the Rules on Appeal.

[1] The clerk's transcript indicates that appellant's complaint for divorce was filed on June 7, 1957. After exchange of correspondence between counsel for the respective parties, a reconciliation was attempted on June 29, 1957. On July 14, 1957, the parties separated again. Defendant's answer and cross-complaint were executed but not filed on July 29, 1957. On September 13, 1957, appellant's counsel wrote to respondent's counsel requesting

that the answer be filed in ten days. On September 24, 1957, respondent's default was entered, and the interlocutory decree granted on September 27, 1957. On September 27, 1957, respondent filed her answer and cross-complaint. On October 16, 1957, respondent filed notice of her motion to set aside the default and interlocutory decree. The motion was made on the ground that the default was entered through the mistake, inadvertence, surprise and inexcusable neglect of respondent's counsel. The respondent's affidavit of merits states that she has been deprived of her right to care, support and maintenance during the pendency of the action as the plaintiff's complaint does not set forth the community property belonging to the parties. The affidavit of respondent's counsel states that it was necessary for him to be absent from his office for business reasons before the 25th of September 1957, and that he filed the answer and cross-complaint immediately on being notified that the appellant intended to proceed on the original complaint. As we pointed out in *Yarbrough v. Yarbrough*, 144 Cal.App. 2d 610, at page 612, 301 P.2d 426, at page 427, the failure to file respondent's brief imposes an unnecessary burden on this court, and at least raises the inference that respondent concedes that the appeal is meritorious.

[2,3] We are, however, aware of the rule that appellate courts generally are more inclined toward upholding orders vacating defaults in order to dispose of cases on their merits wherever possible. *Stub v. Harrison*, 35 Cal.App.2d 685, 96 P.2d 979. In divorce actions, because of the interest of the state, this rule is particularly applicable. *Gregory v. Gregory*, 92 Cal.App.2d 343, 206 P.2d 1122; *Rehfuss v. Rehfuss*, 169 Cal. 86, 145 P. 1020. "Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application." *Garcia v. Garcia*, 105 Cal.App.2d 289, 291, 233 P.2d 23, 24.

[4,5] While here there is no clear evidence of conduct on the part of appellant's counsel which misled the respondent or her counsel, there is some indication of confusion between counsel because of the attempted reconciliation and a separate maintenance action pending in another county. The record indicates that respondent's actions took place immediately on notice of the default. We think this case falls within the doubtful category and that the trial court properly resolved the doubt in favor of the respondent. No prejudicial error appearing, the order setting aside the default and interlocutory decree must be affirmed.

Order affirmed.

DRAPER, J., and MARTINELLI, J. pro tem., concur.



164 Cal.App.2d 249

Stanley KONECKO, Plaintiff and Appellant,  
v.

Josephine KONECKO, Administratrix of the  
Estate of Pauline Konecko, Deceased,  
Defendant and Respondent.

Civ. 23040.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 16, 1958.

Proceeding by husband to rescind property settlement agreement executed by husband and his deceased wife. The Superior Court, Los Angeles County, Kenneth N. Chantry, J., granted defendant's motion to dismiss, and husband appealed. The District Court of Appeal, White, P. J., held that although husband for some years had made his living by buying and selling properties, wife had right to determine for herself when and how she would dispose of

her interest in their community property, and wife's refusal to sign transfers of real property necessary for husband to carry on his business was not an act of duress sufficient to warrant husband's attempted rescission of property settlement agreement.

Affirmed.

#### 1. Husband and Wife ⇨278(1)

Where husband for some years prior to entering into property settlement agreement with wife had made his living by selling properties and at time of entering into agreement husband was represented by counsel, husband was not entitled to rescission of agreement on ground of misrepresentation and/or mutual mistake as to value of properties owned by him and divided between himself and wife.

#### 2. Husband and Wife ⇨278(1)

Although husband for some years had made his living by buying and selling properties, wife had right to determine for herself when and how she would dispose of her interest in their community property, and wife's refusal to sign transfers of real property necessary for husband to carry on his business was not an act of duress sufficient to warrant husband's attempted rescission of property settlement agreement entered into between husband and wife.

#### 3. Contracts ⇨95(3), 96

A threat to exercise a legal right is not an act of duress, menace, or undue influence sufficient to warrant rescission of contract.

#### 4. Husband and Wife ⇨278(5)

Where husband and wife entered into property settlement agreement which recited that wife's release of certain of community property and her right to support was consideration for husband's agreement to release to wife other community property and to release his right to any support from wife, wife's death before her procurement of final decree of divorce was not a failure of consideration promised and given by her for her husband's agreement,

and did not warrant rescission of property settlement agreement.

#### 5. Contracts ⚖83

When a party gets consideration promised to him, fact that it proves worthless or of little value to him because of an unexpected occurrence is not ground for rescission.

#### 6. Appeal and Error ⚖1061(2)

Even if plaintiff states cause of action for declaratory relief, where such relief is asked on basis of alleged facts which entitle plaintiff to no relief, court cannot be required to permit the useless trial on that count alone, and plaintiff cannot be prejudiced by dismissal of action.

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Joan H. Martin, Los Angeles, for appellant.

William J. D. Lane, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from the judgment and/or minute order granting defendant's motion to dismiss after the demurrer to his second amended complaint had been sustained and he had failed to further amend.

The question raised on appeal is whether the facts alleged in the second amended complaint are sufficient to constitute a cause of action. The complaint attempts to state four causes of action for rescission of a property settlement agreement executed by plaintiff and his deceased wife, and one cause of action for declaratory relief.

The following is a summary of the salient facts alleged by appellant in his second amended complaint.

April 20, 1955, plaintiff and his wife, Pauline Konecko, entered into an agreement by which they divided all their community property. Plaintiff (although represented by his own counsel) signed said agreement relying upon statements of decedent's attorney that the values of the properties to be conveyed to the respective

parties were equal. That in fact, plaintiff's properties were worth only \$7,632.10 and decedent's \$18,055.03. That, on May 17, 1955, Pauline was granted an interlocutory divorce.

September 10, 1955, she died intestate.

November 9, 1955, defendant, Josephine Konecko, daughter of plaintiff and his deceased wife, was appointed administratrix of her mother's estate. November 26, 1956, defendant rendered her final account and petitioned for distribution to herself and her sisters and brother, as the only heirs of her mother.

February 28, 1957, plaintiff mailed notice of rescission to defendant. That this was not done sooner because plaintiff "did not know that his children, in whom he had trust and confidence, would enforce it (the property settlement agreement) against him to keep him from sharing in the distribution of his deceased wife's estate." That on April 20, 1955, decedent, because of her 52 years of age and physical infirmity "was incapacitated from doing any business or making or entering into any business." That defendant, "with the intent of cheating and defrauding her father," the plaintiff, induced her mother to sign the agreement.

It was further alleged that prior to April 20, 1955, plaintiff supported himself and decedent by buying and selling real property "on his own account and not as a broker;" that in lieu of alimony plaintiff gave decedent a large portion of his working capital; and "the main consideration in Stanley Konecko's (plaintiff's) entering into the purported property settlement agreement was to provide support for Pauline Konecko and said consideration has completely failed and become entirely void."

That plaintiff was induced to sign the agreement by his wife's refusal to sign the transfers of real property necessary for him to carry on his business of buying and selling real property.

"That a controversy has arisen between plaintiff and defendant relative to their legal rights and duties under said purported



property settlement agreement, in that plaintiff alleges said agreement is of no force or effect because of innocent misrepresentation and/or mutual mistake, undue influence, failure of consideration and economic duress as aforesaid, while defendant is seeking to enforce it through the decree of distribution in Pauline Konecko's estate."

Appellant, in his opening brief, urges that causes of action for rescission have been stated on the grounds of mutual mistake, undue influence, duress, and failure of consideration.

[1] The innocent misrepresentation and/or mutual mistake alleged by appellant in said second amended complaint concerns the values of properties owned by him and divided between himself and his deceased wife, which are alleged to have been misstated to him by his wife's attorney. From the complaint it appears that appellant was at that time also represented by counsel; and that for some years prior thereto he had made his living by buying and selling properties. Under the facts so alleged, appellant cannot be permitted to rescind the contract because of his failure to exercise reasonable care to ascertain the true values of his own properties to be divided between himself and his wife who was then suing for divorce. *Mesmer v. White*, 121 Cal.App.2d 665, 674, 264 P.2d 60.

Appellant, in his opening brief, states that the "undue influence" relied upon by him as a ground for rescission of the property settlement agreement was the advantage taken of his now deceased wife by their daughter, the defendant. He has alleged no advantage taken of him by his wife or the defendant, nor has he alleged any confidential relationship.

[2,3] The duress relied upon as sufficient to warrant his attempted rescission of the property settlement agreement is his deceased wife's refusal to sign the transfers of real property. No unlawful act of decedent or defendant is alleged. Decedent's threat to sign no more convey-

ances of real property requested by appellant cannot be construed to be an act of duress. She had the right to determine for herself when and how she would dispose of her interest in their community property. A threat to exercise a legal right is not an act of duress, menace or undue influence. *Miller v. Walden*, 53 Cal.App.2d 353, 361, 127 P.2d 952; *Yost v. Yost*, 116 Cal.App.2d 572, 578, 253 P.2d 696.

In appellant's opening brief, he states that the failure of consideration relied upon by him as a ground for rescission is "based upon frustration of purpose in that appellant would not have signed the contract sought to be rescinded if he had known that his wife would die before their divorce was final in that the property was conveyed to the wife in lieu of support."

The agreement, cancellation of which is sought by appellant in the instant action, copy of which is attached to and by reference made a part of the complaint, recites that wife's release of certain of the community property and her right to support is consideration for appellant's agreement to release to his wife other community property and to release also his right to any support from said wife.

[4,5] His wife's death before her procurement of the final decree of divorce in her action against appellant is not a failure of the consideration promised and given by her for her husband's agreement. When a party gets the consideration promised to him, the fact that it proves worthless or of little value to him because of an unexpected occurrence, as the wife's death in the instant action, is not ground for rescission.

Because of our views hereinabove expressed that plaintiff failed to state any cause of action for rescission, it is not necessary to here decide whether plaintiff's attempted rescission over two years after his wife's death was a timely or sufficient notice of rescission.

[6] Assuming, but not deciding, that appellant did state a cause of action for declaratory relief, where, as in the instant

action, such relief is asked on the basis of the facts alleged which entitle a plaintiff to no relief, then the court cannot be required to permit a useless trial on that count alone, and appellant cannot have been prejudiced by the dismissal of the action.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



164 Cal.App.2d 174

**Raymond D. BRUNSCHER, Plaintiff and Respondent,**

**v.**

**Charles REAGH et al., Defendants,  
Thelma Brunscher, Defendant and Appellant.**  
Civ. 17945.

District Court of Appeal, First District,  
Division 1, California.

Oct. 15, 1958.

Proceeding to partition property and for an accounting. The Superior Court, County of Monterey, Stanley Lawson, J., ordered the property sold, and an accounting was then had of the money received, and plaintiff's former wife, who claimed an interest in the property, appealed from the accounting. The District Court of Appeal, Peters, P. J., held that while there was sufficient evidence to show a wrongful ouster of plaintiff husband on January 1, 1948, when plaintiff husband was moved out of house and was not permitted to re-enter the property after former wife's grantee had leased the property to another, there was insufficient evidence to show that the ouster was permanent or for how long it was effective, due to allegations of plaintiff husband in Municipal Court action brought by his former wife to the effect that since October, 1949 the occupancy of

former wife and her collection of rent on the property had been permissive, and damages to plaintiff husband by the ouster would have to be recomputed accordingly by trial court after determining whether ouster was temporary or permanent.

Reversed.

#### 1. Appeal and Error ⇨770(1)

Where respondent refused to file brief, District Court of Appeal was entitled to accept as true statement of facts in appellant's brief, and was under no duty to seek out points of law in support of the judgment, and was entitled to assume that respondent had abandoned any attempt to support the judgment, and that the point made by appellant for reversal was meritorious. West's Ann.Rules on Appeal, rule 17(b).

#### 2. Tenancy In Common ⇨21, 28(3)

Generally, each tenant in common has a right to occupy the same property, and one such tenant cannot recover rent from the other tenant.

#### 3. Tenancy In Common ⇨28(3, 7)

Where one tenant wrongfully ousts the other and prevents him from enjoying joint possession, the wrongfully ousted cotenant may recover the damages resulting from the ouster, which ordinarily are his share of the value of the use and occupation of the land during the period of the ouster.

#### 4. Appeal and Error ⇨1177(6)

In action for accounting and for partition of property acquired by husband and former wife as tenants in common, where husband was ousted from the premises in January, 1948 when former wife's grantee leased possession to another who took possession, but there was insufficient evidence to show that ouster was permanent or how long it was effective, due to allegations of husband in Municipal Court action brought against him by former wife that since October, 1949 the occupancy of his wife and her collection of rents had been permissive, it was necessary to remand case to trial court for determination of whether ouster

was temporary or permanent in order to recompute damages accordingly for ouster of husband.

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Charles Reagh, San Francisco, for appellant.

Edmund J. Leach, Jr., Salinas, for respondent.

PETERS, Presiding Justice.

Plaintiff, Raymond Brunscher, brought this action against Charles Reagh to partition certain property claimed by plaintiff to be jointly owned by plaintiff and Reagh, and for an accounting. Thelma Brunscher answered, claiming that she now owns the interest in the property formerly owned by Reagh, and also alleging that if an accounting be granted she be given credit for certain improvements to the property made by her, and for certain other specified items. Pursuant to court order the property was sold and the money received therefrom impounded. An accounting was then had. After all obligations against the property were paid the trial court found that there remained \$2,750 to be distributed and that Raymond Brunscher should receive \$838.79 and Thelma Brunscher should receive \$1,911.21. Thelma Brunscher appeals, challenging the accounting. Reagh has not appealed. Raymond Brunscher has not filed a respondent's brief and his counsel has informed the court that Raymond does not desire to do so.

[1] Where the respondent refuses to file a reply brief, under Rule 17(b) of the Rules on Appeal "the court may accept as true the statement of facts in the appellant's opening brief and, unless the appellant requests oral argument, may submit the case for decision on the record and on the appellant's opening brief." In *Postin v. Griggs*, 66 Cal.App.2d 147, 148, 151 P.2d 887, it was stated: "Under the provisions of that rule [17(b)] we are entitled to accept as true the statement of facts in the opening brief. We are under no duty to seek out points of law in support

of the judgment, are entitled to assume that respondent has abandoned any attempt to support the judgment, and that the point made by appellant for reversal is meritorious."

In the instant case, it is apparent that the judgment appealed from must be reversed. The record shows that in 1933 Ray and Thelma Brunscher were husband and wife. They acquired the real property in question in that year. Title was taken as joint tenants, but they treated it as community property. A deed of trust was put on the property and payments of \$27.80 to \$30.50 per month were made on it. The parties separated on June 10, 1946, and Raymond took possession of the property and lived there with their oldest child. There were two younger children who remained with Thelma. Thelma and her children spent some time with the Reagh family and then went to Nevada and secured a default divorce from Raymond on January 14, 1947. On February 21, 1947, Thelma deeded her interest in the property to Reagh as security for attorney's fees and money advanced by him. Reagh, by deed dated July 31, 1950, but not recorded until January 28, 1955, deeded the interest involved back to Thelma.

Raymond remained in possession of the property until January 1, 1948. On that date, while Raymond was employed out of town, a Joy Hammock moved in under a lease granted by Reagh. Raymond's personal belongings were moved out of the house and he was not permitted to re-enter the property. Hammock paid rent of \$50 per month which was paid to Thelma until September 2, 1953, when Hammock vacated the premises. Thelma then moved into the house with her two children and occupied the premises until June 29, 1956.

Raymond paid the installments on the deed of trust while he occupied the property. After January 1, 1948, Thelma made these payments and as of June 29, 1956, had made payments totalling \$2,835.60.

On some date not here important Raymond deeded his interest in the property



to one Gordon Hicks, a step-son, and Raymond's interest remained in Hicks until the property was sold pursuant to court order. Raymond purchased the property at the public sale for \$6,200, less his one-half interest.

In the accounting the trial court charged Thelma with rent at \$50 per month from January 1, 1948, to September 1, 1953, a total of \$3,400, while Hammock was in possession, and also rent at \$50 a month from September 1, 1953, to June 29, 1956, a total of \$1,696.67, the period that Thelma occupied the premises. These two items are challenged by Thelma on this appeal.

[2, 3] It is the general rule that each tenant in common has a right to occupy the common property, and, generally speaking, one such tenant cannot recover rent from the other tenant. *McWhorter v. McWhorter*, 99 Cal.App. 293, 278 P. 454; *Nevarov v. Nevarov*, 117 Cal.App.2d 581, 256 P.2d 330. But this rule does not apply where one cotenant wrongfully ousts the other and prevents him from enjoying joint possession. In such event, the wrongfully ousted cotenant may recover the damages resulting from the ouster, which ordinarily are his share of the value of the use and occupation of the land during the period of the ouster. *Zaslow v. Kroenert*, 29 Cal. 2d 541, 176 P.2d 1.

In the present case there is evidence that Raymond was wrongfully ousted from the premises on January 1, 1948, when Hammock took possession and Raymond's possessions were moved out of the house and Raymond was denied permission to enter. Hammock remained in possession until September 2, 1953. Then Thelma moved in and occupied the premises until June 29, 1956. But there is no evidence that Raymond was denied entry after Thelma had taken possession. Defendant testified that Raymond never demanded possession of the property from her.

Moreover, it appears in the record that in October of 1949 an action was filed against Raymond by Thelma in the Municipal Court

of San Francisco to recover doctors' bills incurred by her for one of their children. In a verified answer Raymond averred that the parties own the property in question "and that in order to provide for the support of said minor child this defendant has allowed the mother of said child to collect all of the rents from said community property to be used as and for the support of said minor child." If these allegations are binding on Raymond, a point not passed on by the trial court in the instant case, it would appear that at the time they were made (October of 1949) the occupation of Thelma through Hammock was permissive. If such is the true fact, Raymond is entitled to no damages from the time such agreement was made, because the possession would then be permissive and there is no evidence of any subsequent ouster.

In view of the fact that the judgment must be reversed something should be said about the measure of damages. A wrongfully ousted cotenant is allowed to recover damages equal to his share of the value of the use or of the rental value during the period of the ouster. During both the periods here involved, assuming there was an ouster, recovery would be limited to Raymond's share of the rental value, that is, to one-half of the rents, not all of the rents.

[4] The judgment must be reversed because, while there is sufficient evidence to show a wrongful ouster of Raymond on January 1, 1948, there is insufficient evidence to show that the ouster was permanent or for how long it was effective. This is particularly true because of the allegations of Raymond in the Municipal Court action to the effect that since October, 1949, the occupancy of Thelma and her collection of rents have been permissive. The case must be remanded to the trial court for a determination of whether the ouster of January 1, 1948, was temporary or permanent, and, if temporary, when it terminated. The damages to Raymond

caused by the ouster should be recomputed accordingly and in accordance with the views herein expressed.

The judgment appealed from is reversed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.



164 Cal.App.2d 152

**ESTATE of Estelle Christine GODDARD,**  
etc., Deceased.

**Catherine SHAFOR, etc., and Anna Goddard,**  
Contestants and Appellants,

v.

**Martha L. HILANDS, etc.,** Petitioner and  
Respondent,

**Fred Judson, Alta Davidson, Bruno Demke,**  
**Frank Flicker, Trinity Baptist Church of**  
**Santa Monica, Braille Institute of America,**  
**and Shriners Hospital for Crippled**  
**Children, a corporation, Legatees and Re-**  
**spondents.**

Civ. 22983.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 14, 1958.

Action to revoke probate of will on ground of alleged lack of testamentary capacity and undue influence. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., entered summary judgment adverse to contestants who appealed. The District Court of Appeal, Patrosso, J. pro tem., held that contestants' affidavits, on motion for summary judgment, alleging that testatrix grieved over death of husband and felt that she was unable to handle her own affairs, were insufficient to raise triable issue as to testamentary capacity, and even assuming a confidential relationship existed between one of the legatees and testatrix, in absence of showing par-

ticipation in procuring execution of will, there was no proof of undue influence.

Affirmed.

#### 1. Wills Ⓒ55(1), 166(1)

Fact that testatrix grieved over the loss of her husband and allegedly told persons that she was unable to handle her own affairs and needed someone to prepare income tax returns for her, was insufficient to show lack of testamentary capacity, or that she executed will as result of the undue influence exerted upon her by any particular legatee or other person.

#### 2. Wills Ⓒ427

Admission of will establishes prima facie for all purposes of contest that it was duly executed in the manner required by law by testator who was competent, free from undue influence, etc., and burden in contest to revoke probate of will is on contestants to establish its invalidity

#### 3. Wills Ⓒ52(1)

Where contest is brought to revoke probate of will it is only when contestant has established prima facie case of absence of testamentary capacity that proponent of will has burden of meeting it.

#### 4. Wills Ⓒ52(1)

Testamentary capacity is always presumed to exist until contrary is established and ultimate question is what was testator's actual mental state at time of testamentary act and not what it may have been.

#### 5. Wills Ⓒ50

Testator has sufficient testamentary capacity if at the time he understands nature of act, nature and situation of his property and his relation to those having claims upon his bounty.

#### 6. Wills Ⓒ55(1, 3)

Mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will but contestant is required to go further and prove either such complete mental degeneration as de-

notes utter incapacity to know and understand those things which the law prescribes essential to making of will, or the existence of a specific insane delusion which affected making of will in question.

#### 7. Judgment ⇨185.3(1)

In contest to revoke probate of will, contestants' affidavits, opposing motion for summary judgment, which alleged that testatrix mourned loss of husband and claimed she was incapable of handling her own affairs which were in fact taken care of by one of the devisees under will, were insufficient to raise a triable issue as to lack of testamentary capacity or undue influence.

#### 8. Wills ⇨50

Ability to transact business is not legal standard of testamentary capacity.

#### 9. Wills ⇨166(7)

Mere proof of opportunity to influence testator's mind, even coupled with an interest or motive to do so will not sustain finding of undue influence in absence of testimony showing that there was pressure operating directly on the testamentary act.

#### 10. Wills ⇨163(2)

Even assuming that fact that devisee had, by reason of handling testatrix' business affairs, established a confidential relationship between herself and testatrix, no presumption of undue influence arose therefrom in absence of proof that such person actually participated in procuring execution of will.

#### 11. Judgment ⇨185.2(6)

On motion for summary judgment, affidavits of moving party are to be strictly construed and those of party opposing motion are to be liberally construed.

#### 12. Judgment ⇨185.3(1)

Where action was brought to revoke probate of will and defendants moved for summary judgment, since contestants' affida-

vits contained no facts showing existence of cause of action and affidavits in support of motion stated facts which if proved would support judgment in favor of defendants, judgment granting defendants' motion was proper.

#### 13. Appeal and Error ⇨129

Order denying motion to strike affidavits in support of motion for summary judgment and order granting motion for summary judgment are not appealable.

Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellants.

Harold E. Allport, Jr., Hollywood, Scudder & Forde, Pacific Palisades, Tanner, Odell & Taft, A. G. Ritter, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

This is an appeal from a summary judgment dismissing a petition for the revocation of the probate of the will of the above named decedent.

The testatrix Estelle Christine Goddard died on September 29, 1956, at the age of 60 years, leaving surviving as her sole heirs, Catherine Shafor, a cousin, and Anna Goddard, the mother of the testatrix's predeceased husband.<sup>1</sup> An holographic will executed by the testatrix on March 22, 1948, was duly admitted to probate on October 29, 1956. Thereafter a petition to revoke probate thereof was filed by said Catherine Shafor and Anna Goddard who will hereinafter be referred to as contestants or appellants. The petition for revocation alleged five grounds of contest: (1) lack of testamentary capacity; (2) want of due execution; (3) undue influence alleged to have been exercised by Martha L. Hilands, the executrix and residuary legatee under the will; (4) fraud upon the part of said Martha L. Hilands and (5) that the will had been revoked by the testatrix prior to her death.

1. We assume, although there is no evidence to this effect, that Anna Goddard was an heir by virtue of either section

228 or 229 of the Probate Code, as no claim to the contrary is made by the respondents.



Answers to the contest were filed by the executrix and the other legatees under the will wherein they denied each and all of the allegations thereof.

Following the filing of the answers the respondents served and filed a notice of motion for summary judgment pursuant to the provisions of section 437c of the Code of Civil Procedure supported by two affidavits, one by the executrix and the other by H. E. Allport, her attorney, who had also been the attorney for the testatrix during her lifetime. In opposition to this motion, the appellants filed an affidavit of Grace Lighty, the sister of the testatrix's predeceased husband. At the hearing of the motion for summary judgment it was stipulated that the deposition of Dr. Francis M. Smith, Alta Davidson and H. E. Allport, Sr., might be considered as affidavits on behalf of the moving parties and that the deposition of the appellant Anna Goddard might be considered as a counteraffidavit on behalf of the appellants.

By the affidavits and depositions upon behalf of the respondents it was made to appear (1) that at the time of the execution of the will the testatrix was of sound mind and possessed testamentary capacity; (2) that the will was entirely written, dated and signed in the handwriting of the testatrix and was found among her effects after her death, in an envelope addressed to her attorney; (3) that the respondent Martha L. Hilands never discussed with the testatrix the making of the will; that she never suggested to the testatrix that she make a will nor did she induce or persuade her to do so; that she never knew that the testatrix had executed a will until after it was executed and did not learn of the contents thereof until after the testatrix's death; (4) that the respondent Martha L. Hilands never made any representations to the testatrix with respect to the execution of the will and never conversed with the testatrix or advised her with respect to the disposition of her estate nor did she make any suggestions or representations with respect to the manner of the dis-

position thereof; and (5) that an examination of the testatrix's papers and personal effects failed to disclose the existence of any will other than the one admitted to probate except a prior will dated March 10, 1942, and likewise failed to disclose any writing, codicil or other instrument revoking or purporting to revoke the will so admitted to probate.

Directing our attention to the showing made by appellants in opposition to the motion for summary judgment by the affidavit of Grace Lighty and the deposition of Anna Goddard, we fail to find therein a single word of testimony to the effect that the will was not entirely written, dated and signed in the handwriting of the testatrix or that there was in existence any later will or other document revoking the same or that the respondent Martha L. Hilands made any false representations to the testatrix in order to induce her to execute a will in her favor. Indeed, in the briefs in this court, appellants make no pretense that there was any showing of any such facts. Appellants' only claim is that the affidavit of Grace Lighty and the deposition of Anna Goddard contain statements of fact which if admitted to be true, as they must on the hearing of a motion for summary judgment, are sufficient to establish the existence of a triable issue as to testamentary capacity and undue influence.

In support of this contention they refer to the following statements in the affidavit of Grace Lighty: Subsequent to the death of her husband the testatrix would call Mrs. Lighty on the telephone and "cry bitterly" and when said affiant visited the testatrix the latter "appeared to be totally incapable of doing anything for herself;" that the respondent Martha L. Hilands "was constantly in touch with the" testatrix, "handling her business affairs, and in fact on one occasion your affiant received a call from Martha Hilands wherein Martha Hilands informed your affiant that she, Martha Hilands, was preparing the income tax returns for the deceased Estelle Christine Goddard because Estelle Christine

Goddard could not do that herself; that around March of 1948, at the time your affiant had this conversation with Martha Hilands, your affiant called the deceased Estelle Christine Goddard back on the telephone and the telephone was answered by Martha Hilands. At that time Martha Hilands informed your affiant that your affiant could not speak to Mrs. Goddard because she, Martha Hilands, was handling Estelle Christine Goddard's affairs. That your affiant well and truly believes and is of the opinion that during the year 1948 Estelle Christine Goddard could not and did not handle any of her affairs, nor was she able at that time to make a Will uninfluenced by others."

With respect to the deposition of the appellant Anna Goddard, the testimony therein upon which appellants rely is to the effect that the testatrix was "Very, very nervous. She had to have everything done by someone. She couldn't do a thing alone. So, I think she was persuaded. \* \* \* [S]he couldn't do anything for herself. \* \* \* When she made out that will, yes, there was something wrong, absolutely. \* \* \* I think she was very nervous and she cried most of the time, especially after my son [testatrix's husband] died, and I don't think she was really of a sound mind sometimes because I seen her, I would talk to her over the phone, and she would cry and cry. So, I know that she really wasn't herself. She couldn't have been because it is so unjust to leave that to that one girl [Martha Hilands]. Very unjust."

[1] We fail to find in the foregoing any fact or facts which if testified to upon the trial would tend to establish that the testatrix did not possess testamentary capacity when executing her will or that the same was executed as the result of undue influence exerted upon her by the respondent Martha Hilands or any other person.

[2-4] It is to be remembered that this is a contest after probate and that the admission of the will to probate "'established *prima facie* for all the purposes of the contest, that it was duly executed in the man-

ner required by law by a testator who was competent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity.' In re Estate of Baird, 176 Cal. 381, 384, 168 P. 561. It is only when the contestant has established a *prima facie* case of the absence of testamentary capacity that the proponent of the will has the burden of meeting it. Testamentary capacity is always presumed to exist until the contrary is established, and the ultimate question is what was *actually* the testator's mental state at the time of the testamentary act, and not what it *may* have been." In re Estate of Russell, 1947, 80 Cal.App.2d 711, 714, 715, 182 P.2d 318, 321.

[5] The test of the testamentary capacity has so frequently been stated by the decisions in this State that it seems hardly necessary to repeat it here. A testator has sufficient testamentary capacity if at the time he understands the nature of the act, the nature and situation of his property and his relations to those having claims upon his bounty. In re Estate of Arnold, 1940, 16 Cal.2d 573, 586, 107 P.2d 25.

[6] As has likewise frequently been said: "It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question. In re Estate of Shay, 196 Cal. 355, 359, 237 P. 1079; In re Estate of Russell, 189 Cal. 759, 769, 210 P. 249." In re Estate of Arnold, *supra*, 16 Cal.2d 573, 585-586, 107 P.2d 25, 32.

[7,8] Where in the showing made by the appellants is there to be found anything even suggesting that the testatrix was mentally deranged or that she was laboring under an insane delusion when she executed her will? The mere fact that she grieved over the loss of her husband certainly does

not constitute proof of mental derangement. The only other evidence to which the appellants point as constituting proof of lack of testamentary capacity is the affiant's belief or opinion, unsupported by any reason or specific fact, that the testatrix was unable to handle her own affairs and that she required the services of someone to prepare her income tax returns. However, as our courts have frequently had occasion to point out, the ability to transact business is not the legal standard of testamentary capacity. In *re Estate of Sexton*, 1926, 199 Cal. 759, 768, 251 P. 778; In *re Estate of Powers*, 1947, 81 Cal. App.2d 480, 483, 184 P.2d 319; In *re Estate of Arnold*, supra, 16 Cal.2d at page 586, 107 P.2d at page 32.

Liberalistically construed, the affidavits on behalf of the appellants fail to reveal any fact or facts from which it could be inferred that the testatrix, when executing her will, did not understand the nature of her act or that she was not cognizant of the nature and situation of her property or her relation to those having claims upon her bounty. Construing the statements in the affidavits on behalf of the appellants that the testatrix did not appear to be herself and that she was unable to handle her affairs as constituting expressions of opinion that testatrix was of unsound mind, they are wholly insufficient to establish that fact. As said in the *In re Estate of Collins*, 1917, 174 Cal. 663, 670, 164 P. 1110, 1113: "When, as in this case the opinions as to unsoundness of mind including those of the intimate acquaintances, are based on facts which show neither morbid delusion nor total mental incapacity, \* \* \* the evidence is wholly insufficient to establish the fact."

In *re Estate of McGuirk*, 1920, 50 Cal. App. 352, 355, 195 P. 279, 280, it is said: "Nevertheless, and assuming further that his conduct justified the inference that his mental faculties were impaired and weakened to an extent which warranted the conclusion, as stated by witnesses, that he was of unsound mind, there is nothing in

the evidence which tends, either directly or inferentially, to prove that his testamentary act was in the slightest degree influenced or affected by the condition of mind which prompted him to say and do things upon which the witnesses based their opinion."

If further support is needed for our conclusion that the showing made by the appellants entirely fails to establish testamentary incapacity, reference may be had to the following cases in each of which it was held that evidence much stronger than that here presented was insufficient as a matter of law to establish this fact: In *re Estate of Kendrick*, 1900, 130 Cal. 360, 363, 62 P. 605; In *re Estate of Chevalier*, 1911, 159 Cal. 161, 113 P. 130; In *re Estate of Purcell*, 1912, 164 Cal. 300, 305, 128 P. 932; In *re Estate of Casarotti*, 1920, 184 Cal. 73, 192 P. 1085; In *re Estate of Perkins*, 1925, 195 Cal. 699, 235 P. 45; In *re Estate of Finkler*, 1935, 3 Cal.2d 584, 46 P.2d 149; In *re Estate of Garvey*, 1940, 38 Cal.App.2d 449, 101 P.2d 551; In *re Estate of Arnold*, supra, 16 Cal.2d 573, 582, 107 P.2d 25; In *re Estate of Powers*, supra, 1947, 81 Cal.App.2d 480, 184 P.2d 319.

[9, 10] With respect to the issue of undue influence little need be said. Assuming that the appellants' proof establishes that Martha Hilands had the opportunity and the motive of exercising undue influence upon the testatrix, this does not serve to establish that such influence was in fact exerted. "Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act." In *re Estate of Kilborn*, 1912, 162 Cal. 4, 11, 120 P. 762, 765. Assuming further for the purpose of this discussion that proof that Martha Hilands handled the testatrix's business affairs established that a confidential relationship existed between herself and the testatrix, no presumption of undue in-



fluence arises therefrom in the absence of proof that Martha Hilands actually participated in procuring the execution of the will. In re Estate of Arnold, supra, 16 Cal. 2d at page 581, 107 P.2d at page 29. No such proof was adduced here.

[11] While it is true, as appellants contend that upon a motion for summary judgment the affidavits of the moving party are to be strictly construed and those of the party opposing the motion are to be liberally construed (Gibson v. De La Salle Institute, 1944, 66 Cal.App.2d 609, 618, 152 P.2d 774), it was incumbent upon the appellants to establish by factual affidavits that the charges made in their petition to revoke the probate of the will "raised a real issue, something more than 'the product of adept pleading.'" Schessler v. Keck, 1956, 138 Cal.App.2d 663, 668, 292 P.2d 314, 317.

[12] Appellants, in order to defeat respondents' motion for a summary judgment, were required to present an affidavit or affidavits setting forth evidentiary facts sufficient, if accepted as true, to justify setting aside the probate of the will. Since the appellants' affidavits contain no facts showing the existence of a cause of action in appellants, and the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving parties, the judgment granting respondents' motion was proper. Maltby v. Shook, 1955, 131 Cal.App.2d 349, 355, 280 P.2d 541; Hardy v. Hardy, 1943, 23 Cal. 2d 244, 248, 143 P.2d 701; Terrell v. Local Lodge 758, etc., Machinists, 1957, 150 Cal.App.2d 24, 28, 309 P.2d 130.

[13] The judgment is affirmed. The attempted appeals from the order denying appellants' motion to strike respondents' affidavits in support of the motion for summary judgment and from the order granting the motion for summary judgment are dismissed as said orders are not appealable.

SHINN, P. J., and VALLÉE, J., concur.

164 Cal.App.2d 459

**ELK RIVER MILL AND LUMBER COMPANY, a corporation, Plaintiff and Appellant,**

**v.**

**GEORGIA-PACIFIC CORPORATION, a corporation, Hammond-California Redwood Company, a corporation, and Hammond Lumber Company, a corporation, Defendants and Respondents.**

**Civ. 9444.**

District Court of Appeal, Third District, California.

Oct. 21, 1958.

Rehearing Denied Nov. 19, 1958.

Action for a declaration that a logging contract entered into between the parties had been terminated and rescinded, to quiet title, and to enjoin the defendants from removing and cutting timber on the lands and to recover damages for timber cut and removed. Judgment for the respondents in the Superior Court, Humboldt County, William G. Watson, J., and the plaintiff appeals. The District Court of Appeal, Warne, J. pro tem., held that the evidence sustained the finding that the logging contract had not been assigned in violation of the contract; that the defendant had the right to subcontract the logging operations; and that plaintiff was not entitled to rescind by reason of assignment and transfer of the defendant's assets and its dissolution.

Judgment affirmed.

#### **1. Appeal and Error ⇨996, 1008(1)**

Where some of the evidence was oral and some written and much of it bore in some degree on intent and meaning of the contractual agreement, the trial court's inferences and conclusions of fact were decisive on appeal.

#### **2. Declaratory Judgment ⇨347**

In an action for a declaration that a logging contract had been terminated and to enjoin the further removal of timber from the lands involved, evidence sustained the finding that defendant had not violated

the covenant against assignment of the contract.

### 3. Logs and Logging ⇨8(1)

Under a contract for the logging of a tract of land providing that the contract should not be assigned or transferred without written consent but authorizing the defendant to contract with other persons for any portion of the work undertaken to be performed by the defendant, defendant had the right to subcontract the logging operations.

### 4. Corporations ⇨691

Under a contract for the logging of a tract of land and containing a covenant against assignment, assignment and transfer of all of Delaware corporate defendant's assets and its dissolution did not entitle the plaintiff to rescind the contract, since under Delaware law the defendant, in filing a notice of dissolution, remained in existence in order to gradually close and settle its affairs for a term of three years from such dissolution. 8 Del.C. § 278.

### 5. Corporations ⇨691

Under a contract to log a tract of land, defendant, a Delaware corporation, by subcontracting the logging and selling logs was not "continuing the business" for which it was established in violation of the Delaware statute after filing notice of dissolution where the defendant was merely doing precisely what the statute authorized, which was the closing of its business and the disposing of its remaining assets, including the timber on the property. 8 Del.C. § 278.

See publication Words and Phrases, for other judicial constructions and definitions of "Continuing the Business".

### 6. Logs and Logging ⇨3(7)

A contract for the logging of a tract of land indicating a sale to the defendant of all standing and down timber was construable as the sale of timber and not a license to cut, especially where defendant paid plaintiff a substantial sum for all its timber and was required by the contract to pay all taxes on the timber, and hence under the statute the defendant was au-

thorized to dispose of and convey the property. 8 Del.C. § 278.

### 7. Corporations ⇨691

Under a contract of a Delaware corporation for the purchase of all timber on a tract of land, even if corporation had no more than an executory contract authorizing it to harvest the timber and had filed a notice of motion to dissolve, plaintiff could be still compelled to perform its agreement, since the right to such performance passed on dissolution of the corporation to the shareholders who were entitled to enforce that right. 8 Del.C. § 278.

### 8. Logs and Logging ⇨3(1)

A contract for the sale of timber on a tract of land was not invalid for want of consideration where by the contract the plaintiff was entitled to money for the timber and to good logging and the plaintiff had been paid in full for all timber removed up to a certain date and the defendant had tendered payment in full and in advance for all timber remaining on the property.

Falk & Falk, Eureka, and William F. Reed, San Diego, and Louis F. DiResta, San Francisco, for appellant.

Henry D. Costigan, Walker Lowry, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent Hammond Lumber Co.

Herbert W. Clark, Richard J. Archer, Girvan Peck, Morrison, Foerster, Holloway, Shuman & Clark, San Francisco, and Hill & Hill, Eureka, for other respondents. King, Miller, Anderson, Nash & Yerke, Portland, Or., of counsel.

WARNE, Justice pro tem.

Appellant, Elk River Mill and Lumber Company, a corporation hereinafter called "Elk River", brought this action against Hammond Lumber Company, a corporation, hereinafter called "Hammond", Hammond-California Redwood Company, a corporation, hereinafter called "Redwood", and Georgia-Pacific Corporation, a corporation, hereinafter called "Georgia-Pa-

cific", for a judicial declaration that a logging contract entered into between Elk River and Hammond for the logging of the timber on Elk River lands by Hammond had been terminated and rescinded; to quiet title to certain Elk River lands and to the standing and down timber thereon; to enjoin Hammond and Redwood from further cutting and removing timber on or from the Elk River lands; and to recover damages for timber cut and removed by said respondents subsequent to the alleged rescission and termination of the contract. The case was tried by the court sitting without a jury and judgment was entered in favor of the respondents. This appeal followed.

In 1948, appellant, Elk River, and Hammond entered into a contract for the purchase and sale of all standing and down timber on certain Humboldt County property owned by Elk River. Hammond made an advance payment of \$500,000. The purchase price to be paid by Hammond for said timber was to be determined by quantity cut and removed from the said real property at the rate of \$7.50 per thousand board feet and if the logging was not completed by December 31, 1959, the remaining timber was, at the option of Elk River to be cruised and paid for at the agreed price of \$7.50 per thousand, and Hammond was to have until December 31, 1961, to complete the logging. Hammond was required to pay all the taxes on the timber from and after March of 1957. If the \$500,000 advance payment more than paid for the timber, Elk River was to make an appropriate refund to Hammond. Section 13 of the contract provided that neither party could assign or transfer its interest in the contract without the consent in writing of the other party but "this provision shall not be construed to prevent Hammond from entering into contracts with other persons for any portion of the work undertaken to be performed hereunder by Hammond."

From October, 1948, to October, 1956, the property was logged by Hammond in accordance with good logging practice and

to the satisfaction of Elk River. During this period Hammond subcontracted a large part of the trucking. During the same period Hammond invested \$15,000 in surveying and \$100,000 in building roads on the Elk River property and removed about 90 million board feet of timber. At the time this controversy developed, approximately 39 million board feet were yet to be logged.

By an agreement dated May 23, 1956, Georgia-Pacific obtained the right to buy all the stock of Hammond. Tax and financial problems made it difficult for Georgia-Pacific to complete the stock purchase, and Georgia-Pacific made an alternative proposal: It agreed to buy the Hammond assets for \$79,508,800 (that being the agreed price of all stock), provided, however, that part of the purchase price was to be paid in debentures rather than cash. The asset purchase agreement was dated September 24, 1956, and it provided that the transaction should close on October 22, 1956.

Promptly after the Georgia-Pacific-Hammond stock purchase proposal became enforceable and the transaction was revised to take the form of an asset purchase, Elk River was requested to consent to an assignment of the 1948 timber sale agreement to Georgia-Pacific or to its wholly owned subsidiary, Redwood. Elk River refused to consent to such assignment.

Elk River's refusal to permit an assignment of the 1948 timber contract forced a change in the asset purchase plan between Hammond and Georgia-Pacific. Consequently, the liquidation plan whereby Hammond was to have disposed of all its assets to Georgia-Pacific was modified to exclude the sale of Hammond's interest in the 1948 timber contract and it was agreed that Hammond would enter into a subcontract with Hammond-California, a Georgia-Pacific subsidiary, whereby Hammond-California, for an agreed consideration, would log the Elk River property and deliver the logs to Hammond at Eureka, California, and that Hammond would then sell the logs to Hammond-California, at cost, the



cost to include logging expense, stumpage payments to Elk River, and any other expense incurred by Hammond. The contract then provided that the work should be performed strictly in accordance with the Elk River agreement, and specifically provided that no assignment of Hammond's rights under the Elk River agreement was contemplated.

The sale by Hammond to Georgia-Pacific was consummated on October 22, 1956, and thereupon Hammond, a Delaware corporation, filed a notice of dissolution with the Secretary of State of the State of Delaware. The trial court found: That Hammond has retained its interest in the timber on the Elk River property and the Hammond liquidation program has been modified accordingly; that the activities of Hammond since October 23, 1956, have been its own activities undertaken on its own account and for its own purposes; that those activities have not been the activities of Georgia-Pacific or Hammond-California taken in the name of Hammond Lumber Company; that there has been no assignment by Hammond of the timber sales agreement of October 22, 1948; that the logging contract and the log sales agreement are not, either in form or in substance or in effect, an assignment of the October 22, 1948, contract; that they are not the equivalent of such an assignment; that the transactions evidenced by the logging contract and the log sales agreement were the bona fide transactions entered into by the parties for legitimate business purposes and supported by legitimate business considerations; that it was not a sham transaction or a device to evade the provisions of paragraph 13 of the timber sales agreement of October 22, 1948; that Hammond did not transfer the burden of its obligations under the terms of the Elk River-Hammond contract and that Hammond remains obligated to perform said contract; that subsequent to October 23, 1956, Hammond distributed all its assets to its stockholders, except the timber on the Elk River property, certain cash and the benefit of certain contractual obligations of Georgia-Pacific and

Hammond-California. The court further found that the logging operations of Hammond-California on the Elk River property are being conducted by the same methods as when Hammond did the logging and those operations are being supervised by the same foreman and the same logging superintendent who were in charge for Hammond; that the ultimate responsibility for those operations rests with Earl B. Birmingham, president of Hammond-California, who is and for several years has been president of Hammond; that by the provisions of the asset purchase agreement of September 24, 1956, Georgia-Pacific and Hammond-California have guaranteed the performance by Hammond of the timber sales agreement of October 22, 1948; that as of December 31, 1956, the net worth of Hammond-California was approximately \$13,500,000 and the net worth of Georgia-Pacific (excluding Hammond-California from consideration) was approximately \$47,800,000; that Hammond has tendered to Elk River prompt payment for all timber removed from the Elk River property since October 22, 1956, at the contract stumpage rate of \$7.50 per thousand; that Hammond has tendered to Elk River its certified check in the amount of \$292,500 to pay in full (at the contract stumpage rate of \$7.50 per thousand) for the 39 million feet of timber estimated to remain on the Elk River property; that Elk River has not proved that Hammond will be unable to perform its remaining obligations under the Elk River-Hammond timber sales agreement, and, further, that Elk River has failed to prove that it has been or will be in any way damaged or prejudiced by the transactions of which it complains; that all actions taken by the defendants in connection with the transactions to which this case relates have been taken in good faith and under claim of right; and that Hammond has fully performed all of its obligations under the timber sales agreement of October 22, 1948, and that there has been no breach by Hammond of that agreement.

[1,2] Elk River contends and argues that Hammond has, in substance and effect,

assigned the 1948 contract in violation of paragraph 13 of the 1948 timber contract. As heretofore stated, the trial court found that Hammond had not violated the covenant against assignment and we feel that, in this, the record amply sustains the trial court. The findings show on their face that they are based not only on documents but upon all of the surrounding circumstances. Some of the evidence is oral, some is written and much of it bears in some degree on the intent and meaning of the contractual agreement of which Elk River complains. Under such circumstances the trial court's inferences and conclusions of fact are decisive on appeal. As stated in *Re Estate of Rule*, 25 Cal.2d 1, at page 11, 152 P.2d 1003, at page 1008, 155 A.L.R. 1319:

"The rule is that an 'appellate court will accept or adhere to the interpretation [of a contract] adopted by the trial court—and not substitute another of its own—\* \* \* where parol evidence was introduced in aid of its interpretation, and such evidence \* \* \* is such that conflicting inferences may be drawn therefrom.' (4 Cal.Jur. 10-Yr. Supp. (1943 rev.) 146-147, § 192; see also 2 Cal.Jur. 934-939, § 549.)"

And here, as in that case, "certainly inferences may be drawn from the contract and the surrounding circumstances \* \* \* which would support the finding which we must presume was made by the trial court relative to the intention of the contracting parties."

[3] In a material way the Hammond-Elk River timber contract and the facts of this case are similar to the facts and the contract ruled upon by this court in *Ascherman v. McKee*, 143 Cal.App.2d 277-283, 299 P.2d 367, 368. In that case Mrs. Ascherman in 1951 entered into a contract with the McKees "for the purchase and sale of the right to cut and remove, on or before July 31, 1956, all fir and pine timber" on the Ascherman property. The purchase price was \$20,000, payable \$5,000 down and the balance at the rate of \$5 per thousand for

the timber removed. "There was a covenant against the assignment of the contract or the assignment of any right to remove timber thereunder without Mrs. Ascherman's written consent." The McKees logged for two weeks and then arranged for Stoll to do the logging. Stoll agreed to pay the McKees \$7 per thousand for all timber removed. Stoll set about logging the property and the McKees continued paying the Aschermans until the total purchase price of \$20,000 had been paid. Mrs. Ascherman then sought to terminate the contract for breach of various covenants, including the covenant against assignment. The trial court concluded that there had been no assignment. This court agreed that the trial court was correct in so concluding. Here, as in that case, the contract entered into between Hammond and Redwood did not purport to be an assignment of the Elk River 1948 timber contract nor of any rights thereunder. On the contrary, it purported to be a contract with Redwood for the logging of timber which Hammond was in the process of paying for. There is nothing in the Elk River contract which prevented Hammond from subcontracting the logging. As heretofore stated paragraph 13 provides: "It is expressly understood and agreed that this contract shall not be assigned or transferred by either party hereto without the consent in writing of the other, but this provision shall not be construed to prevent Hammond from entering into contracts with other persons for any portion of the work undertaken to be performed hereunder by Hammond." In view of this provision in the contract, it may not be said that Hammond did not have the right to subcontract the logging operations. To say otherwise would be contrary to the clear intent and purpose of the paragraph. Here, as in the Ascherman-McKee contract, there was nothing in the Elk River contract which forbade Hammond from selling the timber they were purchasing from Elk River. The fact that Redwood was to deliver the logs to Hammond at Eureka where Hammond, in turn, was then to resell them to Redwood

is of no concern to appellant. This was a sale and not an assignment. Elk River acknowledges that here, as in the Ascherman case, the logging subcontract is not identical with the timber purchase agreement. For one thing, Hammond-California must complete the logging by December 31, 1958, rather than December 31, 1961. Apparently the reason for the difference in the time of completion of the logging operations was that if Redwood does not finish the work by December 31, 1958, Hammond will have until October 23, 1959, to complete the logging with its own employees. Elk River points out that in the Ascherman case the McKees had not disposed of their assets. The Hammond sale to Georgia-Pacific makes no difference. Here, Hammond has tendered to Elk River the estimated amount for all timber remaining to be cut or logged upon the Elk River property. Moreover, as matters now stand, Elk River can look not only to Hammond and its stockholders for performance of the 1948 agreement but also to Georgia-Pacific with a net worth of \$47,800,000 and Hammond-California with a net worth of \$13,500,000, for each has agreed with Hammond to discharge whatever obligations Hammond may have to Elk River.

We do not consider it necessary to distinguish the many cases cited by appellant on the subject matter, since we feel that the ruling in the Ascherman case is decisive here. If there was no assignment in the Ascherman case there was none here. Hammond did not seek to substitute another in its place.

[4] Nor do we believe that there is merit in appellant's contention that by reason of the assignment and transfer of all Hammond's assets and its dissolution Elk River had the right to rescind. The fact that Hammond has filed a notice of dissolution with the Delaware Secretary of State does not mean that the corporation no longer exists. Under section 278 of the Corporation Law of Delaware, 8 Del.C. Ann., Hammond remains in existence in or-

der to gradually close and settle its affairs for the term of three years from such expiration or dissolution. The section, in part, provides: "All corporations, whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established." Under this provision Hammond will remain in existence until October 23, 1959, for all purposes mentioned in the statute.

Elk River contends that the notice of dissolution terminated the 1948 timber contract and forfeited the timber to Elk River. Such is not the case. In *Addy v. Short*, 1952, 8 Terry 157, 47 Del. 157, 89 A.2d 136, 139, the Supreme Court of Delaware rejected the position for which Elk River contends. In holding that a dissolved corporation could maintain an action of ejectment to force a right of reverter the Delaware court pointed out that the purpose of section 278 is to make certain that upon dissolution a corporation shall not forfeit its rights. The court said:

"The section above quoted is in effect a statutory expansion of the equitable doctrine that upon dissolution of a corporation its property, notwithstanding the technical rules of the early common law, does not escheat to the sovereign or revert to the original grantor, and will be administered in Chancery for the purpose of winding up the corporate affairs and distributing the assets to those equitably entitled to them. Cf. *Diamond State Iron Co. v. Husbands*, 8 Del.Ch. 205, 68 A. 240; *Washington Fire Co. etc. v. Yates*, 13 Del.Ch. 32, 115 A. 365. During the three-year period of winding up, the corporation functions exactly



as it had functioned before dissolution, with the important qualification that its powers are limited to closing its affairs and do not extend to carrying on the business for which it was established. But as concerns the property it had at the time of dissolution, its title and possession are unimpaired. Whatever rights it had, of whatever nature, are preserved in full vigor during the three-year period. Any other conclusion would contravene the plain language of the statute. The suggestion that the act of dissolution in itself in some fashion works a forfeiture or extinguishment of a legal right, by analogy to the death of an individual, is therefore on the face of the statute unsound."

To the same effect see *Harned v. Beacon Hill Real Estate Co.*, 1911, 9 Del.Ch. 232, 80 A. 805; *Id.*, 1912, 9 Del. 411, 84 A. 229, 235; *Townsend v. Delaware Co.*, 1918, 12 Del.Ch. 25, 103 A. 576. *Addy v. Short*, *supra*, is recognized as an authoritative statement of the Delaware law. See *United States v. P. F. Collier & Son Corp.*, 7 Cir., 208 F.2d 936, 940, 40 A.L.R.2d 1389; *United States v. Maryland State Licensed Beverage Ass'n*, D.C., 138 F.Supp. 685, 708; *Christian v. Texas Gas & Power Corp.*, D.C.Tex.1952, 14 F.R.D. 80, 81; *Stensvad v. Ottman*, 123 Mont. 158, 208 P. 2d 507; *Big Sespe Oil Co. v. Cochran*, 9 Cir., 276 F. 216, 223.

[5] Elk River argues that by subcontracting the logging and selling the logs Hammond is "continuing the business" for which it was established, in violation of section 278 of the Delaware statute. This is not true. Hammond points out that until October 23, 1956, it was in the business of manufacturing and selling lumber, with four billion feet of timber, four mills and 33 retail yards. Since October 23, 1956, Hammond has not manufactured or sold any lumber or operated mills or yards. This means Hammond has not continued in business in violation of section 278 and the trial court so found. What Hammond is now

doing is precisely what section 278 authorizes, that is, closing its business and disposing of its remaining assets.

[6, 7] Among those assets is the timber on the Elk River property. Elk River assumes that the timber on Elk River lands belongs to Elk River. We cannot agree with Elk River in this respect. The contract of October 22, 1948, the short form agreement, the indemnity agreement and the amendment of December 20, 1950, all speak in terms of a present sale to Hammond, i. e., "Elk River agrees to sell to Hammond and Hammond agrees to buy from Elk River all the standing and down timber" on the described property. This language purports a sale of the timber, not a license to cut; that it was intended as a sale is further borne out by the fact that upon the execution of the contract Hammond paid Elk River \$500,000 and, as the contract makes plain, it was considered probable that this \$500,000 would pay for all the timber. Further, Hammond, by the terms of the contract, was thereafter required to pay all taxes on the timber. We feel that this means that title passed when the agreement was signed, and became one of Hammond's assets. See *Woodbine v. Van Horn*, 29 Cal.2d 95, 107, 173 P.2d 17; *Johnson v. Besoyan*, 85 Cal. App.2d 389, 392, 193 P.2d 63; *Aiello v. Sliskovich*, 72 Cal.App.2d 39, 163 P.2d 768; *Gianelli v. Globe Grain & Milling Co.*, 48 Cal.App. 103, 191 P. 720. Therefore, under the provisions of section 278 of the Delaware Corporation Law, Hammond is authorized to dispose of and convey this property. The result would be the same even if Hammond has no more than an executory contract authorizing it to harvest the timber, since under the ruling in *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 345, 182 P.2d 182, 188, the right to compel Elk River to perform its agreement passed on dissolution of the corporation to the shareholders who, as partners, were entitled to enforce that right. The court, in the *Trubowitch* case, *supra*, said:

"Since the assets of a dissolved corporation can only be distributed to the shareholders subject to the rights of creditors of the corporation, the assets of the corporation remained subject to an equitable charge for all debts owed by the corporation (see Civ.Code, sec. 402; *In re Estate of Scrimger*, 188 Cal. 158, 166, 206 P. 65; *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 354, 181 P. 780; 16 *Fletcher, Cyc. Corporations*, perm. ed., secs. 8127, 8161; *Ballantine, Corporations*, rev. ed., 723; see 97 A.L.R. 480), and its shareholders who continued the business as a copartnership became personally liable to the creditors of the corporation on existing contracts. *National Union Bank of Watertown v. Landon*, 45 N.Y. 410; *Steele v. Stanley*, 237 Ky. 517, 35 S.W.2d 867; 16 *Fletcher, ibid.*, sec. 8132. *Nor under modern statutes does the dissolution of the corporation terminate its ability to enforce a contract for the delivery of goods.*" (Emphasis added.)

[8] There is no merit in the contention that the consideration for the 1948 contract has failed. By the terms of the contract Elk River is entitled to money for the timber and to good logging. The record shows that Elk River concedes that it has been paid in full for all timber removed prior to October 22, 1956, and the record further shows that Hammond has tendered payment in full, and in advance, for all timber remaining on the property. Logging is being continued by the same methods and by the same personnel acting under the same supervision as when Hammond's employees did the work, logging then concededly satisfactory to everyone. Nor is there any merit in Elk River's contention that Hammond has repudiated the 1948 agreement. The record shows, and the court so found, that there was no repudiation of this contract.

For the reasons hereinabove stated we conclude that the judgment should be affirmed. Therefore, we consider it unneces-

sary to discuss the remaining points raised by this appeal.

The judgment is affirmed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.



164 Cal.App.2d 133

George A. MITCHELL, Petitioner,

v.

COUNTY SANITATION DISTRICT NUMBER ONE OF LOS ANGELES COUNTY, State of California, and J. M. Lowery, County Auditor of Los Angeles County, State of California, Auditor of Said Board, Defendants.

George A. MITCHELL, Petitioner,

and

County Sanitation District Number One of Los Angeles County, State of California, Defendant, Respondents,

v.

J. M. LOWERY, Defendant, Appellant.

Civ. 23084.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1958.

As Modified on Denial of Rehearing

Nov. 3, 1958.

Hearing Denied Dec. 10, 1958.

Proceeding on memorandum filed by sanitation district for costs and disbursements incurred on appeal of prior mandamus proceeding. Auditor of board of directors of district moved to be relieved of personal liability on ground that his defense had been made in good faith. The Superior Court of Los Angeles County, William P. Haughton, J., denied motion, and auditor appealed. The District Court of Appeal, Lillie, J., held that where party brought mandamus to compel sanitation district and auditor of board of directors of district to pay judgment against district, party obtained judgment, auditor appealed, but district did not, district averred that

auditor's refusal to pay as directed by judgment had been without authority of board of directors of district, that auditor appeared in mandamus proceeding without consent and approval of board and that board was forced to incur costs by virtue of acts of auditor, denial of auditor's motion was not an abuse of discretion.

Affirmed.

#### 1. Costs ⇨230

Where auditor of board of directors of sanitation district, in prior proceedings, had been directed to issue warrants in favor of party who claimed interest on coupon bonds, but auditor refused to issue warrants as ordered by board pursuant to judgments, party brought mandamus against district and auditor to compel payment, district did not appeal from adverse decision, but auditor appealed and served copy of his opening and closing briefs on district, after clerk of court designated district as respondent on appeal, district was an "adverse party" on appeal under section of code designating names of parties on appeal, and district was a "prevailing party" and was entitled to costs. West's Ann.Code Civ.Proc. § 938; West's Ann.Rules on Appeal, rule 26(a), (b) (1).

See publication Words and Phrases, for other judicial constructions and definitions of "Adverse Party" and "Prevailing Party".

#### 2. Statutes ⇨223.4

A special statute dealing expressly with a particular subject controls and takes priority over a general statute.

#### 3. Mandamus ⇨190

Where statute relating to matter of costs generally and statute dealing specifically with costs in mandate matters were not consistent, with respect to costs in connection with mandate proceeding, general statute was superseded by statute dealing specifically with mandate matters. West's Ann.Code Civ.Proc. §§ 1029, 1095.

#### 4. Mandamus ⇨190

A county sanitation district is a "municipal corporation" within statute providing that in mandate action where respondent is municipal officer all damages and costs awarded against respondent shall be recovered and awarded against municipal corporation represented by such officer and not against such officer, if officer appeared in the defense in good faith. West's Ann.Code Civ.Proc. § 1095.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Corporation".

#### 5. Municipal Corporations ⇨1039

Where statute permits sanitation district to be sued in its own name but provides for board of directors which constitutes governing body of district to carry on its affairs and direct its policies, auditor of board, who was not a member of board, had no connection with its counsel, and had no control over its litigation, had no statutory authority to appear on behalf of district and appeal from decision which was rendered against him and district and from which district did not appeal. West's Ann. Health & Safety Code, §§ 4730 et seq., 4738.

#### 6. Mandamus ⇨190

Where party brought mandamus to compel sanitation district and auditor of board of directors of district to pay judgment against district, party obtained judgment, auditor appealed, but district did not, after adverse judgment, auditor moved to strike cross bill of sanitation district, on ground that his defense had been in good faith, counter affidavit executed by district averred that refusal to pay had been without authority of board of directors of district, that auditor appeared in mandamus proceeding without consent and approval of board and that board was forced to incur costs by virtue of acts of auditor, denial of auditor's motion to be relieved from personal liability for costs was not an abuse of discretion. West's Ann.Code Civ.Proc. § 1095.



**7. Appeal and Error** ⚡920(1)

In considering an appeal from order, which was made on motion based on affidavits and which involves a determination of question of fact, if there is any conflict therein, that favoring respondent is accepted by reviewing court as true, and since all intendments are in favor of ruling of lower court, affidavit in behalf of successful party is deemed not only to establish facts directly stated therein, but all facts reasonably to be inferred from those stated.

**8. Costs** ⚡264

In proceeding to determine costs in connection with appeal from mandamus action brought against county auditor and county sanitation district to compel payment of valid judgment against district, which did not appeal, evidence sustained implied finding that appeal of auditor was not made in good faith. West's Ann.Code Civ.Proc. § 1095.

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Harold W. Kennedy, County Counsel, Los Angeles, Alfred Charles De Flon, Deputy County Counsel, Hollywood, for appellant.

No appearance for respondent George A. Mitchell.

Gordon, Knapp & Gill, Joseph C. Gill, Los Angeles, for respondent County Sanitation Dist. No. One of Los Angeles County.

LILLIE, Justice.

On the original trial of this action, a mandamus proceeding to compel the county auditor Lowery to pay a valid municipal court judgment against the county sanitation district for interest on bond coupons and entitled, "George A. Mitchell, Petitioner, v. County Sanitation District Number One of Los Angeles County, State of California, and J. M. Lowery, County Auditor of Los Angeles County, State of California, Auditor of Said Board, Defendants," judgment was rendered in favor of petitioner Mitchell, and solely against appellant J. M. Lowery, as auditor of the

board of directors of the district, directing him to issue certain warrants in favor of petitioner. Lowery appealed from the judgment and served his opening brief on both Mitchell and the sanitation district. In opposition thereto they each filed separate briefs. Lowery was at all times represented by the county counsel; the sanitation district had its own counsel, as authorized by section 4739, Health and Safety Code, who represented it in all of the within litigation. The judgment was affirmed (150 Cal.App.2d 366, 309 P.2d 930), and a petition for hearing was denied by the Supreme Court. The remittitur included an award of costs on appeal to "*respondents*."

Pursuant thereto, Mitchell and the sanitation district filed separate memorandum for their costs and disbursements on appeal. Before the court below Lowery made two motions—to strike the cost bill of the sanitation district on the ground it was not a party to the appeal and therefore was not entitled to costs; and to be relieved of personal liability for costs in accordance with section 1095, Code of Civil Procedure. The trial court denied both motions and it is from the orders denying the same he appeals.

It is the contention of appellant, in connection with his motion to strike the sanitation district's cost bill, that the district was neither a "prevailing party" within the purview of rule 26(a), Rules on Appeal, nor an "adverse party" to the appeal under section 938, Code of Civil Procedure. He urges on his motion to be relieved of personal liability for costs that in appealing from the judgment in the mandamus action he acted in good faith in a representative capacity on behalf of the sanitation district, and that under section 1095, Code of Civil Procedure, he is entitled to relief.

At the request of appellant the record in the mandamus proceeding has been incorporated by reference into the record before this court. Therein we note, as did the reviewing court in its opinion disposing of the matter (150 Cal.App.2d 366, 309 P.2d 930), that the superior court litigation was

originally made necessary by the refusal of Lowery, as auditor of the board of directors of the sanitation district, to honor a demand previously reduced to a final judgment in a municipal court action brought by Mitchell against the district. This action had its genesis in the refusal of the district, because the obligation had been outlawed by the statute of limitations, to pay interest on certain bonds issued by it and held by Mitchell who had been out of the country on maturity date. Lowery was not therein joined as a party defendant—only the sanitation district was sued. The district, through its board of directors and by resolutions, waived the defense of the statute of limitations at the request of Mitchell's attorney in open meeting, and upon being informed by its counsel that it had intentionally done so, as set forth in its answer, the municipal court granted judgment on the pleadings. Thereafter, when Mitchell, pursuant to the judgment, made demand upon Lowery for payment of the coupons from the funds of the sanitation district, he refused. Mitchell sought the writ of mandate in the superior court to compel him to pay the amount of the judgment. In that proceeding Lowery attacked the waiver of the statute of limitations in the municipal court as being beyond the scope of the sanitation district's legal powers and alleged, among other things, that the board of directors of the district had "improperly and illegally" agreed with Mitchell's attorney to waive the statute.

This court, speaking through Mr. Justice Fourt, affirmed the superior court judgment (150 Cal.App.2d 366, 309 P.2d 930) and declared that it was entirely proper under the circumstances for the district to waive the statute of limitations to permit it to honor and pay its legitimate debts, for which it had the funds available. One of Lowery's contentions on that appeal was that the power of the board to waive the statute was not determined by the municipal court after a "fair, open, adversary hearing," that Mitchell's judgment was obtained by "concert and improper agreement between Mitchell and the Board," and that

a violation of the board's so-called official "trust" required a nullity of the waiver. (Appellant's Opening Brief and Closing Brief, No. 22100.)

Although in the mandamus proceeding Lowery, in his unverified counterclaim, alleged that the board of directors of the district acted "fraudulently and in collusion and concert with the plaintiff," his amended verified counterclaim eliminated the claim. However, on appeal, by way of argument, Lowery placed principal reliance for his contentions upon cases involving fraud or collusion, thereby implying the existence of such a situation. The court took cognizance of this and other claims and resolved them adversely to Lowery. It is obvious that this court, too, believed there existed an insinuation against the motives of the board, for it went to some extent to show that Mitchell's counsel presented his claim to the board in a "forthright manner," that before the meeting he had "never seen nor heard of any of the members of the board of directors, or the attorney for the District," had "never discussed the matter with any member of the board individually" and that all matters relating to the waiver were determined in "open public meeting" (150 Cal.App.2d 366, 368, 309 P.2d 930, 931); and concluded, at page 376 of 150 Cal.App.2d, at page 936 of 309 P.2d: "It is difficult to see how or in what manner the District was imposed upon in the present case."

Appellant urges here that the sanitation district *itself* (as opposed to its board of directors) had a common interest with, and was not a party adverse to, him in the prior appeal. We see no merit in this contention for we cannot comprehend how the district could act except through its board of directors.

We agree with the position advanced by respondent that Lowery's criticisms of the governing board's motives; the implied suggestion of "fraud or collusion"; and his attacks on the integrity and legality of the board's acts necessarily made the district an adverse party in the prior appeal;

and that by refusing to draw the warrants as ordered by the board pursuant to the municipal and superior courts' judgments, from which the district did not appeal, appellant placed himself in a position adverse to the district.

The early case of *Senter v. De Bernal*, 1869, 38 Cal. 637, 640-641, construed the term "adverse party" found in former Practice Act, section 335 (now § 938, Code of Civil Procedure) as every party whose interest in the subject matter of an appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of whether he appears upon the face of the record as plaintiff, defendant or intervenor. In the instant case the integrity of an official body and the propriety of its acts constituted one of the pivotal questions, becoming a major part of the subject matter of the previous appeal, requiring a defense on the part of the district and by necessity making it a party respondent.

Of interest at this point is his declaration in appellant's previous Notice of Appeal (No. 22100) that he appealed as an "officer" and "employee" of the district, as its auditor, "and on behalf of said County Sanitation District Number One." Since in the original mandamus proceeding the sanitation district and Lowery were named as separate defendants, and since the district did not appeal from the judgment, it is apparent that the district was willing to pay the claim. Although describing himself as an "employee" and "officer" of the district it is clear from the record that appellant in prosecuting his appeal was acting neither under the authority or direction of the board of directors of the district or its counsel, nor with their consent or approval, but was in fact acting in opposition to their authority, contrary to their direction, and in his own behalf. Lowery's Notice of Appeal certainly gave the district the right, if not the duty, to appear in the appellate proceedings and disavow any purported appeal on its behalf.

This it did, effectively defending its waiver of the statute of limitations, standing on its original determination to pay its legitimate obligations.

Additionally, the district was designated as a "respondent" in the Clerk's Transcript in appeal No. 22100, and under rule 14, Rules on Appeal, was entitled to file a brief. In *re Estate of Green*, 133 Cal.App. 2d 451, 452, 284 P.2d 202. Although originally the clerk may have been responsible for this, the fact that thereafter Lowery recognized and acknowledged the district as a "respondent," is borne out by his service on it of a copy of his opening brief, as well as his closing brief, in which he was silent concerning the district's appearance.

[1] Under all of the facts herein presented we believe that the sanitation district was an "adverse party" under section 938, Code of Civil Procedure. We reach the same conclusion with respect to appellant's further contention that the district was not the "prevailing party" on the prior appeal and hence not entitled to costs under rule 26, Rules on Appeal.

A "respondent" is defined by rule 26(a) as the "prevailing party" where there is a "general and unqualified affirmance"; and the rule 26(b) implements this definition by prescribing the clerk's entry of costs in the remittitur: "(1) In the case of a general and unqualified affirmance, \* \* \* for the respondent \* \* \*." Obedient to the mandate of that section the affirmance of the judgment being general and unqualified, the clerk of this court inserted an entry in the remittitur awarding costs to "respondents."

The Supreme Court has observed, In *re McGee*, 37 Cal.2d 6, at page 8, 229 P.2d 780, that a litigant may be the prevailing party in substance if not in form. In that case the court held it unjust to require the respondent to bear the costs of appeal when the position he maintained from the inception of the proceedings was eventually upheld. Such a rationale should here, too, be adopted. The district's main contention, to wit, its right to waive the statute of



limitations, made necessary by Lowery's attack on the legality and propriety of its actions, eventually obtained the sanction of the reviewing court. Irrespective then of any question of the formal status of the sanitation district on the prior appeal, we believe the district should have its costs under rule 26.

We come now to Lowery's claim for relief from personal liability for costs. He contends that "public officers are not personally liable for costs when they sue, or are sued, in their representative capacities." This general rule of law has been codified in California. The pertinent language of the Code of Civil Procedure, section 1095, providing for costs to the successful applicant in a mandate action reads as follows: "If judgment be given for the applicant, he may recover the damages which he has sustained \* \* \* together with costs; \* \* \* provided, however, that in all cases where the respondent is a state, county or municipal officer, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the state, county or municipal corporation represented by such officer and not against such officer so appearing in said proceeding \* \* \* but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith."

Lowery questions (1) whether as auditor of the sanitation district he was an officer of a "municipal corporation" within the meaning of section 1095, and if not whether the only statute then applicable would be section 1029, Code of Civil Procedure, which provides: "When any county, city, district, or other public agency or entity, or any officer thereof in his official capacity, is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the treasury thereof;" and (2) if section 1095 rather than 1029 is applicable, whether the trial court abused its discretion in failing to find that he acted in good faith.

[2, 3] Section 1029 relates to the matter of costs generally, whereas section 1095 deals specifically with costs in mandate matters. Appellant concedes as much, and also acknowledges that the statutes are not consistent. Where such inconsistencies appear, courts are governed by the established principle of statutory construction that a special statute dealing expressly with a particular subject controls and takes priority over a general statute. *Brill v. County of Los Angeles*, 16 Cal.2d 726, 732, 108 P.2d 443; *Tousley v. Dishman*, 90 Cal.App. 759, 761, 266 P. 373. For the purposes of this appeal, therefore, we think that section 1029 is superseded by section 1095.

[4] However, before section 1095 can be properly invoked it must appear that all of the conditions therein specified have been met. First, the respondent officer sought to be charged must have been an officer of one of the public agencies listed—in the instant case, a municipal corporation. No case has been cited to the effect that a county sanitation district is or is not a municipal corporation; although in *Imperial Irr. Dist. v. County of Riverside*, 96 Cal.App.2d 402, 405-406, 215 P.2d 518, an irrigation district was held to be a "municipal corporation" as that term is used in Section 1, Article XIII of the California Constitution. The Imperial Irrigation District case, *supra*, follows the reasoning found in *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, at page 11, 172 P.2d 863, 866, where the court quotes with approval from the dissenting opinion in the case of *Turlock Irr. Dist. v. White*, 186 Cal. 183, 195, 198 P. 1060, 17 A.L.R. 72: "An irrigation district probably comes nearer than any other of the subordinate public corporations of the state to meeting the technical requirements defining a municipal corporation. It has its own directors and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent

of the county and state, aside from the control of general laws." All of the foregoing powers are granted a county sanitation district by the provisions of Health and Safety Code, section 4700 et seq., and the district operates independently of other agencies; hence, we cannot do otherwise than decide that a county sanitation district is a "municipal corporation" as the term is used in section 1095. Furthermore, such a conclusion makes for uniformity and obviates the anomaly which would result if for certain purposes, such as exemption from property taxes, county sanitation districts are to be treated in the same category as municipal corporations, and for other purposes such as the one at bar they are to be placed in another category. *Metropolitan Water Dist. of Southern Cal. v. Co. of Riverside*, 21 Cal.2d 640, 644, 134 P.2d 249.

[5] The next condition specified in section 1095 relates to the representation of the municipal corporation by the officer against whom costs are asked. As auditor of the county in which the district was formed, Lowery is ex officio auditor of the district. Section 4732, Health and Safety Code. According to the record in the mandamus action, he appeared as "an officer, employee and agent" of the district and "on his own behalf and on behalf of said County Sanitation District Number One," and his then attorney, the county counsel, is his present counsel of record. He was not a member of the district's governing body, the board of directors consisting of the chairman of the board of supervisors and the presiding officers of 9 other cities located within the district (Health and Safety Code, section 4730), nor did he have the same authority given the district to employ counsel. Health and Safety Code, section 4739. His sole interest in the original litigation between Mitchell and the district seemingly stemmed from a difference of opinion with the board which ordered him to draw the warrant—his personal belief, and that of his counsel, that the district and the taxpayers as real parties in interest were being im-

posed upon. The trial judge in the municipal court action, however, determined otherwise and any personal liability for the payment of a doubtful claim was thus extinguished. Personally dissatisfied with the trial court's decision in the subsequent mandamus action, he prosecuted an appeal to this court and unsuccessfully sought a hearing in the Supreme Court. Appellant would have incurred no possible personal liability had he drawn the warrant in payment of the municipal court's final judgment, or in compliance with the writ of mandate. The record is clear that the appeal he prosecuted was neither necessary nor authorized by the district or its counsel; nor did he represent the district. It was, at all times, represented in this litigation by its board of directors and its counsel, a fact upon which the opinion of this court (150 Cal.App.2d 366, 309 P.2d 930) was predicated. The question posed here is whether the enactment of the proviso in section 1095, permitting recovery of costs under stated conditions, contemplated the situation at bar. Although the right of the district's auditor to refuse payment of a doubtful claim must be conceded, we do not believe that in opposing satisfaction of a final judgment thereafter validating such claim, the auditor, acting as he did not only without the consent and approval of the board of directors of the district but directly contrary to its directions to pay it, was then and there representing the district and thus entitled to the protection of the pertinent provisions of section 1095. Particularly is this so when he took such action without the authority or sanction of the district's governing board which alone was empowered by statute to employ counsel trained and paid to render advice on legal matters. Lowery advanced the argument that in this litigation he has represented the *district* as opposed to its board of directors. It takes only a review of section 4730 et seq., Health and Safety Code, to reject appellant's argument as without merit. Although section 4738 permits the district to sue and be sued in its own name, the code further provides in detail for a board of



directors which constitutes the "governing body" of the district, to carry on its affairs and direct its policies. Since Lowery is not a member of the board, has no connection with its counsel and has no control over its litigation, we are at a loss to find any statutory authority for his appearance "on behalf of the district," in the prior appeal. Nor does the record aid him in his claim, for it is apparent that his acts, since the entry of the municipal court judgment, were in complete derogation of the board's order. Nor does statutory authority or the record show Lowery in this case had any control over the board's litigation, which right at all times was vested with the governing board. An Illinois case, *People ex rel. Altorfer v. City of Peoria*, 378 Ill. 572, 39 N.E.2d 42, cited by respondent, seems persuasive. The court there upheld the right of the city council to control its litigation and stated, 39 N.E.2d at page 44: "One of the defendants, the city of Peoria, it is agreed, is a nominal party to the mandamus action. Its co-defendant, the commissioner of buildings, is a party to the record in his official capacity, no relief being sought or granted affecting his individual rights in any respect. The judgment awarding the writ of mandamus commanded him to issue a building permit, an order limited to action incident to his official duties and, conversely, in no way related to his personal interest. The interest which the commissioner of buildings and his superior, the mayor, might have in prosecuting an appeal from a judgment rendered against the city and its officer was subject to the rule of a majority of the council as expressed at a regular meeting. *Hotchkiss v. Calumet City*, 377 Ill. 615, 37 N.E.2d 332."

In short, Lowery disagreed and took personal issue with the board, its counsel and the courts, and expected the taxpayers to pay costs expended in asserting his position on appeal.

It is interesting to note at this point that appellant's argument is predicated mainly upon his contention that fiscal officers generally should be permitted to serve as

"watchdogs" at government cost over the actions of local governing bodies to protect the taxpayers. Referring only to the case at bar, we are unable to find statutory authority for this position, and it would appear as a practical matter that appellant, whose personal liability was in no way at stake, in obtaining independent counsel and directly opposing the district's orders and the two judgments, was in no better position than that of a taxpayer who brings a suit to determine the legality of official action. Appellant cites *District Bond Co. v. Cannon*, 20 Cal.App.2d 659, 67 P.2d 1090, for the proposition that he had the privilege of appealing a judgment he deemed incorrect. In that case it is obvious that the city treasurer acted with the authority of the board of the improvement district and on the advice of its counsel, who represented her. She did not act in derogation of the district's authority. The petitioner urged a dismissal of her appeal because she was not personally an aggrieved party. In rejecting its contention the court recognized she was acting as an officer and affirmed her right in that capacity to appeal from an order which determined her duty with reference to the fund in question. The privilege of appealing as such is not in question in the instant case. Our query is whether it can be done at district expense.

[6] In any event, it clearly appears from the record that the trial court did not abuse its discretion in refusing to find that Lowery was acting in good faith—such refusal being implicit in the order denying the motion for relief from personal liability. The motion was heard and submitted on affidavits, as well as on the record (trial and appellate) in the mandamus action. Lowery's affidavit was limited to the allegation that he asserted his defense "in good faith" and on advice of counsel "and not for the purposes of harassment of petitioner George A. Mitchell, or for any other purpose." A counteraffidavit, executed by the district's counsel averred, among other things, that as auditor it was Lowery's duty to draw the warrant, that his refusal has been without the consent, direction or au-



thorization of the board of directors, and without and contrary to the advice of the board's official counsel, that adequate funds were available for the payment of the final judgment, and that the board has been willing and able to pay. It further alleged that Lowery was ordered by the board to satisfy the judgment, his refusal resulting in the judgment in the mandamus proceeding, that he appeared without the consent and approval of the board or its counsel and that the "district was forced to incur these costs by virtue of the unlawful refusal of J. M. Lowery to discharge his legal duty to draw a warrant in payment of what the district board of directors and its counsel, as well as the courts, determined to be a lawful obligation of the district."

[7,8] Lowery argues that to charge him here with costs and disbursements would substantially eliminate a valuable check on the official acts of governing bodies; he refers to a ruling on a demurrer to the effect that the district could not legally waive the statute; and points out that this court in no wise considered his appeal a frivolous one and went to some lengths to resolve the issues presented. Of course, in the last analysis the existence or absence of "good faith" was a factual question, although a close one, and governed by the familiar substantial evidence rule, also applicable to matters submitted by way of affidavit. *Griffith Co. v. San Diego College for Women*, 45 Cal.2d 501, 508, 289 P.2d 476, 47 A.L.R.2d 1349. It is well settled that in considering an appeal from an order made on a motion based on affidavits and which involves a determination of a question of fact, if there is any conflict therein, that favoring the respondent is accepted by the reviewing court as true, and since all intendments are in favor of the ruling of the lower court, the affidavit in behalf of the successful party is deemed not only to establish the facts directly stated therein but all facts reasonably to be inferred from those stated. *DeWit v. Glazier*, 149 Cal. App.2d 75, 307 P.2d 1031; *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *West Costs Securities Co. v. Kilbourn*, 110 Cal.App. 293, 294

P. 57. The Supreme Court has held that the phrase "good faith" "generally speaking means being faithful to one's duty or obligation." *People v. Nunn*, 46 Cal.2d 460, 468, 296 P.2d 813, 818. Under the facts as here presented and the applicable statutes governing the management of county sanitation districts, the inference is reasonable that Lowery had no duty, official or otherwise, to which he owed the measure of fidelity evidence by his defense of the mandamus action and the appeal which followed. On the issue of "good faith" insofar as the trial court has passed upon the credibility of those executing the affidavits and weighed the evidence offered therein, its implied findings will not be disturbed (*Griffith Co. v. San Diego College for Women*, supra). We find in the record before us no abuse of judicial discretion in the trial court's denial of Lowery's motion to be relieved from personal liability for costs.

For the foregoing reasons, the orders are, and each of them is, affirmed.

WHITE, P. J., and FOURT, J., concur.



164 Cal.App.2d 340

**Fleda HAMRICK and W. L. Hamrick,**  
Plaintiffs and Respondents,

v.

**ACME CIGARETTE SERVICE, a corporation,**  
and **John W. Wheelus, Defendants**  
and Appellants.

Civ. 5721.

District Court of Appeal, Fourth District,  
California.

Oct. 17, 1958.

Action by wife and her husband for a declaratory judgment determining rights of the parties under an installation and service agreement covering a cigarette

vending machine installed in wife's restaurant by corporate defendant following a signing of the agreement by plaintiff-husband. Defendants counter-claimed for damages for breach of contract. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Griffin, P. J., held that evidence sustained finding that plaintiff-wife was sole owner of the restaurant, that individual defendant knew plaintiff-wife was the sole owner of the cafe and procured husband's signature to the agreement on the false representation that the agreement was merely a receipt for the machine, and that there was no valid written agreement between the parties for retention of the machine in wife's restaurant beyond a one year period.

Judgment affirmed.

#### 1. Contracts Ⓒ99(3)

##### Husband and Wife Ⓒ264

In action by wife and her husband for a declaratory judgment determining rights of the parties under an installation and service agreement covering a cigarette vending machine installed in wife's restaurant by corporate defendant following a signing of the agreement by plaintiff-husband, evidence sustained finding that plaintiff-wife was sole owner of the restaurant, that individual defendant knew plaintiff-wife was the sole owner of the cafe and procured husband's signature to the agreement on the false representation that the agreement was merely a receipt for the machine, and that there was no valid written agreement between the parties for retention of the machine in wife's restaurant beyond a one year period.

#### 2. Evidence Ⓒ434(8), 437

Evidence that a corporate agent wrongfully represented to husband of cafe owner that a contract for retention of a cigarette machine in the cafe was only for one year, and that if husband would sign it, it was only a form and did not amount to anything, and that husband did not read the

agreement but believed the representations and signed it for his wife without her consent or knowledge, was admissible as an exception to parol evidence rule, to establish illegality or fraud. West's Ann.Code Civ.Proc. § 1856; West's Ann.Civ.Code, §§ 1640, 2317, 2318, 2334.

Caidin, Bloomgarden & Kalman, Beverly Hills, for appellants.

C. E. Crowley, Ontario, for respondents.

#### GRIFFIN, Presiding Justice.

In this action by plaintiffs-respondents, and cross-defendants, husband and wife, against defendants-appellants and cross-complainants for declaratory judgment under section 1060 of the Code of Civil Procedure involving the interpretation of and rights of the parties in an installation and service agreement, plaintiffs prevailed. The agreement involved (Exhibit 1) reads in part:

"In consideration of Acme Cigarette Service, \* \* \* installing and servicing various cigarette vending machines in the undersigned's place of business \$125.00 Advanced Commissions and other valuable consideration, the undersigned agrees to, and does hereby, assign and grant to Acme the exclusive right and privilege of selling cigarettes at said premises for a period of one year commencing with the 4th day of September, 1953, and thereafter from year to year unless sooner terminated by written notice sent registered mail by either party to the other not later than sixty (60) days prior to the expiration of the term, or any extension hereof; and during said period, further agrees not to permit any person, firm or corporation other than Acme to sell, trade in, or offer cigarettes for sale at said premises. The undersigned further states there is no other legal agreement in effect covering the sale of cigarettes at said premises."

"Acme agrees to maintain and service said machine(s) during said period and shall have full access to the undersigned's place of business during reasonable business hours for that purpose. Acme shall pay to the undersigned its prevailing rate of commission, subject to the express understanding that in the event of any change in the cost of cigarettes to Acme, or any change in or imposition of any tax on the sale of cigarettes, or in the ownership, use or operation of cigarette vending machine(s), the commissions to be paid by Acme may be changed accordingly without otherwise affecting this agreement, upon written notice to the undersigned of any such change. The undersigned agrees that if he shall sell and/or transfer his interest in the business during the term, or any extension, hereof, he shall, in that event, require that as a condition of said sale and/or transfer, the purchaser and/or transferee thereof shall accept this contract for the unexpired portion thereof and assume all of the terms, covenants and conditions thereof. In the event of a breach of this agreement, the undersigned agrees to pay all costs and attorney's fees which may be incurred by Acme by reason thereof. This agreement sets forth the complete understanding between the parties and no representations were made not appearing herein.

"Trade Name      Coffee Cup Cafe  
                                         Title

(Signed) "By W. L. Hamrick  
                 "636 W. 'A' St., Ontario, Calif.

"Approved and Accepted:  
                 "Acme Cigarette Service  
(Signed) "By John W. Wheelus."

The evidence is, and the court found generally that in accord with said written contract (Exhibit 1) defendants installed one of their cigarette vending machines

in the premises of the Coffee Cup Cafe, in Ontario; that plaintiff Fleda Hamrick was and is the sole owner, as her separate property; that plaintiff husband never had any interest therein; that on September 4, 1953, defendant company, acting through its agent, defendant Wheelus, agreed orally with plaintiff wife that said defendant could place said machine, then owned by defendants, in her place of business "for a period of one year" at the agreed rental of \$125, paid in advance; that defendant Wheelus, knowing Mrs. Hamrick was the sole owner of the cafe, "procured" the husband, W. L. Hamrick alone to sign an agreement in her absence and that he represented to the husband that Exhibit 1 was merely a receipt and that if he would sign it, he could show his employer, "Acme Cigarette Service" assurance that the machine could remain in said cafe; that no copy of said agreement was given to nor left with either plaintiff; that about July 1, 1954, Wheelus interviewed plaintiff wife and endeavored to "procure" her to enter into an agreement that would provide that said vending machine should remain in her cafe for one year and that she then verbally informed him that the machine must be removed when the year agreed to had expired; that she had a machine of her own and would not agree to leave their machine there beyond the year agreed upon; that about September 4, 1954, Wheelus informed Mrs. Hamrick that this agreement (Exhibit 1) was in full force and effect and he intended to enforce it; that on September 4 she turned said machine to the wall and refused to let it operate and that Wheelus subsequently removed it from said cafe; that Mr. Hamrick never was authorized to sign the agreement; that Wheelus knew at all times that the only agreement he had regarding the operation of said machine was the oral agreement of Wheelus with her that the machine would stay in her cafe for one year only and that said agreement was terminated in July, 1954, as of September 4, 1954, when plaintiff Fleda Hamrick refused to give defendants a new agreement; and



said agreement was terminated when defendants removed the machine. The court found generally in favor of plaintiffs and cross-defendants on defendants' cross-complaint. It concluded that no valid written agreement was entered into between Mrs. Hamrick and defendants; that the verbal agreement was for one year only and was terminated; and that defendants concurred in said termination. Judgment was entered in favor of plaintiffs and against defendants on their cross-complaint seeking damages for breach of contract, costs and reasonable attorneys' fees.

The main claims on appeal are insufficiency of the evidence to support the findings; that the findings do not support the conclusions or judgment; and that the trial court failed to find on a material issue raised by the pleadings.

It is argued that the finding that Mr. Hamrick owned no interest in said cafe is not supported by the evidence because it showed the husband worked in said cafe and did odd jobs, and that accordingly he must have contributed community property to the business enterprise even though it was purchased by Mrs. Hamrick with money left to her by her first husband, citing *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880. Although the business was purchased after the marriage of plaintiffs, the evidence shows the city license, bank accounts and employment reports were all carried in the wife's name and she actually operated the business as her own. The husband was paid a few dollars occasionally for his work. The facts are distinguishable from the *Pereira* case. The evidence was sufficient to support the finding. 10 Cal.Jur.2d 684, sec. 21; Sec. 162, Civil Code.

[1,2] Although in conflict, there was sufficient evidence to show, independent of the signed agreement, that Mrs. Hamrick did have some verbal agreement with defendants to allow the machine to remain in her place of business for a period of one year, and that Wheelus did wrongfully represent to Mr. Hamrick, who he

knew did not own the coffee shop, that the contract was only for one year, and if he would sign it, it was only a form and did not amount to anything; that therefore he did not read it but believed these representations and signed it for his wife without her consent or knowledge. The facts were sufficient to bring the case within the exceptions mentioned in the parole evidence rule that when the terms of a contract have been reduced to writing there can be no evidence of the terms other than the contents of the writing except (1) where a mistake or imperfection of the writing is put in issue by the pleadings; or (2) where the validity of the agreement is the fact in dispute. "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud." Sec. 1856, Code Civ.Proc.; see also Sec. 1640, Civ.Code.

It is next argued that the finding that Mr. Hamrick never had any authority to sign the agreement is not supported by the evidence because it showed that, at least, he had the ostensible authority so to do or that Mrs. Hamrick was estopped to deny it, citing *Laack v. Dimmick*, 95 Cal.App. 456, 273 P. 50; Civil Code, secs. 2317, 2318, and 2334. The testimony is that defendants knew Mrs. Hamrick was the sole owner of the Coffee Cup Cafe, and knowing this fact he accepted Mr. Hamrick's signature under the representations found to be made. The finding has evidentiary support.

Some claim is made that although the name Acme Cigarette Service was signed to the contract and was the named defendant herein, it was Wheelus's testimony that the Acme Service, Inc., took over the outstanding service agreement and accordingly the finding that there was no evidence submitted showing that they were the same corporation is not supported by the evidence. Apparently the entire agreement was terminated or held void and unen-

forceable. We see no prejudice by the finding.

Defendants next argue that the cross-complaint pleads a breach of the agreement by both Mr. and Mrs. Hamrick and that the court failed to find on the issue of Mr. Hamrick's personal liability thereon. The court specifically found Mr. Hamrick signed the agreement on the false representation that the signing of it by him was only to show the company that the machine could remain in the cafe. A recovery against him on the cross-complaint was rejected. This sufficiently disposed of the issue. The evidence, although conflicting, supports the findings, as made, in respect to both plaintiffs and cross-defendants.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.



164 Cal.App.2d 178

**Felix MALLON, Plaintiff,**  
v.

**CITY OF LONG BEACH, a Municipal Corporation; A. L. Parmley, Lyman B. Suter, Raymond C. Kealer, James R. Seaton, Clarence E. Wagner, Max Livoni, Carl Fletcher, Basil U. Carlson and John Doe, as Councilmen of the City of Long Beach, Frank W. Brejcha, as Treasurer of the City of Long Beach; and John R. Mansell, as Auditor of the City of Long Beach, Defendants and Respondents.**

**Alma Swart, Plaintiff in Intervention in certain pleadings and Appellant.**  
Civ. 22844.

District Court of Appeal, Second District,  
Division 1, California.  
Oct. 15, 1958.

Taxpayer's suit to enjoin city from using for municipal purposes income derived from submerged and tidelands which

state had granted in trust to city. From judgment of the Superior Court of Los Angeles County, A. Curtis Smith, J., denying a permanent injunction, plaintiff in intervention appealed. The District Court of Appeal, Lillie, J., held that change in conditions after commencement of suit, including legislative and judicial determination as to ownership and proper use of income from lands granted in trust to city and fact that city had accepted and complied with such determination, made injunction unnecessary.

Judgment affirmed.

### 1. Appeal and Error ⇐991

In taxpayer's suit to enjoin city of Long Beach from using for municipal purposes income derived from submerged and tidelands which state had granted in trust to city, good faith of city in abandoning, in compliance with judicial determination as to trust status of such income, previously asserted intention to continue using such income for municipal purposes was a question of fact, and reviewing court would not interfere with trial court's finding of good faith. St.1951, p. 2443, § 2; West's Ann.Civ.Code, §§ 2228-2236.

### 2. Appeal and Error ⇐994(3), 1012(1)

In suit for injunction, involving question of good faith of defendant, weighing the evidence and determining the credibility of witnesses were proper functions of trial court.

### 3. Appeal and Error ⇐991

In taxpayer's suit to enjoin city of Long Beach from using for municipal purposes income derived from submerged and tidelands which state had granted in trust to city, in what manner city conducted itself, why it did so, and whether it had reasonable cause so to do were questions of fact, and reviewing court would not disturb trial court's findings on such questions. St.1951, p. 2443, § 2; West's Ann. Civ.Code, §§ 2228-2236.

**4. Injunction** ⇨1

Whether injunctive relief will be granted in a particular case is a matter largely within the discretion of trial court.

**5. Injunction** ⇨4

In proceedings for injunctive relief, equity acts upon the situation as it appears at the termination of litigation as distinguished from situation at the time of or prior to commencement of action.

**6. Municipal Corporations** ⇨1000(1)

Refusal in taxpayer's suit to enjoin city of Long Beach from using for municipal purposes income derived from submerged and tidelands which state had granted in trust to city was not abuse of discretion, in view of legislative and judicial determination after commencement of suit that portion of such income released from trust was released to state and not to city and that city held balance of such income in trust for purposes of commerce, navigation and fishing and subsequent compliance by city with such determination. St.1951, p. 2443, § 2; St.1956, 1st Ex.Sess., p. 341.

**7. Injunction** ⇨4

The appropriateness of injunction is to be determined as of the time of order or judgment, unless special circumstances otherwise require.

**8. Injunction** ⇨4

Equity acts in the present and not in the past tense, and whether injunctive relief will be granted depends upon present and future conditions and not solely on conditions existing when suit was brought.

**9. Injunction** ⇨1

Injunction is an extraordinary power to be exercised with great caution, and rarely, if ever, should such power be exercised in a doubtful case.

**10. Injunction** ⇨22

In absence of special circumstances, injunctive relief will be denied, if, at time of order or judgment, there is no reasonable probability that past acts complained of will recur.

**11. Injunction** ⇨22

Injunctive power is not used as punishment for past acts and is ordered against such acts only if there is evidence they will probably recur.

**12. Injunction** ⇨22

Injunction will not be granted to prevent in the future that which in good faith has been discontinued, in absence of any evidence that acts complained of are likely to be repeated in the future.

**13. Injunction** ⇨4

Injunction will ordinarily be refused, where events which render an injunction unnecessary occur after the filing of complaint.

**14. Municipal Corporations** ⇨1000(1)

Change in conditions after commencement of taxpayer's suit to enjoin city of Long Beach from using for municipal purposes income derived from submerged and tidelands which state had granted in trust to city, including legislative and judicial determination that portion of such income released from trust by statute was released to state and not to city and that city held balance of such income in trust for purposes of commerce, navigation and fishing and fact that city had accepted and complied with such determination, made injunction unnecessary. St.1951, p. 2443, § 2; St. 1956, 1st Ex.Sess., p. 341.

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Theodore R. Gabrielson, Los Angeles, for appellant.

Walhfred Jacobson, Long Beach, O'Melveny & Myers, Pierce Works, Los Angeles, for respondents.

LILLIE, Justice.

Plaintiff in intervention Alma Swart appeals from a judgment denying a permanent injunction.

The city of Long Beach, as trustee, held in its possession certain revenues received by it under a trust which it had used and intended to continue to use for general



municipal purposes. These funds were derived from oil and gas developed on tide and submerged lands granted to the city by the state of California in 1911. Under this grant the state conveyed to the city of Long Beach all of the tide and submerged lands within the corporate limits of the city in trust for commerce, navigation and fishing.

In May, 1953, plaintiff Mallon, not an appellant herein, filed a "taxpayer's" suit against the city of Long Beach and various city officials to enjoin them from using the revenues in question for municipal purposes, claiming they could be expended only for the trust purposes of commerce, navigation and fishing. Appellant was permitted to intervene. Demurrers to the complaints were sustained and appellant appealed to the Supreme Court from the order sustaining the same.

In the meantime the city filed its answer admitting its intention to use 50% of the oil and gas revenues and 100% of the dry gas revenues for general municipal purposes and not for the trust uses designated by the grant and alleging that under Assembly Bill 3400 (Stats.1951, Ch. 915, page 2443), hereinafter referred to as the Act of 1951, the funds had been released to it; that it owned the funds absolutely free from the terms of the trust and had a right to use them as its own.

On April 5, 1955, the Supreme Court rendered its opinion on the appeal from the order sustaining the demurrers (Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481), reversing the lower court and holding that the Act of 1951 effected a partial revocation of the trust over the tide and submerged lands releasing certain revenues from the trust, but that the monies were released *not to the city of Long Beach but to the state of California*, and operated to transfer to the state 50% of the income from oil and gas and 100% of the income (past, present and future) from dry gas derived from the city's tide and submerged lands.

After this decision and in July of 1955, the city amended its answer admitting the

prior transfers of trust revenues into the municipal treasury, but contending it acted in good faith believing that under the Act of 1951 they had been released to it and therefore belonged to the city and that the expenditures were proper; and asserting that it would discontinue its prior practices of transferring and using the funds for its own purposes, did not intend to do so in the future, and that an injunction to prevent further diversion of funds was not necessary.

Shortly thereafter in August of 1955 the state, seeking to recover the funds released to it under the ruling of the Supreme Court (Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481), unsuccessfully attempted to intervene in the instant case. On September 16, 1955, it filed an action of its own against the city entitled "People of the State of California, et al. vs. City of Long Beach, et al., No. 649466, in the Superior Court of Los Angeles County" (hereinafter referred to as the People's case) to recover the revenues. Negotiations for settlement arose and no proceedings were taken until after the legislature passed the Act of 1956 (Ch. 29, Stats. 1st Ex.Sess.1956), effective July 5, 1956, which supplied legislative approval of settlement of the People's case, fixing the sum payable by the city to the state as \$120,000,-000, for all claims to the funds as of January 31, 1956, monthly payments by the city to the state for future accruals of 50% of the oil and gas revenues and 100% of the dry gas revenues, and providing the judgment to be rendered in the People's case to be final. Pursuant thereto a stipulated judgment was entered in the People's case on September 11, 1956.

Under the consent decree the city on October 31, 1956, paid to the state, in full settlement of all claims to the funds in question up to February 1, 1956, the sum of \$122,339,133.89. It thereafter started making monthly payments as provided in the judgment and as far as we know has continued to do so.

The trial of the instant case was held in February of 1957 principally on the issue of whether a permanent injunction would lie against defendants to enjoin them from expending for general municipal purposes the trust funds already covered by the Act of 1956 and the judgment in the People's case. It revolved around the issue of defendants' good faith in abandoning their prior expressed intent to use the funds for other than trust purposes. The assistant city attorney of Long Beach who interpreted the Act of 1951 for the city council and gave it advice on all of its proposed actions; a former member of the city council from 1950 to 1954, now a judge of the Long Beach Municipal court; a former mayor of Long Beach from 1942 to 1945; and the Long Beach city auditor testified on behalf of defendants. Numerous exhibits were received for both plaintiff and defendants, the majority of which were city council resolutions. The plaintiff offered no testimony. Defendants' witnesses were questioned extensively about various transfers of funds, under what authority they were made, the city council's belief concerning the construction of the Act of 1951, its general intent then and now, and its activities in connection with certain prior court litigation and legislative action.

The trial court found, among other things, that defendants, although mistaken in their construction of the Act of 1951, believed in good faith that the funds, released from the tidelands trust thereunder (50% of oil and gas revenues, and all past and future dry gas revenues), had been released to the city as absolute owner and not to the state of California; and as such they could use them as their own for general municipal purposes as distinguished from public tidelands or harbor purposes; that this belief and understanding was shared by the governor of the state, the then legislature, the attorney general and the legislative counsel. The trial judge also found to exist certain changed conditions or circumstances since the filing of the action. In denying injunctive relief the court concluded that due to changed cir-

cumstances occurring subsequent to the commencement of the action "There is no reasonable expectation or probability that the acts complained of herein by plaintiff and by plaintiff in intervention will be either repeated or continued by defendants or any of them and no necessity for the granting of the injunctive relief prayed for herein now exists."

The issue on this appeal is whether the trial judge abused his discretion in refusing the injunctive relief sought.

Appellant contends that since 1939 the city's conduct relating to its various transfers and use of trust funds for general municipal expenditures, its extended litigation over the use and ownership of the trust revenues and its lobbying activities in connection with the Act of 1951, clearly shows past deliberate "misappropriation of trust funds" and that the city's protestations that it has ceased its transfer and expenditure of revenues and intends no further such activities are not in good faith. Appellant argues that defendants' past conduct, not having been in good faith, they are not now in good faith in "abandoning" their previous intention to use the revenues as their own. To show that defendants are not to be trusted in the future she submits a history of the city's activities since 1939, which without doubt discloses numerous efforts on the part of the city to free itself from the status of trustee and use the funds as its own. This history constituted part of the record considered by the trial court in determining whether defendants were in good faith in their assertions of abandonment of earlier activities to gain control of the funds.

The record discloses prior extended litigation by the city, most of which was instituted either by it, or its officials, in the form of "friendly suits" for judicial determination of its rights in the funds at various times.

The first, an original proceeding in the Supreme Court, was brought by the city against its port manager (*City of Long Beach v. Marshall*, 11 Cal.2d 609, 82 P.2d

362) in 1938 to determine if it had the right to drill for oil on the tidelands. The court held it could develop the mineral resources but that the lands were conveyed in trust for commerce, navigation and fishing. Thereafter the city developed gas and oil on the tidelands, receiving substantial revenues therefor. It arranged through its municipal gas department to sell dry gas and place the revenues therefrom in the gas revenue fund. By council resolutions it transferred the funds to the general purpose fund for general municipal uses. The trial court herein, having heard the testimony of the city officials concerning these transfers and their explanation for the council's activities, concluded: "Now, with respect to their conduct after the Marshall case, so far as the holding of the Marshall case at least is concerned, I can't say that they deliberately violated that."

On December 30, 1947, suit was filed by the city against its treasurer (*City of Long Beach v. Morse*, 31 Cal.2d 254, 188 P.2d 17), to force him to transfer money from the harbor fund to the public improvement fund for general use. The court held that since the tidelands were granted to the city in trust, proceeds from oil and gas development must be used for trust purposes (commerce, navigation and fishing). Thereafter substantial funds were transferred for municipal use. After hearing the testimony relating to the city's activities in this regard, the lower court admitted they presented "a much more serious problem." From its further statement, this obviously was taken into consideration in deciding the showing necessary to establish good faith, because the trial judge further related the city's conduct after the *Morse* case with subsequent acts to show good faith had reestablished itself in the city's later activities.

On January 25, 1951, an injunction suit was filed against the city (*Trickey v. City of Long Beach*, 101 Cal.App.2d 871, 226 P.2d 694) to enjoin it from transferring trust funds into the general purpose fund. The court held that the "dry gas" income was part of the trust and could not be used for nontrust purposes.

Immediately after the court's decision in the *Trickey* case, in an attempt to "undo" the court's ruling, city officials lobbied in the legislature. It resulted in the Act of 1951 which provided that 50% of the oil and gas revenues on hand and to be derived in the future, and 100% of the dry gas revenues, past, present and future, received by the city in its capacity as trustee, are "declared to be free from the public trust for navigation, commerce and fisheries, and from such uses, trusts, conditions and restrictions as are imposed by any of said above-entitled acts." Sec. 2, Stats. 1951, p. 2443. Appellant sharply criticized the conduct of city officials in lobbying for the passage of this act, accusing the (city) trustee of violating its duties and obligations to the beneficiary, withholding information from the legislature and perpetrating a fraud upon the state, the legislature and the people of the state of California.

However, the trial court after listening to the testimony of the city officials concerning their interest in the bill, their lobbying activities and their reasons and explanations therefor, said: "The plaintiff in intervention seems to take the view that there is something wrong, almost underhanded, in going to the Legislature to try to undo that (*Trickey*) case and to even get much more." The trial judge declared the city's acts were not only legitimate but that it is entirely proper "where you are dissatisfied with the law, to go to the people who make the laws and attempt to avoid the consequences of the law with which you are dissatisfied. I see nothing in the slightest wrong with going to the Legislature and seeking the legislation that they sought and having obtained the legislation."

After the Act of 1951 became effective, a public improvement fund was set up, the city transferred funds for general use, and authorized certain expenditures for the erection of municipal buildings and facilities. The evidence shows that the city relied upon its attorney's interpretation of the Act that the revenues belonged to it; that defendants at all times believed that the Act of 1951 released the funds from the trust to the city.



Of this the trial judge said, "I see nothing unreasonable in the interpretation that they placed upon the law. They were wrong, but many other people were wrong, too, in the interpretation of that law, and consequently, the fact that they did not follow the law as it was ultimately construed by the Supreme Court in the Mallon case, was of course legally wrongful, but nothing morally wrongful. \* \* \*". The court concluded from all of the evidence before it that the city had not acted in defiance of the law but on erroneous advice and under mistaken belief.

It was at this point the instant action was filed. The city, believing it had the right to use the funds, continued to do so up to the day of the Supreme Court's ruling on April 5, 1955 (*Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481). Appellant claims that on the very day the decision was rendered the city transferred \$980,000 for general use (Exhibit 34) and other sums by council resolution on October 4, 1955 (Exhibit 35), and on April 12, 1956 (Exhibit 36). The evidence showed that the transfer of \$980,000 was actually made four days prior to April 5, 1955, and when the city council passed its resolution (Exhibit 34), it was unaware of the decision and that later all funds transferred subsequent thereto were restored as impounded trust money. The trial judge, after hearing the explanation for these transfers and the resolutions said: "if it hadn't been for the explanation in Exhibits 34, 35 and 36, I believe are the ones—the last three resolutions—in any event, under which transfers were made, two of them subsequent to the Mallon decision, one on the day of the Mallon decision, if it hadn't been that I had been completely satisfied with the City's explanation of those three resolutions, that, coupled with their conduct following the Morse case, it would have probably led me to believe that they were in need of an injunction \* . . .".

This points up two facts—that the trial judge accepted the city's explanation of its conduct and believed it acted in good faith; and that he was not unmindful of the city's questionable conduct between the Morse

case and the Trickey case and appellant's claims that it had deliberately misappropriated trust funds. But considering the entire record the trial judge had this further to say: "I find little or nothing in the record of the conduct of the City of Long Beach since 1951 that is reprehensible. . . ."

[1,2] Since the court heard the testimony of the witnesses, all city officials during the crucial periods, and had before it all of the council resolutions bearing upon every transfer and expenditure charged, we feel it will serve no useful purpose to further recount the evidence. The issue of good faith was one of fact and was resolved in favor of respondents by the trial judge. In so doing, the lower court was performing its normal and proper function of weighing the evidence and determining the credibility of the witnesses. With the trial judge's determination of the good faith issue, and its finding thereon, this court will not interfere.

[3] No complicated legal issues are here involved. Appellant in her accusations against the city (which mainly involve factual questions resolved by the trial judge) charges the trustee, among other things, with dealing with trust property for its own profit (using the funds for general municipal purposes), taking action adverse to the beneficiary without disclosure of its adverse interest, lobbying for the passage of the Act of 1951, commingling trust property with its own (as in the Trickey case), defrauding the beneficiary by interpreting the law favorable to its own interests, and "misappropriating trust funds." In support of these charges, she cites extensively from sections 2228-2236 of the Civil Code and authorities pointing up the obligations and duties of a trustee. In what manner the city conducted itself, why it did so, and if it had reasonable cause so to do, were questions of fact resolved by the lower court. The findings reflecting these determinations the reviewing court will not disturb.

[4] It is almost too well settled to require citation of authority that whether injunctive relief will be granted in a given

case is a matter largely within the discretion of the trial court. *Wholesale Tobacco Dealers Bureau of Southern California v. National, etc., Co.*, 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; *Phillips v. Isham*, 111 Cal. App.2d 537, 244 P.2d 716; *Smith v. Mendonsa*, 108 Cal.App.2d 540, 238 P.2d 1039; *People v. Black's Food Store*, 16 Cal.2d 59, 105 P.2d 361; *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931. The trial court not only based its holding that "no injunction is presently necessary" upon its findings of good faith on the part of the city in asserting its intention to abandon its prior conduct, and "because of the present conduct of the City of Long Beach, which I believe is beyond reproach"; but also upon the additional point "that for all practical purposes, the problem is already disposed of by the law of the case, in this very case that we now have before us, the Mallon decision, the Supreme Court decision of the Mallon case (April 5, 1955); we have the legislative enactment (Act of 1956) authorizing the settlement of this problem; we not only have the People's case, but we have an injunction in the People's case. \* \* \*" which the trial court classed under "change of circumstances," all of which led the court to conclude that "(T)here is no reasonable expectation or probability that the acts complained of \* \* \* will be either repeated or continued. \* \* \* and no necessity for the granting of the injunctive relief prayed for herein now exists."

[5] Before discussing the general rule that equity acts in injunctive proceedings upon the situation, as it appears at the termination of litigation as distinguished from that at the time of or prior to the commencement of the action, recognized by the trial judge when he said: "We are concerned with the present situation, and not with the prior situation," we refer briefly to the changed circumstances supported by the record and relied upon by the trial court.

[6] At the outset of the instant litigation, the city in its answer emphatically declared its intention to continue to expend the funds in question for its general use. How-

ever, since then and before the trial on the merits, conditions arose, the effect of which was to foreclose defendants' further use of the money—in the form of a Supreme Court decision, a legislative enactment and a final stipulated judgment in an action between the city and state, settling once and for all in clear and unequivocal language the long dispute between them over the ownership of the funds accrued and accruing. In the face of this state of affairs, the city filed an amended answer saying in effect, "We engaged in these activities up to now, we thought we were right; we were wrong; we will not do it again and we need no further court order to prevent us from doing it in the future." This "change of circumstances" resulting in the city's present attitude, supported by the record herein, completely warranted the exercise of the trial court's discretion in denying injunctive relief. Very briefly the change consisted of the following: After the city filed its answer in 1953 asserting its right to the money, the Supreme Court on April 5, 1955, advised defendants that the Act of 1951 operated to release to the state, not to the city, the funds it intended to use. To recover the revenues which accrued since 1951, and to accrue in the future, the state sued the city in September of 1955. To implement settlement of this case, the Act of 1956 was passed by the legislature approving the rendition of a judgment completely and finally disposing of all claims past, present and future. Pursuant to this act a stipulated judgment was entered in the People's case on September 11, 1956, completely settling all claims to 50% of the revenues from gas and oil and all revenues from dry gas up to February 1, 1956, all future claims to those revenues accruing after January 31, 1956, ordering the city to account for and pay over monthly accrued revenues and declaring the city's rights to 50% of oil and gas revenues remaining in the tidelands trust and directing their use only for trust purposes requiring an order of court for other uses. Pursuant to this order, the city on October 31, 1956, paid to the state of California a lump sum of \$122,339,133.89 in full settlement of

all claims to the funds to February 1, 1956, started monthly payments to the state which it has continued to date and has not touched the remaining 50% for a nontrust purpose.

By the time the instant case was tried an accounting had been had and all acts or omissions occurring prior to February 1, 1956, had been finally settled, all past controversy between the parties over the disputed funds had ended and the city had acceded to the legislative and judicial adjudication of its rights in and to the revenues in question. Long before trial the city found itself under judicial decree bound to use the very funds here in dispute in the same identical way urged by appellant. It has complied and we have no reason to believe it is not now still complying. Any protection the beneficiary may need is found in the mandatory judgment in the People's case to pay over to the state the monies as to which appellant sought an injunction preventing their use for municipal purposes, and the injunctive effect of the judgment as to the monies remaining in the so-called Long Beach tidelands trust. We can only conclude from the record that there was no necessity for what, in effect, would be a second injunction regulating the use of the disputed revenues.

[7,8] In *Pacific Gas & Elec. Co. v. Minnette*, 115 Cal.App.2d 698, at page 709, 252 P.2d 642, at page 648, the court stated the general rule applicable to the facts of the case at bar: "The appropriateness of injunction is to be determined as of the time of the order or judgment unless special circumstances otherwise require." This is based upon the theory that equity acts in the present and not in the past tense. "It has been said that equity acts in the present tense, and that relief is dependent on present and future conditions rather than solely on those existing when the suit was brought." 43 C.J.S. Injunctions § 29, page 460; *American Fruit Growers v. Parker*, 22 Cal.2d 513, 140 P.2d 23. A case of interest at this point is *Oliver v. City of Cincinnati*, 12 Ohio App. 432, 32 O.C.A. 533, involving a taxpayer's suit for injunctive relief to enjoin a proposed street railway

franchise. The city appeared and admitted its intention to do that sought to be enjoined. The county prosecuting attorney then filed an ex rel. quo warranto proceeding in the name of the state wherein an injunction was issued enjoining the carrying out of the terms of the ordinance granting the franchise. Thereafter, the city filed an amended answer and denied it would attempt to proceed further. In refusing what in effect would be a second injunction, the Ohio Court of Appeals said:

"In the absence of exceptional circumstances, in equitable actions, the right to judgment or decree is not limited to the facts as they existed at the commencement of the action, but the relief administered is such as the nature of the case and the facts as they exist at the close of the litigation demand. An injunction will not be granted where at the time of the hearing conditions have so changed that no unlawful act is threatened. *Continental Securities Co. v. Interborough Rapid Transit Co.* [D.C.], 207 F. 467; *Sherman v. Foster*, 158 N.Y. 587 [53 N.E. 504]; *Pond v. Harwood*, 139 N.Y. 111, 120 [34 N.E. 768]; *Peck v. Goodberlett*, 109 N.Y. 180 [16 N.E. 350]; *Union Bag & Paper Co. v. Allen Bros. Co.*, 107 App.Div. 529 [95 N.Y.S. 214]; *Hale v. Jenkins* [55 Misc. 119], 106 N.Y.S. 282; *Brown v. Cole* [Sup.], 105 N.Y.S. 196; *Boone v. Von Arx*, 4 Alaska 716, and *Grand Trunk Ry. Co. of Canada v. Michigan Railway Commission* [D.C.], 198 F. 1009, 1022. See note to *Alsager v. Peterson*, 31 S.D. 452 [141 N.W. 391], in 38 Ann.Cases, 1915D [1251], and cases therein cited, and 16 Am. & Eng. Ency. Law, 431.

"In the case at bar, before this cause was presented to the court for decision, there was a binding judgment by the court of last resort determining that the agreements in question were void. It was between substantially the same parties as those in this case. Unlike the situation presented in *Davis v. Berry*, *supra* [D.C., 216 F. 413], there is



no apprehension that the defendants will attempt to carry out the ordinance, the invalidity of which has been conclusively established and the performance of which has been prohibited. The city requires no further decree to protect its interest. To paraphrase the decision in *Continental Securities Co. v. Interborough Rapid Transit Co.* [D.C.], 207 F. 467, 471, the obnoxious franchise is dead and the supreme court has written its epitaph. There is not even a moot question for determination by this court. The plaintiff is not entitled to a decree." 12 Ohio App. at pages 437-438.

[9-13] Injunction "is an extra-ordinary power, and is to be exercised always with great caution" and the power rarely, if ever, should be exercised in a doubtful case. *City & County of San Francisco v. Market St. Ry. Co.*, 95 Cal.App.2d 648, 655, 213 P.2d 780, 781; *Schwartz v. Arata*, 45 Cal.App. 596, 188 P. 313. If, therefore, at the time of the order or judgment, in the absence of special circumstances, which are not here involved, there is no reasonable probability that past acts complained of will recur, injunctive relief will be denied. Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur. *Rosicrucian Fellow-*

*ship v. Rosicrucian, etc., Ch.*, 39 Cal.2d 121, 245 P.2d 481; *Hannah v. Pogue*, 23 Cal.2d 849, 147 P.2d 572. A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future. 43 C.J.S. Injunctions § 22, p. 445; *Thome v. Honcut Dredging Co.*, 43 Cal.App.2d 737, 111 P.2d 368. In line with these general rules governing the issuance of an injunction are the cases of *Ratterree Land Co., Inc., v. Hutton*, 4 Cal.2d 100, 47 P.2d 732 and *Blackmore Investment Co. v. Johnson*, 213 Cal. 148, 1 P.2d 978, which hold that where events occur after the filing of the complaint which render an injunction unnecessary, it will ordinarily be refused.

[14] A search of the record before us discloses nothing to indicate a probability of either a disposition of, or opportunity for, the city to in the future abandon its declared intention to abide by the legislative act of 1956 and the court's judgment. Without such a probability an injunction is unnecessary.

For the foregoing reasons the exercise of the trial court's discretion in denying injunctive relief was warranted. No abuse thereof is apparent in the record and the judgment is affirmed.

WHITE, P. J., and FOUNT, J., concur.

164 Cal.App.2d 83

**RUSS-FIELD CORPORATION, a corporation,**  
Plaintiff and Respondent,

v.

**UNDERWRITERS AT LLOYD'S, LONDON, ENGLAND,** Malvern Insurance Company, Drake Insurance Company Limited, Sphere Insurance Company Limited, Defendants and Appellants.

Civ. 23070.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 9, 1958.

Rehearing Denied Nov. 6, 1958.

Hearing Denied Dec. 3, 1958.

Action by motion picture corporation against insurers on feature motion picture errors and omissions policies for amount which corporation had paid in settlement of actor's claim against it. The Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment for corporation, and insurers appealed. The District Court of Appeal, Herndon, J., held that where policies provided that corporation warranted that it knew of no act or omission which might form basis of claim against it, and producer in accordance with industry, custom, and usage believed he had right to make or obtain script changes which he believed would improve story, there was no duty on part of corporation to notify insurers at time corporation applied for policies of decision to revise screenplay, in absence of any knowledge of actor's objections to revisions, and corporation did not breach warranty by making script revision which resulted in actor's making claim against corporation after effective date of policies.

Affirmed.

#### 1. Insurance ⇨430

Where feature motion picture errors and omissions policies provided that they covered loss arising from any claim against insured by reason of negligent act in connection with production of picture or breach of contract rights wherever alleged to have been committed by insured and that insured warranted that it knew of no act,

error or omission which might form basis of claim against it, policies covered loss or liability arising from any claim or claims which might be made as distinguished from loss or liability arising from act or event upon which claim might be based and covered claims arising from acts or errors previously committed.

#### 2. Insurance ⇨177

Under endorsement to feature motion picture errors and omissions policies providing that insurers were liable for any loss occasioned by any claim arising either on picture placed in production during term of insurance or picture released or first licensed for use during term of insurance, coverage for claim based on picture which was released for distribution within one year designated as effective period of policies was not excluded.

#### 3. Insurance ⇨665(4)

In action on feature motion picture errors and omissions policies evidence sustained finding that picture, in connection with which claim was made against insured, was placed in production during term and effective period of policies.

#### 4. Stipulations ⇨18(7)

In action on feature motion picture errors and omissions policies, pretrial stipulation that claim was asserted against insured arising out of and in connection with production of motion picture while policies were in force and effect was binding upon insurers and precluded any successful attack upon finding that claim was a loss sustained in connection with production of picture.

#### 5. Insurance ⇨665(3)

In action on feature motion picture errors and omissions policies which contained insured's warranty that it knew of no act, error or omission which might form basis of claim against it, evidence sustained finding that insured had no knowledge of claim asserted against it on effective date of insurance.

#### 6. Insurance ⇨285½

Where producer of motion picture for corporation, which obtained feature motion

picture errors and omissions policies under which corporation warranted that it knew of no act or omission which might form basis of claim against it, in accordance with industry custom and usage believed he had right to make or obtain script changes which he believed would improve story, there was no duty on part of corporation to notify insurers at time corporation applied for policies of decision to revise screenplay in absence of any knowledge of actor's objections to revisions and corporation did not breach warranty by making script revision which resulted in actor's making claim against corporation after effective date of policies.

#### 7. Statutes  223.1

Fact that word is common to two statutes does not mean that decision construing it in one statute must control in construction of the other.

#### 8. Insurance  437

A "willful act" within statute providing that an insurer is not liable for loss caused by willful act of insured connotes something more blameworthy than the sort of misconduct involved in ordinary negligence and something more than the mere intentional doing of an act constituting such negligence. West's Ann.Insurance Code,   533.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Act".

#### 9. Insurance  665(4)

In action on feature motion picture errors and omissions policies, evidence sustained finding that breach of contract, if one occurred, with respect to revision of script resulting in claim against insured by actor who refused to perform under revised script, was not a "willful act" within statute providing that an insurer is not liable for loss caused by willful act of insured. West's Ann.Insurance Code,   533.

#### 10. Insurance  514

Although by terms of contract insurers were not obligated to defend insured against asserted claims, insured acquired right to

make any reasonable and bona fide compromise of claim against it when insurers denied coverage and disclaimed liability.

#### 11. Insurance  646(8)

Where feature motion picture errors and omissions policies indemnified against 90% of loss arising from making of claim alleging negligent act, error or omission or breach of contract rights, settlement by insured with party who made claims against insured was presumptive evidence of liability of insurers.

#### 12. Insurance  665(4)

In action on feature motion picture errors and omissions policies for amount which insured had paid in settlement of claim against it, evidence sustained finding that settlement was reasonable and prudent in the circumstances.

#### 13. Insurance  670

Where feature motion picture errors and omissions policies indemnified against percentage of loss arising from making of a claim alleging negligent act, error or omission or breach of contract rights, it was not necessary to find that insured had in fact breached its contract with actor, who asserted claim against insured for breach of contract, in order to find that insurers were liable for insured's loss resulting from compromise settlement of actor's claim.

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Spray, Gould & Bowers, Los Angeles, for appellants.

Zagon, Aaron & Sandler, Beverly Hills, Nelson Rosen, Hollywood, for respondent.

HERNDON, Justice.

The questions presented by this appeal relate to the scope of the coverage of a rather special and unique contract of insurance issued by the Underwriters at Lloyds, London, and denominated "Feature Motion Picture Errors and Omissions Insurance for Studios and/or Distributors." The trial court held that the claim which gave rise to the loss in question constituted a risk within the coverage of the policy



and accordingly rendered judgment for plaintiff, the insured. The defendant insurance carriers have appealed.

Plaintiff, a producer of motion pictures, owned the motion picture rights to a literary property entitled "The Most Dangerous Game." Early in 1955 plaintiff engaged Henry Tatelman as producer, vesting him with authority to supervise the production of a motion picture based upon that story. In February, 1955, Tatelman commenced preparations for the production by employing Robert Wilder, a screen writer, who proceeded at once to prepare a draft of the script for a motion picture entitled "Run For the Sun." Tatelman thereafter also employed other necessary personnel, including a director and various actors, one of whom was Mr. Leo Genn.

Mr. Genn, a resident of England, was under contract to render his services as an actor for the Genn Company, and Mr. Tatelman negotiated for the services of the actor through the William Morris Agency, which had local offices and acted as agent for Mr. Genn and the Genn Company. Mr. Tatelman submitted the Wilder script, which was designated as "a first draft screen play," for Mr. Genn's examination. Thereafter, in August, 1955, the Genn Company, acting through the Morris Agency, entered into an oral agreement with plaintiff to furnish the services of Leo Genn to portray the role of "Martel" in the Wilder script. Plaintiff agreed to pay Genn the sum of \$3500 per week for a minimum of ten weeks and to furnish Genn round-trip transportation from London, England, to Mexico City, together with certain other emoluments.

Thereafter, in order to secure a desirable director and to overcome certain censorship objections which had been raised, plaintiff employed Mr. Dudley Nichols to revise and rewrite the Wilder script. There was no express contractual provision in the agreement with Mr. Genn giving the actor script approval, and there is testimony in the record that Mr. Tatelman had the script revised on the assumption and

in the belief that, pursuant to custom and usage in the industry, the producer had the right to control the script and to make such changes as it deemed desirable to improve the picture. Both Mr. Tatelman and Mr. Nichols testified that they did not anticipate any objection by Mr. Genn to the changes they made in the Wilder screenplay. Although the Nichols screenplay substantially retained the story line and plot of the first script, the name of the character which Mr. Genn was to play was changed from "Martel" to "Browne" and his nationality and characterization changed from that of a German Nazi official to that of an English traitor. The Nichols screenplay was completed late in October, 1955, and plaintiff made arrangements to commence principal photography from this screenplay on or about October 31.

Meanwhile, on October 17, 1955, the two policies of insurance which are the subject of this action were issued to plaintiff by defendants' agents covenanting to indemnify 90% of certain enumerated losses which might be sustained by plaintiff in connection with the production and distribution of the picture "Run For the Sun." The most pertinent provisions of the policy read as follows:

"1. This insurance, subject to the terms, conditions, limitations and warranties hereinafter mentioned, covers \* \* \* the 'Insured' for loss, liability, costs and expenses (hereinafter referred to as 'loss') arising from any claim or claims which may be made by any person or persons, firms, or corporations, against the insured by reason of any negligent act, error or omission in connection with the production of Feature Length Motion Pictures, \* \* \* or any infringement of property or patent rights, or breach of contract rights, or invasion of the rights of privacy (whether under common or statutory law,) or defamation, or slander, or libel, or plagiarism, or any violation of copyright (whether under common or statutory law) aris-

ing out of said Motion Pictures, wher-  
ever committed or alleged to have been  
committed by the Insured. \* \* \*

\* \* \* \* \*

"6. The Insured warrants that as  
of the effective date of this Insurance  
and with respect to any coverage  
granted by this Insurance, it knows of  
no act, error or omission which might  
form the basis of a claim against it or  
in respect of which a claim has al-  
ready been made against it except as  
specifically enumerated in this Insur-  
ance.

\* \* \* \* \*

"7. It is understood and agreed that  
the Underwriters shall be liable only  
for loss arising from any claim or  
claims made against the Insured during  
the effective period of this Insurance  
or within three (3) years thereafter in  
respect of any Motion Picture covered  
hereunder, whether the production of  
any such Motion Picture shall have  
been commenced during said effective  
period or prior thereto, with said li-  
ability being limited to that proportion  
of the loss resulting from any such  
claim as shall apply to any such Mo-  
tion Picture or repetition or continua-  
tion of loss from any such claim as a  
result of the continued distribution of  
such Motion Picture during the effec-  
tive period of this Insurance."

Within a week or so after the delivery  
of the certificates, counsel for plaintiff in-  
formed the insurance brokers that he  
thought Clause 7 was ambiguous and re-  
quested a clarification. Pursuant to this  
request, the insurer issued Endorsement No.  
2 dated October 31, 1955, the pertinent por-  
tion of which reads as follows: "It is  
further understood and agreed that Clause  
No. 7 is deleted in its entirety, and the  
following substituted therefor: 'Underwrit-  
ers shall not be liable for loss arising  
from or by reason of: (a). Any claim,  
suit or action unless it arises on a picture  
placed in production during the term of  
this insurance or on a picture released or

first licensed for use during the term of  
this insurance, and any distribution during  
or subsequent to the term of this Certifi-  
cate. (b). Any claim, suit or action un-  
less notice of such claim, suit or action  
be given to the Underwriters within three  
years of the expiration or termination date  
of this Certificate."

The foregoing endorsement was trans-  
mitted to plaintiff's attorneys on or about  
November 8, 1955. The attorneys found  
the endorsement unsatisfactory, and later  
notified defendants' agents that it was  
unacceptable to plaintiff. Although the  
matter is not of controlling importance, it  
is to be noted that the trial court held  
that the endorsement was effective and be-  
came a part of the contract.

On or about October 21, 1955, Leo Genn  
arrived in Los Angeles from England, and  
was furnished with a copy of the final  
draft of the screenplay as rewritten and  
revised. At a meeting held on October  
22, 1955, Genn informed plaintiff's repre-  
sentatives that the role of "Browne" was  
not a proper vehicle for his artistic talents  
and would detract from his reputation and  
standing in the motion picture industry.  
Mr. Genn declared his refusal to accept  
said role, but stated that he stood ready  
to perform the role of "Martel" based upon  
the original Wilder screenplay. This was  
the first time that plaintiff, or its repre-  
sentatives, learned that Genn had any ob-  
jection to the changes and revisions in the  
script.

In the meantime plaintiff had made ar-  
rangements and commitments to commence  
principal photography based upon the re-  
vised script on or about October 31. Plain-  
tiff offered to attempt to make changes in  
the revised script in an effort to overcome  
Genn's objections, but he remained adamant  
in his refusal to appear in the picture un-  
less it was made upon the original Wilder  
script in which he would play the role of  
"Martel." Plaintiff refused to utilize  
Genn's services on this basis and employed  
another actor to portray the role of  
"Browne."

On or about November 1, 1955, Genn Company asserted a claim against plaintiff alleging that plaintiff had breached its obligations under the contract whereby Genn was employed and demanded payment of damages in the sum of \$35,000 plus traveling and living expenses in excess of \$4000. On November 7, 1955, Genn Company instituted legal action against plaintiff wherein it sought recovery of damages in the sum of approximately \$39,000, together with interest and costs. Plaintiff immediately notified defendant insurance carriers of the making of the claim and of the filing of the legal action by Genn Company. On March 12, 1956, defendants advised plaintiff that it was their position that the insurance issued by defendants did not cover the claim asserted by Genn Company.

Upon the assertion of the claim by Genn, plaintiff caused its attorneys to investigate the facts and circumstances involved in the controversy. After completing their investigations, plaintiff's counsel recommended that an attempt be made to settle the case upon a reasonable basis. On May 9, 1956, after various negotiations, plaintiff paid to Genn Company the sum of \$11,500 by way of compromise and settlement of Genn's claim. This settlement was recommended by plaintiff's counsel.

Plaintiff thereafter instituted the instant action on the insurance contract. After a nonjury trial judgment was rendered for plaintiff in the sum of \$11,250, representing 90% of the settlement with Mr. Genn plus the reasonable value of attorneys' services as provided in the policy. The trial court found: that plaintiff notified defendants immediately on receiving knowledge of Mr. Genn's claim; that the compromise settlement was made by plaintiff in good faith; that the settlement was prudent and reasonable in view of the facts and circumstances; that plaintiff neither knew nor should have known of Mr. Genn's claim at the time of applying for insurance or on the effective date thereof; and that "[t]he certificates issued by defendants in-

demnify plaintiff against loss resulting from breach of contract rights either committed or alleged to have been committed by plaintiff." The court expressly refrained from finding whether plaintiff actually breached the contract with Mr. Genn, but found that "if there were such a breach, it was not an intentional or wilful or deliberate breach" but one which resulted from negligence "in the ordinary course of business."

Appellants' first contention is that the insured event occurred prior to October 17, 1955, the effective date of the policy, and that plaintiff's loss, therefore, is not covered. In the supplement to their opening brief, appellants state their contention as follows: "It also clearly appears that the changes in the script were material, and that they were made before the effective date of the certificates of insurance. The alleged breach of contract by plaintiff, or in the alternative, its alleged negligent act, error or omission in that respect, occurred before the policies ever became effective." This contention is based upon two premises: (1) that under the terms of the contract the insured event consisted of the acts or omission of the insured giving rise to the claim rather than the making or presentation of the claim itself; and (2) that the acts and omission which gave rise to the instant claim were the making of material changes in the movie script without obtaining Genn's approval, all of which occurred before October 17, 1955.

Neither of these premises is tenable. The first runs counter to the trial court's interpretation of the contract—an interpretation which is amply supported by well settled rules of construction. See *Cal-Farm Ins. Co. v. Boisseranc*, 151 Cal.App. 2d 775, 780, 312 P.2d 401. The second is factually erroneous because it was *after* the effective date of the insurance that Genn declared his refusal to accept the role of "Browne" in the revised script and plaintiff refused to return to the original screen play. It was approximately two weeks *after* the effective date of the policy



that plaintiff hired a substitute for Genn and proceeded with production dispensing with his services.

Applicable rules of construction were recently stated by this court in *City of Santa Monica v. Royal Indemnity Co.*, 157 Cal. App.2d 50, at pages 54 and 55, 320 P.2d 136, at page 138, quoting from *Continental Casualty Co. v. Phoenix Construction Co.*, 46 Cal.2d 423, 437, 296 P.2d 801, 57 A.L.R. 2d 914; *Arenson v. National Automobile and Casualty Insurance Co.*, 45 Cal.2d 81, 83, 286 P.2d 816; *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 747, 117 P.2d 661, and *Osborne v. Security Insurance Company*, 155 Cal.App.2d 201, 207-208, 318 P.2d 94; “\* \* \* any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. \* \* \* If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. \* \* \* If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against \* \* \*, the amount of liability \* \* \* or the person or persons protected \* \* \*, the language will be understood in its most inclusive sense, for the benefit of the insured. \* \* \* Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail.”

[1] With these rules of construction in mind, we readily conclude that the trial court's interpretation of the instant contract is correct. The coverage clause above quoted provides that the certificates cover “\* \* \* loss \* \* \* arising from any claim or claims which may be made \* \* \* against the insured by reason of any negligent act, error or omission in connection with the production of Feature Length Motion Pictures \* \* \* or breach of contract rights, \* \* \* arising out of said Motion Pictures, wherever committed or

alleged to have been committed by the Insured, \* \* \*.” It is reasonable to conclude that the quoted language expresses an intent to cover loss or liability arising from “any claim or claims which may be made” as distinguished from loss or liability arising from the act or event upon which the claim may be based. This interpretation of the coverage clause is aided by the provisions of paragraph 7 which state that “\* \* \* the Underwriters shall be liable only for loss arising from any claim or claims against the Insured during the effective period of this Insurance, or within three (3) years thereafter in respect of any Motion Picture covered hereunder, whether the production of any such Motion Picture shall have been commenced during said effective period or prior thereto. \* \* \*” Again in paragraph 11 the term “any one loss” is defined to mean “\* \* \* loss arising from any claim or claims made by any person or persons in respect of any act, error, or omissions, including any repetition or continuance thereof.”

The trial court's interpretation of the contract is further aided by the provisions of paragraph 6 whereby the insured warranted that it knew of no act, error or omission “\* \* \* which might form the basis of a claim against it or in respect of which a claim has already been made against it \* \* \*.” If it were the time of the act, error, or omission rather than the time of the assertion of the claim which was determinative of the insurer's liability, the warranty would be without purpose. If the policy were not intended to cover claims arising from acts or errors previously committed, there would have been no reason to call upon the insured to warrant its lack of knowledge of any such act, error, or omission.

Appellants properly concede that a contract of insurance or of indemnity may be so written as to cover liability for events which have occurred prior to the issuance of the policy. There are numerous precedents for sustaining coverage in analogous situations. In *Tulare County Power*

Co. v. Pacific Surety Co., 43 Cal.App. 315, 325, 185 P. 399, 403, the liability insurance policy purported to insure "against loss or expense arising or resulting from claims upon the assured for damages on account of bodily injuries, including death therefrom, accidentally suffered, or alleged to have been suffered, during the period of this policy \* \* \* when such injuries or death result from accident occurring within the period hereinafter mentioned." A person was killed when he came in contact with an electric line which the insured had negligently installed and maintained. The insurer contended there was no liability for the claim because the negligent acts which caused the injury had been done prior to the issuance of the policy. In rejecting this contention the reviewing court declared: "The accident in question happened 'during the period of this policy,' and we think it entirely immaterial that the installation of the wires which caused the accident occurred two months prior to the issuance of the policy. \* \* \* its [the insurance company's] liability was for accidents occurring during the life of the policy."

Similar contentions by the insurers were rejected in *Protex-A-Kar Co. v. Hartford Accident and Indemnity Co.*, 102 Cal.App. 2d 408, 416, 227 P.2d 509, and *Remmer v. Glens Falls Indemnity Company*, 140 Cal. App.2d 84, 88, 295 P.2d 19, 57 A.L.R.2d 1379.

[2,3] It appears equally clear that Endorsement No. 2 does not exclude coverage of the claim here involved. Under this Endorsement the insurers are liable for any loss occasioned by any claim arising either (a) on a picture placed in production during the term of the insurance, or (b) on a picture released or first licensed for use during the term of the insurance. It is undisputed that the picture was released for distribution in July, 1956, which was within the one year designated "as the effective period" of the certificates. The trial court also found that the picture was "placed in production during the term and

effective period of the certificates." There is ample evidence to sustain this finding.

[4] Furthermore, it is to be noted that one of the pre-trial stipulations provided as follows: "On or about November 1, 1955, and while the aforesaid certificates were in full force and effect, \* \* \* [Genn Company] asserted a claim against plaintiff arising out of and in connection with the production of said motion picture." This stipulation is binding upon the insurers and precludes any successful attack upon the court's finding that Genn's claim was a loss sustained in connection with the production of the picture. *Capital National Bank of Sacramento v. Smith*, 62 Cal.App.2d 328, 343, 144 P.2d 665; *Grand v. Griesinger*, 160 Cal.App.2d 397, 325 P.2d 475.

[5] Appellant's second contention, that plaintiff breached its warranty under paragraph 6 of the policy, must be rejected. The warranty was simply to the effect that the insured *knew* of no act, error or omission which might form the basis of a claim against it. The trial court's finding that plaintiff had no knowledge of the Genn claim on the effective date of the insurance is amply supported by the evidence. Both Mr. Tatelman and Mr. Nichols testified that the script as revised was not substantially different from the original script and both testified that they did not anticipate any objection from Genn by reason of the changes made. " \* \* \* where the insured qualifies his statement regarding a certain material matter by an expression to the effect that he makes such statement only according to his knowledge of the fact or condition involved, untruth or incompleteness of the statement due to ignorance, by the insured, of a fact or facts making the statement untrue or incomplete does not amount to a breach of warranty." 27 Cal.Jur.2d 725, § 239.

[6] There is evidence in the record that in accordance with industry custom and usage Mr. Tatelman believed he had the right to make or obtain script changes which he believed would improve the story. Under such circumstances there would not

be any duty on the part of the insured to notify the insurer of a decision to revise the screenplay prior to any knowledge of the actor's objections to the revisions.

Third, appellant contends that the Genn claim arose by reason of a "wilful" act of the insured, and that the appellant was thereby exonerated by virtue of Insurance Code, § 533 which provides: "An insurer is not liable for a loss caused by the wilful act of the insured \* \* \*". As has been pointed out above, the trial court expressly refrained from deciding whether or not the insured actually had breached its contract with Genn, but it did find that "\* \* \* if there were such a breach, it was not an intentional or wilful or deliberate breach by plaintiff, but was a breach which resulted in the ordinary course of business from negligent act, error and lack of due care on the part of plaintiff and its employees."

In urging the applicability of section 533 of the Insurance Code, appellant argues that the term "wilful act" as used in the statute means simply an act performed intentionally and deliberately, regardless of the intent or purpose with which it was performed. Respondent's position is that the term "wilful" as used in the statute denotes performance of an act for which no reasonable excuse can be given.

Both constructions advanced above find support in the decisions. Depending on the context, the terms "wilful" and "wilful act" as used in statutes have quite different significations attached to them. See e. g. 45 Words and Phrases, p. 186, Id., Willful Act, p. 246. The terms are used in one sense to denote the *quality* of an act or the *intent* with which it was done. See *McPheeters v. Board of Medical Examiners of California*, 103 Cal.App. 297, 301, 284 P. 938; *Alden v. Mayfield*, 33 Cal.App. 724, 727, 166 P.2d 382. More often the terms denote simply an act deliberately and voluntarily performed. See *Davis v. Morris*, 37 Cal. App.2d 269, 274, 99 P.2d 345; *In re Trombley*, 31 Cal.2d 801, 807, 193 P.2d 734 (construction of the term "wilful" in sections 203 and 216 of the Labor Code). *Parsons v. Smilie*, 97 Cal. 647, 654-656, 32 P. 702;

*Crowell v. City of Riverside*, 26 Cal.App.2d 566, 581, 80 P.2d 120 (construction of "wilful" in § 3275 of the Civil Code).

[7] But the fact that a word is common to two statutes does not mean that a decision construing it in one statute must control in the construction of the other. *Union Iron Works v. Industrial Acc. Com.*, 190 Cal. 33, 43, 210 P. 410. Thus we must determine the sense in which the Legislature employed the term "wilful act" in enacting § 533 of the Insurance Code. See generally, 23 Cal.Jur. 745, § 122 et seq. In *McKenzie v. Scottish U. & N. Ins. Co.*, 112 Cal. 548, 557-558, 44 P. 922, 925, the Supreme Court in discussing the legislative intent in the enactment of § 2629 of the Civil Code, the statutory predecessor of Insurance Code, § 533, said:

"The *ordinary* negligence of the insured and his agents has long been held as a part of the risk which the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability; but *willful exposure, gross negligence, negligence amounting to misconduct, etc., have often been held to release the insurer from such liability.*

"To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose, was the object of the framers of our Civil Code. Under section 2629, supra, [now § 533 of the Insurance Code] *the nice distinctions often made necessary are dispensed with;* and the general proposition is established that *no form of negligence on the part of the insured, or his agents or others, leading to a loss, avoids the policy, unless it amounts to a willful act on the part of the insured.* The Code thereby sets at rest a fruitful cause of litigation." (Emphasis added.)

[8] A "wilful act" as used in this statute connotes something more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the



mere intentional doing of an act constituting such negligence. Cf. *Meek v. Fowler*, 3 Cal.2d 420, 426, 45 P.2d 194; *Gimenez v. Rissen*, 12 Cal.App.2d 152, 161, 55 P.2d 1254.

[9] The finding that the breach, if one occurred, was not "wilful" is supported by substantial evidence. Cf. *Pellas v. Ocean Acc. & Guar. Corp.*, 24 Cal.App.2d 528, 535, 75 P.2d 635. Mr. Tatelman testified in substance that he made arrangements for filming from the revised screenplay on the assumption that Mr. Genn would play his role in the revised version without objection. It is a legitimate inference that when Mr. Genn's objections were made known, it was too late to do anything but proceed to produce the film on the revised version. See *McPheeters v. Board of Medical Examiners of California*, 103 Cal.App. 297, 301, 284 P. 938, and see also *Nome Beach Lighterage and Transportation Co. v. Munich Assur., C.C.*, 123 F. 820, 825-826, reversed 9 Cir., 133 F. 636, on retrial, judgment for the insured *Nome Beach Lighterage and Transportation Co. v. Standard Marine Ins. Co., C.C.*, 156 F. 484, affirmed 9 Cir., 167 F. 119, 120.

The fourth of appellants' major contentions is that the policy covers only a loss arising from a "negligent act, error or omission" on the part of the insured, and that liability for a loss arising from a "breach of contract" must be limited to a negligent breach. In other words, the argument is that the element of negligence must be present to qualify the breach of contract as an insured risk. The argument is academic in view of the trial court's express finding that the claimed breach of contract rights "\* \* \* arose by reason of negligent act, error or omission on the part of plaintiff in connection with the production of said motion picture." Although the finding does not recite the specific act or omission constituting the negligence, it was not unreasonable for the trial court to conclude that Mr. Tatelman had been negligent in failing to notify Mr. Genn at an earlier date of the proposed changes in his role and in failing to seek his cooperation and acquiescence in changes before proceeding with other arrangements.

Finally, appellant contends that the trial court committed reversible error in failing to find whether or not there was an actual breach of contract by respondent, arguing that the validity of the Genn claim constituted a vital issue because "[i]f there was no breach [by the plaintiff] there was no loss for which defendant could possibly be liable." This argument, in effect, is simply another attack on the trial court's conclusion that "The certificates issued by defendants indemnify plaintiff against loss resulting from breach of contract rights either committed or *alleged to have been committed by plaintiff.*" (Emphasis added.) That construction of the contract is well supported by precedent and authority, as discussed *supra*.

[10-13] By the terms of the instant contract the insurer was not obligated to defend the insured against asserted claims. But when the insurer denied coverage and disclaimed liability, the insured acquired the right to make any reasonable and bona fide compromise of the claim against it. *Ritchie v. Anchor Casualty Co.*, 135 Cal. App.2d 245, 258, 286 P.2d 1000; *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 630, 40 P.2d 311. The insurer by the terms of its contract did not agree to indemnify against liability, but rather against 90% of the loss arising from the *making of a claim* alleging negligent act, error or omission or breach of contract rights. "A policy providing for indemnity against the *liability* is to be differentiated from a policy providing for indemnity against *loss or damage.*" 1 *Richards, Insurance*, 612-614, § 166. (Emphasis added.) The settlement by plaintiff with Mr. Genn was presumptive evidence of liability of the insured. *Ritchie v. Anchor Casualty Co.*, *supra*, 135 Cal.App.2d 245, 250, 286 P.2d 1000; *Chrysler Motors of California v. Royal Indemnity Co.*, 76 Cal. App.2d 785, 788, 174 P.2d 318. However, wholly apart from that presumption there is ample evidence to sustain the trial court's finding that the settlement of the instant claim was reasonable and prudent in the circumstances. It was not necessary for the trial court to find that plaintiff had in fact

breached its contract with Genn in order to find a loss for which the appellant was liable.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



164 Cal.App.2d 438

**Fred L. MULLOY, Clarice A. Mulloy, his wife, and Beverly D. Mulloy, a minor, by and through her Guardian ad litem, Fred L. Mulloy, Plaintiffs and Respondents,**

**v.**

**SHARP PARK SANITARY DISTRICT,  
Defendant and Appellant.**

**Civ. 17994.**

District Court of Appeal, First District,  
Division 2, California.

Oct. 21, 1958.

Hearing Denied Dec. 17, 1958.

Action against sanitary district for damages resulting when home was flooded with sewer water and debris because district's manhole was plugged. The Superior Court, County of San Mateo, Louis B. Dematteis, J., rendered judgment for homeowner, and district appealed. The District Court of Appeal, Kaufman, P. J., held that jury, under evidence, was entitled to draw inferences that there had been improper inspection of sewer system and that district was guilty of negligence.

Affirmed.

#### 1. Municipal Corporations ⚡736

A governmental unit is liable for creating and maintaining a nuisance. West's Ann.Civ.Code, § 3479.

#### 2. Municipal Corporations ⚡845(2)

In considering whether facts alleged are sufficient to constitute a cause of action in nuisance against sanitary district, plain-

tiff must show that legislative body has declared the condition complained of to be a nuisance. West's Ann.Civ.Code, § 3479.

#### 3. Municipal Corporations ⚡837

Obstruction of sanitary district's manhole resulting in flooding of home with sewer water and debris constituted a nuisance within statute providing that anything which is injurious to health, is indecent or offensive to the senses, or is an obstruction to free use of property is a nuisance. West's Ann.Civ.Code, § 3479; West's Ann.Health & Safety Code, § 6400 et seq.

#### 4. Municipal Corporations ⚡845(4)

In action against sanitary district for damages resulting when home was flooded with sewer water and debris because district's manhole was plugged, jury, under evidence, was entitled to draw inferences that there had been improper inspection of sewer system and that district was guilty of negligence. West's Ann.Health & Safety Code, § 6400 et seq.

#### 5. Municipal Corporations ⚡839

Sanitary district was not entitled to notice that its manhole was plugged in order to be held liable under theory of negligence for damages resulting to home which was flooded by sewer water and debris because manhole was plugged. West's Ann.Health & Safety Code, § 6400 et seq.

Ropers & Majeski, Robert F. Kane, Redwood City, for appellant.

Saul N. Ross, San Bruno, for respondents.

KAUFMAN, Presiding Justice.

Plaintiff Fred L. Mulloy his wife, Clarice, and plaintiff as guardian of his minor child Beverly, filed a complaint setting forth two causes of action against the defendant Sanitary District. The first charges the defendant with the creation of a private nuisance of December 1, 1955, when the plaintiffs' home was flooded with sewer water and debris; the second charges the defendant with the improper construc-

tion, operation and maintenance of sewer line servicing the plaintiffs' home. The defendant sanitary district appeals from a judgment rendered on a jury verdict in favor of the plaintiffs. The following questions are raised by the appeal.

1) Is a sanitary district liable for a private nuisance resulting from an obstruction in the sewer line which the district has failed to discover?

2) If so, does the evidence here support the verdict?

The facts viewed most favorably to the plaintiffs are as follows: On December 1, 1955, the plaintiffs had lived for several years at 203 Manor Drive in Sharp Park in San Mateo County. Defendant, a sanitary district organized pursuant to Health and Safety Code section 6400 et seq., operated a sewer system which serviced the plaintiffs' home. The system consists of numerous pipes of varying sizes running to a sewage treatment plant. The pipes themselves do not actually pass through the manholes, as a trough at the base of each manhole serves this function. Each manhole has two openings at the base, one for entry and one for discharge. There are approximately 500 manholes in the defendant's system. One of these manholes is located directly in front of the plaintiffs' home.

On December 1, 1955, the plaintiff came home from work about 5 p. m. He did not notice anything unusual about the manhole in front of his home or detect any unusual odors in the street. After dinner, the plaintiff heard gurgling in the bathroom. He went to investigate and saw airbubbles coming from the toilet. The bubbles stopped and he returned to the living room. Shortly thereafter the noises began again. The plaintiff returned to the bathroom and flushed the toilet. The water began to back up in the toilet and in the bathtub, soon flooding the bathroom and ultimately the other rooms in the house. About four inches of sewer water and debris was deposited throughout the house causing extensive damage. As soon as the plaintiff

saw the water backing up, about 6:45 p. m. he called the Sharp Park Fire Department. Plaintiffs made several more calls to the fire department during the next 20 minutes, but did not call the defendant district. The superintendent of the defendant district was first notified of the occurrence at about 7:00 p.m. by a plumber called by the plaintiffs and the fire department. When the defendant's employees arrived at approximately 7:10 p. m., most of the damage had been done and the water ceased coming from the manhole. Defendant's employees removed the cover and ascertained that the manhole was plugged and full of water. They inserted a steel rod into the manhole and dislodged a broom or mop wedged in the pipe. The broom or mop was wide enough to cover the mouth of the 6 inch pipe and had a broken handle about 18 inches long. The plaintiffs and a neighbor testified that there was other debris in the manhole, some of which was removed and some of which was washed away. One of defendant's employees and the plumber did not remember any additional debris. The time required to unplug the manhole was estimated from 5-15 minutes by the various witnesses.

Defendant's evidence indicated that it employed two men whose principal duties were the inspection and maintenance of the pump house, sewer lines and manholes. Occasionally, these men also performed routine installation and other services for the district. Under normal circumstances, a routine inspection of each of the 500 manholes in the district was made every 30 days. Unless some debris is found, a routine inspection takes about one minute and consists of lifting the manhole cover, which weighs about 60 lbs., and looking for trash, sludge, sticks, etc. Records are kept by the defendant of all inspections and maintenance work performed in the district. These records indicate that the manhole in front of plaintiffs' home was inspected on a two hour inspection tour November 30, 1955 (the day before the occurrence complained of) and no obstruction of the sewer was seen at that time. Peculiarly,



defendant's records as to the inspection of this particular manhole are more detailed than its records about any other. The testimony of defendant's employees as to the precise route taken by them on November 30, 1955, is in conflict. It is clear however that neither employee descended into the manhole on November 30, 1955. The area covered by the November 30 inspection consisted of 50-60 manholes in an area of 2-3 square miles. Another employee of the defendant's testified that it would take 2-4 hours to conduct a routine inspection of this area if no difficulty or obstruction was encountered. Defendant's records also reveal two prior inspections of the line in question on July 16, 1955, and October 10, 1955. No plugs or obstructions were found on either of these occasions. Defendant's superintendent stated that it was good practice to conduct occasional flushings and cleansings of sewer lines and that men and equipment were available for this purpose. The practice, however, was not to flush the lines unless some obstacle was discovered and the line serving plaintiffs' home had not been flushed prior to December 1, 1955.

It is apparent from the above that there is ample evidence to sustain the verdict. We need therefore to concern ourselves with the first and main question raised by this appeal.

[1,2] Defendant argues that as a public agency engaged in a governmental activity it cannot be held liable in the absence of a special statute. However, we are here concerned with direct damage to real property, for which liability existed even at common law. *Ambrosini v. Alisal Sanitary District*, 154 Cal.App.2d 720, 317 P.2d 33. In this state it has long been recognized that a governmental unit is liable for creating and maintaining a nuisance. *Phillips v. City of Pasadena*, 27 Cal.2d 104, 162 P.2d 625; *Hassell v. City and County of San Francisco*, 11 Cal.2d 168, 78 P.2d 1021; *Adams v. City of Modesto*, 131 Cal. 501, 63 P. 1083; *Peterson v. City of Santa*

*Rosa*, 119 Cal. 387, 51 P. 557. We recently applied this rule to a sanitary district in the *Ambrosini* case, *supra*. In considering whether facts alleged are sufficient to constitute a cause of action in nuisance, the plaintiff must show that a legislative body has declared the condition complained of to be a nuisance. *Vater v. County of Glenn*, 49 Cal.2d 815 and 820, 323 P.2d 85.

[3] Section 3479 of the Civil Code provides in part: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property \* \* \* is a nuisance." It cannot be questioned that the facts proved do constitute a nuisance within the above statutory definition. *Adams v. City of Modesto*, 131 Cal. 501, 63 P. 1083.

Appellant contends that it cannot be held liable on the theory of negligence and hence the court improperly instructed the jury on this subject.

This contention is answered in *Kramer v. City of Los Angeles*, 147 Cal. 668, 82 P. 334, where the city was held liable for negligently allowing the outlet of a drain to be clogged with debris, causing the bursting of a pipe on plaintiff's premises.

[4,5] The jury here, under the evidence, was entitled to draw an inference of improper inspection of the sewer system and hence the appellant was guilty of negligence. Also under this theory appellant was not entitled to notice. *District of Columbia v. Gray*, 6 App.D.C. 314, at page 319.

We conclude that the judgment finds support in the record before us on both the nuisance and negligence theories.

Judgment affirmed.

DRAPER, J., and MARTINELLI, J.  
pro tem., concur.

Hearing denied; GIBSON, C. J., and SHENK and TRAYNOR, JJ., dissenting.

164 Cal.App.2d 294

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Warren Paul BEGHTEL and Phillip William  
Fritz, Defendants,

Warren Paul Beghtel, Defendant and  
Appellant.

Cr. 6259.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 16, 1958.

Rehearing Denied Nov. 5, 1958.

Hearing Denied Dec. 10, 1958.

Defendant was convicted for robbery. The Superior Court, Los Angeles County, Le Roy Dawson, J., entered judgment. Defendant appealed therefrom and from the sentence, and from order denying motion for new trial and from all prior orders. Defendant also applied for writ of habeas corpus. The District Court of Appeal, Herndon, J., held that the evidence afforded adequate basis for inference that defendant participated in robbery by driving the get-away automobile.

Judgment and order denying new trial affirmed; appeals from sentence and from all prior orders dismissed; application for writ of habeas corpus denied.

#### 1. Robbery $\S$ 15

All participants in a robbery are chargeable as principals and are equally guilty. West's Ann.Pen.Code, § 31.

#### 2. Robbery $\S$ 10

"Robbery", a combination of the crime of assault with that of larceny, includes the element of asportation, and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized.

See publication Words and Phrases, for other judicial constructions and definitions of "Robbery".

#### 3. Robbery $\S$ 24(1)

In robbery prosecution, where evidence indicated that defendant was arrested 20 minutes after holdup of a store, and was driving the codefendant gunman's

car which contained loot taken from the victim of the robbery, and a roll of stolen coins lay at his feet as he drove, evidence adequately justified inference that defendant aided and abetted codefendant gunman in the commission of the robbery by assisting him in making a get-away. West's Ann.Pen.Code, § 31.

#### 4. Criminal Law $\S$ 238

In robbery prosecution, where evidence produced at preliminary hearing indicated that defendant was arrested 20 minutes after a holdup, driving the codefendant gunman's car which contained loot taken from the victim of the robbery, and a roll of stolen coins lay at his feet as he drove, reasonable or probable cause existed to warrant holding him for trial on robbery charge.

#### 5. Criminal Law $\S$ 238

"Reasonable or probable cause" required to uphold the commitment of a defendant is established by proof sufficient to cause a person of ordinary caution or prudence conscientiously to entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

#### 6. Habeas Corpus $\S$ 92(1)

The sufficiency of evidence to warrant conviction of petitioner is not a proper issue for consideration in habeas corpus proceeding.

#### 7. Habeas Corpus $\S$ 48

San Quentin State Prison is not within the habeas corpus jurisdiction of the district court of appeal for the second appellate district, division two.

Warren Paul Beghtel, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appellant Beghtel and one Fritz were charged with robbery and, in a second count, with kidnapping for the purpose of robbery. Appellant was charged with one prior robbery conviction and Fritz was charged with two priors. Both entered pleas of not guilty. Appellant's motion to dismiss made pursuant to Penal Code, § 995 was denied.

When the case was called for trial, Fritz withdrew his original plea and entered a plea of guilty to robbery in the first degree. Pursuant to stipulation, appellant's case was submitted on the transcript of the evidence taken at the preliminary hearing, both sides reserving the right to introduce additional evidence. The only additional evidence offered or taken at the time of trial consisted of cross-examination of the arresting officers by appellant's counsel and the proof of appellant's prior felony conviction. The trial court found appellant guilty of robbery and not guilty of the kidnapping charge. His motion for a new trial and his application for probation were denied, and he was sentenced to State prison.

In his opening brief, appellant states that he is appealing from the judgment, the order denying his motion for a new trial and from "all prior orders made in the case." As indicated by its caption, the opening brief also purports to constitute an application for a writ of habeas corpus. Appellant's contentions relate exclusively to the sufficiency of the evidence to warrant the magistrate's order holding him for trial after the preliminary hearing and to support the judgment of conviction. Since appellant's cross-examination of the police officers neither added anything of substance to the People's case as made at the preliminary hearing nor in any way detracted from it, it is fair to say that the magistrate's order and the judgment of conviction rest upon the same evidence as summarized in the following recital.

On November 17, 1957, at about 8:45 p. m. codefendant Fritz entered a liquor store in Los Angeles, pulled a gun, announced

"This is a holdup" and took approximately \$300 in cash from the owner and operator, a Mrs. Hayward. The money taken consisted of currency taken from the cash register and several rolls of coins of various denominations taken from a desk near the safe in a back room.

Twenty minutes later appellant and Fritz were arrested at a place in Los Angeles about five miles distant from the scene of the robbery. The arresting officers noticed an automobile being driven in an erratic manner, wheeling back and forth across the traffic lanes. They ordered the car to the curb. The car was being driven by appellant but was registered to Fritz, who was seated on the front seat beside the appellant. The police had the occupants of the car step out and a routine sobriety test was commenced with appellant. As Fritz opened the car door on the righthand side a light came on inside the car illuminating the floorboards and one of the officers observed a roll of dimes on the floorboards and another roll of coins lodged under the accelerator. The officer observing the roll of coins stated to his associate in the presence of the defendants that apparently they had something more than a case of drunk driving. Upon being asked, Fritz indicated his consent to the officers' search of the vehicle. Fritz was directed to stand away from the car, and as one of the officers proceeded to look into the vehicle, Fritz began to move between two rows of parked cars. The other officer ordered him to stop and at that time both defendants were handcuffed.

The officer then resumed his search of the car and found a box containing eight .32 caliber shells in the glove compartment. When asked if there was a gun to go with these shells, both defendants declared they didn't know of any gun. The officer then looked under the right-hand side of the front seat and found a .32 caliber Mauser German automatic and wads of currency of various denominations, seven rolls of quarters, three rolls of dimes, six rolls of nickels, five rolls of pennies and \$2.75 in loose change. When asked whether this



was their money, both defendants failed to respond. Both also stood mute when asked the question "Whose gun is this?" Other articles found on the back seat of the car were two face masks, two men's yellow silk baseball-type caps, two pairs of gloves, one of cotton and the other of rubber, a pair of multi-colored sun glasses and a gray felt hat. The defense presented no witnesses.

[1] The sufficiency of the foregoing evidence to sustain the judgment of conviction is self evident from its recital "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, \* \* \* are principals in any crime so committed." Penal Code, § 31. All participants in a robbery are chargeable as principals and are equally guilty. *People v. Best*, 43 Cal.App.2d 100, 105, 110 P.2d 504.

[2] Manifestly the evidence afforded a more than adequate basis for the inference that appellant participated in the robbery by driving the get-away car. As stated in *People v. Raucho*, 8 Cal.App.2d 655, 664, 47 P.2d 1108, 1112, "\* \* \* the perpetration of a robbery is not completed the moment the stolen property is in the possession of the robbers. Robbery, a combination of the crime of assault with that of larceny, includes, as does larceny, the element of asportation, and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized."

[3] The evidence strongly indicates that appellant was arrested while performing the act which constitutes the element of asportation. He was arrested twenty minutes after the holdup, driving the gunman's car which contained the loot taken from the victim of the robbery. A roll of the stolen coins lay at his feet as he

drove. As stated in *People v. Beaulieu*, 144 Cal.App.2d 536, 541, 301 P.2d 304, 306: "\* \* \* it is apparent that it [the evidence] adequately justifies the inference that appellant aided and abetted Beaulieu and Fritz in the commission of the robbery by assisting them in making a 'getaway.'" See *People v. Boss*, 210 Cal. 245, 250-251, 290 P. 881. In numerous cases robbery convictions have been sustained on similar evidence. See *People v. Mora*, 139 Cal. App.2d 266, 271, 293 P.2d 522, and *People v. Bonner*, 5 Cal.App.2d 623, 631, 43 P.2d 343, and cases therein cited.

[4, 5] Appellant's contention that the evidence produced at the preliminary hearing was not sufficient to warrant holding him for trial is obviously untenable, since the "reasonable or probable cause" required to uphold the commitment of a defendant is established by proof sufficient to cause a person of ordinary caution or prudence conscientiously to entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated. *People v. Platt*, 124 Cal.App.2d 123, 131, 268 P.2d 529; *Weber v. Superior Court*, 35 Cal.2d 68, 69, 216 P.2d 871.

[6, 7] It is equally obvious that the application for a writ of habeas corpus constitutes an attempt to invoke a clearly inappropriate remedy. In *re Lindley*, 29 Cal. 2d 709, 722-723, 177 P.2d 918; *People v. Lempia*, 144 Cal.App.2d 393, 398, 301 P. 2d 40. Furthermore, since appellant is confined in San Quentin State prison in Marin County he is not within the habeas corpus jurisdiction of this court. *People v. Lempia*, supra, 144 Cal.App.2d 393, 398, 301 P.2d 40; *People v. Martinelli*, 118 Cal.App. 2d 94, 98, 257 P.2d 37.

The application for the writ of habeas corpus is denied. The appeals from the sentence and "from all prior orders made in the case" are dismissed. The judgment and the order denying the motion for a new trial are affirmed.

FOX, P. J., and ASHBURN, J., concur.

164 Cal.App.2d 391

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

v.

**Hawthorne HOPWOOD, Defendant and**  
**Appellant.**

Cr. 6240.

District Court of Appeal, Second District,  
 Division 1, California.

Oct. 20, 1958.

Prosecution for pool selling and bookmaking in two counts. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of guilty, suspended sentence and granted probation upon condition that fine be paid, and accused appealed. The District Court of Appeal, Fourn, J., held that where accused was charged in one count with engaging in pool selling and bookmaking upon result and purported result of horse race, and in second count that on certain date he received certain moneys wagered upon horse race, criminal venture was divisible transaction, and counts were based upon separate and distinct acts.

Order affirmed.

#### 1. Criminal Law §565

In prosecution for pool selling and bookmaking in two counts, where arresting officer testified that on certain month, day and time he went to place of arrest and that accused was arrested one half hour later on same day, evidence was sufficient to show that offense was committed within required three years of filing of information, especially where officer had been policeman for only two and one half years notwithstanding that officer did not designate the year. West's Ann.Pen.Code § 800.

#### 2. Criminal Law §1137(5)

In prosecution for pool selling and bookmaking in two counts, where counsel for accused indicated that it was not necessary to proceed further with examination of arresting officer as to how bookmaking was commonly conducted in area, on appeal

accused could not argue that there was no sufficient foundation in record to establish that officer was qualified to testify. West's Ann.Pen.Code, § 337a, subds, 1, 3.

#### 3. Indictment and Information §130

Where accused was charged in one count with engaging in pool selling and bookmaking upon result and purported result of horse race, and in second count with receiving on certain date certain moneys wagered upon horse race, criminal venture was divisible transaction, and counts were based upon separate and distinct acts. West's Ann.Pen.Code, §§ 337a, subds. 1, 3, 654.

#### 4. Criminal Law §29

Mere fact that multiple convictions are based upon acts closely related in point of time and arising out of same criminal venture does not raise bar of statute providing that act or omission which is made punishable in different ways by different provisions of Penal Code may be punished under either provision, but not under more than one, but question is whether each conviction was based upon separate and distinct act and whether criminal transaction was divisible transaction, and answer in each case must be resolved upon its own facts. West's Ann.Pen.Code, § 654.

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James L. Garcia, Compton, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

FOURTH, Justice.

This is an appeal from an order granting probation in a bookmaking case.

In an information filed in Los Angeles county, the appellant was charged in count I with a violation of Penal Code, section 337a, subd. 1, in that on July 11, 1957, he had engaged in poolselling and bookmaking upon the result and purported result of a horse race; in count II he was charged with a violation of subd. 3 of the abovementioned section, in that on July, 11, 1957, he received certain moneys wager-

ed upon a horse race. It was also charged that appellant had previously been convicted of the crime of assault with intent to rob and that he had served a term in a state prison therefor.

The appellant pleaded not guilty and a trial by jury was waived. By stipulation the matter was submitted upon the transcript of the hearing at the preliminary examination. Each side reserved the right to introduce further evidence. The prosecution rested and the appellant offered additional evidence. The appellant was found guilty. No finding was made as to the alleged prior conviction because the district attorney, for some reason which is not readily apparent from the record, saw fit not to introduce any evidence with reference thereto. The appellant was sentenced to jail for sixty days on each count, the sentences to run concurrently, and then such sentences were suspended and appellant was placed upon probation for one year upon condition that he pay a fine of \$300 and that he not engage in bookmaking and similar activities for the same period.

A résumé of the facts is as follows: On July 11, 1957, officer Hubert Greene of the police department went to a hot dog stand located on the southwest corner of Third and Central streets. The officer had been on the police department for two and one-half years, and for the last three and one-half months had been engaged in investigating and arresting persons for bookmaking in Los Angeles county. He had made a study of race track gambling and its modus operandi as carried on in Los Angeles county for race tracks and bookmaking, and was familiar with the customs and manner in which poolselling and bookmaking are conducted in Los Angeles county and had made twenty or twenty-five arrests for such offenses.

The officer seated himself at the hot dog stand and ordered a malt and a sandwich. While he was seated there an unidentified female seated herself next to him. They conversed, and after the conversation this female walked to the appellant, held a

short conversation, and then returned to her place next to the officer at the bar. The officer remained at the bar and observed approximately three persons walk to the appellant, have a short conversation, and apparently hand to appellant something that appeared to be money. The appellant went to a telephone and appeared to make a telephone call after the other persons had given him money.

The officer then walked over to the appellant and stated that he had a good horse in the fifth that he would like to get if the horse had not been scratched. The appellant replied that he did not know the officer. The officer informed the appellant that he, the officer, lived right around the corner, that he did not play very often and that he had never made a bet with the appellant before. The appellant then stated, "I guess you are all right," and directed the officer to go to a car outside where he could find a copy of the National Daily Reporter. The officer went to the automobile and was handed a copy of the National Daily Reporter by an unidentified person in the car. He consulted the scratch sheet and selected a horse in the fifth race at Hollywood Park in Inglewood by the name of "Maquita." The officer then returned to the appellant and stated, "I would like \$3.00 to win on number five in the fifth." The appellant repeated the bet and took the \$3. The appellant walked to the telephone and appeared to make a telephone call. The appellant then walked to the rear of the hot dog stand and the officer gave a pre-arranged signal to his partners. When they arrived the appellant was placed under arrest.

The defendant testified in his own behalf, and in effect, stated that he did not take or place a bet with or for the officer.

The appellant asserts (1) that the evidence is insufficient to show the offense was committed within three years of the filing of the information; (2) that the evidence is insufficient to sustain the conviction.



[1] Appellant argues, with reference to the first contention, that the burden was upon the prosecution to show that the information was filed within the period of the statute of limitations, and that the state failed to carry its burden. Section 800 of the Penal Code provides as follows:

"An indictment for any other felony than murder, the embezzlement of public money, the acceptance of a bribe by a public official or a public employee, or the falsification of public records, must be found, and information filed, or case certified to the superior court, within three years after its commission. \* \* \*

In this particular cause the information was filed on August 22, 1957, charging the appellant with the commission of the offenses on July 11, 1957. The officer testified that on July 11, at 1:30 o'clock p.m., he went to the hot dog stand, and that the appellant was arrested at 2:00 p.m. on July 11. Appellant seems to insist that there is no designation of what year was meant by the officer. We are not required to close our eyes to the commonly accepted fact that in ordinary speech a reference to "July," without mention of the year, indicates a reference to the "July" immediately past. Furthermore, in this particular instance, the officer had been a policeman for only two and one-half years, and it is obvious that he referred to July 11, 1957, and not to a July previous to such employment.

[2] Appellant is incorrect in his assertion that there was no evidence as to how bookmaking is commonly conducted in Los Angeles. The officer did testify that he had made twenty-five arrests for bookmaking, that he had testified in court fifteen times as a result of such arrests and that he was familiar with the customs and manner in which bookmaking was conducted in Los Angeles county. He also testified that bookmakers in Los Angeles county commonly used the National Daily Reporter, the Daily Racing Form, and he described the different materials in which bookmakers record bets. In any event, in

this particular case, it does not lie with the appellant to complain at this point, for it is clear from the record that the officer was going to testify more fully as to the customs of bookmakers in Los Angeles county but was cut off by counsel for the appellant, as indicated by the following excerpt from the record:

"Q. [by the Deputy District Attorney]: Officer, what documents, records and paraphernalia are commonly used in bookmaking and pool selling, in Los Angeles County? A. The documents most commonly used are the National Daily Reporter and the daily racing form and different materials in which bookmakers record bets, and formica and paper and pencil and pencils and ink.

"The Court: Do you want to stipulate?

"Mr. Margid [Counsel for defendant]: I think he is about through.

"The Court: I noticed that you were trying to get his attention there.

"Mr. Margid: I was telling him under the facts that I knew it, he doesn't need all these questions he is asking.

"The Court: Are you satisfied then as to his qualifications, Mr. Margid?

"Mr. Margid: Yes, I am.

"The Court: All right, proceed.

"Mr. Plunkett: Thank you, counsel."

Counsel for appellant having indicated, as above set forth, that it was not necessary to proceed further, the appellant surely cannot now press the argument that there was no sufficient foundation in the record. *People v. Boyles*, 45 Cal.2d 652, 656, 290 P.2d 535.

[3,4] Appellant also asserts that in count II the charge of accepting a bet in violation of Penal Code, section 337a, subd. 3, was a necessarily included offense in count I, the charge of bookmaking in violation of Penal Code, section 337a, subd. 1, and that therefore he cannot be convicted on both counts.

The mere fact that multiple convictions are based upon acts closely related in point of time and arising out of the same crim-

inal venture, as was the situation in this case, does not raise the bar of section 654 of the Penal Code. In *re Chapman*, 43 Cal.2d 385, 389, 273 P.2d 817. The question is, whether or not each conviction was based upon a separate and distinct act (*People v. Knowles*, 35 Cal.2d 175, 187, 217 P.2d 1), whether or not the criminal transaction was a divisible transaction, and the answer in each case must be resolved upon its own facts. *People v. Brown*, 49 Cal.2d 577, 591, 320 P.2d 5.

In our opinion, the criminal venture in the case at bar was a divisible transaction, and counts I and II were based upon separate and distinct acts.

The order is affirmed.

WHITE, P. J., and LILLIE, J., concur.



164 Cal.App.2d 346

**PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Leroy LOPEZ, Defendant and Appellant.**  
**Cr. 1245.**

**District Court of Appeal, Fourth District,**  
**California.**

**Oct. 17, 1958.**

Prosecution for sale of narcotics. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment upon verdict of guilty and overruled motion for new trial and accused appealed. The District Court of Appeal, Griffin, P. J., held that trial judge's questioning of witness for accused in regard to whether witness stated in prior report facts given in evidence by her, without indicating that they were inconsistent, was not prejudicial error, where question did not call for production of report and there was no objection made to form of question.

Affirmed.

## 1. Criminal Law ⇨1166½(12)

In prosecution for sale of narcotics, trial judge's questioning of witness for accused in regard to whether witness stated in prior report facts given in evidence by her, without indicating that they were inconsistent, was not prejudicial error, where question did not call for production of report and there was no objection made to form of question. *West's Ann. Health & Safety Code*, § 11500.

## 2. Witnesses ⇨246(2)

The trial judge may make reasonable examination of witnesses in course of trial.

Betty Lou Lamoreaux, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was convicted by a jury of unlawful sale of narcotics (Violation of Sec. 11500 of the Health and Safety Code). He admitted a prior conviction of a felony (possession of narcotics). A reversal is sought on the claimed ground of prejudicial misconduct of the trial judge.

According to the testimony of one O. C. Reed, special employee of the Narcotics Bureau, on February 20, 1958, he and one Ann Massey, a woman who had been previously convicted of selling narcotics on different occasions, saw defendant near the International Pool Hall and Bar, in Fresno. Defendant spoke to Ann and continued on into the bar. Later, he came back to her and she told him Reed would like to buy some narcotics. Defendant said he would go and obtain some but he would have to have the money (\$5) for a single capsule. Reed counted out five one-dollar bills. Defendant placed them in his pocket and told her he would return in a little while. Several narcotic agents were stationed in a Japanese hotel room nearby and they testified they saw the money pass to defendant and that Reed gave a known signal, by tipping his hat to the

other officers, that defendant was going to obtain narcotics for him. Defendant drove away in a car with a known user. Reed began talking to Ann. About 30 minutes later defendant returned and went into the bar and Reed followed. Defendant told Reed to remain there because he wanted to talk with Ann, alone. He walked out to Ann and had a conversation with her. Ann and defendant walked toward an alley and Reed followed them. He saw defendant pass something to Ann and then defendant disappeared. Ann returned to Reed and gave him a capsule and said: "This is the stuff". She said defendant was afraid of Reed. Reed took the capsule containing a powdery substance to his hotel and it was subsequently analyzed and found to contain opium. The other officers corroborated Reed's testimony insofar as they could see from the hotel window and saw the money pass to defendant.

Defendant failed to testify at the trial but produced Ann as his witness. She had been sentenced to prison on several sales of narcotics and apparently had previously applied for probation and had made a statement to the probation officer in reference to her activities in this traffic which the trial court in this action had previously read and considered. Her story on the witness stand was generally that she and Reed were talking near the International Pool Hall about 5 p. m. on the day in question; that she met defendant walking down the street, stopped him, and inquired if he would give her a ride to her mother's home; that Reed handed defendant \$5; that he took it and asked her what it was for; that she told defendant that Reed had made a mistake, that the \$5 was meant for her, and that defendant then gave it to her; that the purpose of the transaction was for the purchase of narcotics because she had agreed to furnish Reed with it; that after defendant returned the money to her he left and later came back to see if she was ready to take the ride; that she walked across the bridge, picked up a capsule she had hidden away underneath the fence, took it back and gave it to

Reed; that she and Reed went to a hotel and divided the capsule; that Reed just "sniffed" a little from his finger and said he was going up to his room and use it; that she made the sale to Reed without any help from defendant; and that this transaction was the reason she was in prison. She was sentenced on more than one count for the sale of narcotics.

[1] Counsel for defendant rested his case. A recess was taken and thereafter the trial judge asked the witness to resume the stand. She did so and the judge inquired: "Now, Ann, you remember that you made a report to me through the probation office in respect to these transactions?"

"The Witness: Yes.

"The Court: Did you tell me any of the things in that report that you have told here? (Pause). You are not afraid of me, are you?"

"The Witness: No.

"The Court: Have I ever said anything unkindly to you?"

"The Witness: No.

"The Court: All right. You remember you made that report through the probation officer? You didn't tell me any of these things in that report, did you?"

"The Witness: No.

"The Court: That is all."

The prosecution called Mr. Reed in rebuttal, who denied Ann's story in reference to "sniffing" the narcotic or using it in any form. The people rested their case and arguments to the jury followed the next morning. Before the jury returned with a verdict against defendant his counsel moved for a mistrial on the grounds that the court committed prejudicial error in relation to the examination of the witness as above related. The motion was denied. The same question was again considered by the trial judge on a motion for new trial which was denied.

The claim is that the judge's questioning indicated to the jury his belief that



the witness was not telling the truth; that the witness had made a prior inconsistent statement, and the court endeavored to impeach the witness' testimony without producing or showing the claimed prior inconsistent statement to her for examination and explanation; that this form and method of impeachment is not authorized and that the error was not cured by subsequent instructions, citing Section 2052 of the Code of Civil Procedure; *People v. Giacomino*, 347 Ill. 523, 180 N.E. 437, 84 A.L.R. 1168, 1172, 1178; *People v. Zammora*, 66 Cal. App.2d 166, 210, 152 P.2d 180; and 3 Cal. Jur.2d 648, sec. 162.

[2] A close examination of the questions propounded do not show that the trial judge indicated the witness had made a contrary or inconsistent statement to that made on the witness stand. The examination only went to the question as to whether the witness stated in a prior report all the facts here related without indicating that they were inconsistent. She stated she did not. The question did not call for the production of the report. There was no objection by counsel for defendant to the form of the question. No motion was made to strike the answer and no request was made that the jury be instructed to disregard the questions and answers. There was a general instruction given to the effect that if any expression of the trial judge seemed to indicate an opinion as to which witnesses were worthy of belief, the jury was instructed to disregard it and that this was a matter solely for the jurors to determine. It is a well-established principle of law that a trial judge may make reasonable examination of witnesses in the course of a trial. *People v. Ottey*, 5 Cal.2d 714, 721, 56 P.2d 193; *People v. Deacon*, 117 Cal.App.2d 206, 209, 255 P.2d 98; *People v. Corrigan*, 48 Cal. 2d 551, 555, 310 P.2d 953. The importance in achieving truth in placing guilt on deserving shoulders in equal to the importance of achieving truth to exonerate the innocent. We are convinced that the questions, as propounded, and the answers given, did not constitute prejudicial error suffi-

cient to warrant a reversal, nor that it would be reasonably probable that a different result would have been reached had the report been produced. *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243; *People v. Hume*, 56 Cal.App.2d 262, 266, 132 P.2d 52; *People v. Corrigan*, 48 Cal.2d 551, 556, 310 P.2d 953; *People v. Deacon*, 117 Cal.App. 2d 206, 208, 255 P.2d 98.

Judgment and order denying a new trial affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.



164 Cal.App.2d 385

In the Matter of the ESTATE of Canfield  
WILSON, etc., Deceased.

Audrey L. COTTERMAN, Appellant and  
Contestant,

v.

Lola REYNOLDS, Petitioner and  
Respondent,

Fern Forister, Respondent.

Civ. 23154.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 20, 1958.

Estate proceeding wherein three persons sought letters of administration. The Superior Court, Los Angeles County, Newcomb Condee, J., entered judgment awarding letters of administration to person he found to be the legitimated natural daughter of decedent, and appeals were taken. The District Court of Appeal, Fourth, J., held that evidence, including testimony that decedent publicly acknowledged prevailing contestant as his natural child, and took her into his family with the consent of his wife, and otherwise treated her as if she were a legitimate child, sustained finding that she

was the legitimated surviving daughter of decedent, and as such entitled to have letters of administration issued to her.

Judgment affirmed.

#### Bastards ⇐ 13

In estate proceeding wherein three persons sought letters of administration, evidence, including testimony that decedent publicly acknowledged prevailing contestant as his natural child, and took her into his family with the consent of his wife, and otherwise treated her as if she were a legitimate child, sustained finding that she was the legitimated surviving daughter of decedent, and as such entitled to have letters of administration issued to her. West's Ann. Civ.Code, § 230.

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Emmett E. Patten, Monrovia, Glen A. Duke, Los Angeles, for appellant Cotterman.

Youngdahl & Glick and Norman W. Alschuler, Los Angeles, for respondent Reynolds.

#### FOURT, Justice.

This is an appeal by Audrey L. Cotterman, a niece of the deceased Canfield Wilson, from a judgment awarding letters of administration to Lola Reynolds, the legitimated natural daughter of the deceased.

In this case there was a three-way contest for letters of administration. Fern Forister claimed to be the common-law wife of the decedent under a purported common-law marriage in Nevada, and as such entitled to letters in his estate. Lola Reynolds, the daughter of Fern Forister, claimed to be the legitimated natural daughter of the decedent, and as such entitled to letters in his estate. Appellant, Audrey L. Cotterman, claimed letters as the daughter of a deceased brother of the deceased.

The sole question at issue is whether the facts support a finding that Lola Reynolds was adopted and legitimated, pursuant to

the provisions of section 230 of the Civil Code. That section reads as follows:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1872.)

It is not contended, on this appeal, that Lola Reynolds was not the daughter of decedent. There was, without question, sufficient evidence to warrant such a finding.

The decedent, during his lifetime, was at one time a bartender. He was married to Marjory Yuill on March 11, 1931, and they separated in 1935, and a final decree of divorce was entered between them on August 24, 1938. He was married to Jean Kellner on September 13, 1939, which marriage was terminated by a final divorce on March 29, 1948. Fern Forister met the decedent about December 10, 1932, and they stayed together for about two weeks, and during such period of time Lola Reynolds was conceived. The decedent's wife at that time, Marjory, testified, in substance, that decedent was away from home for the two weeks in question and that he had admitted to the fact that he had associated with Fern. The wife also testified that sometime in February or March of 1932, the decedent admitted to her that he was in trouble with Fern, who was then pregnant. The wife further stated that she and the deceased gave Fern money from time to time, and that after the birth of the child it was in their home on occasions; that on one of such occasions the baby remained from about noon to dusk, slept on the couch and was played with by the decedent and his mother. An almost identical episode occurred about one year later. Further, the wife stated that on one of such occasions, "we discussed the situation in a friendly manner \* \* we discussed the resemblance, and he said,

'She looks like me.' And I said, 'Yes, you can't deny her.' He said, 'I'm not denying her.' That was in front of her mother." Further, she stated that the father had done such natural things as fondling the child and holding her in his arms and playing with her. The wife also stated that every time they saw the child, "We discussed \* \* \* the resemblance was so clear \* \* \*." The paternal grandmother played with the child in the presence of the deceased and on occasions when there were no customers at the bar where the deceased was employed, he would place the child upon the bar and play and talk with her, and would state, "This is my little girl." Further the wife testified that throughout her marriage to the deceased they gave Fern money, from time to time, to support and maintain the child, and that they visited at Fern's home to see the child, and that all of this was with her consent as the wife of the deceased.

The decedent and his wife separated in 1935, and he went to Nevada. Fern took the child, Lola, with her to Nevada and they lived with the deceased at Henderson, Nevada, during the summer vacation period of 1936.

The decedent remained in Nevada. However, he occasionally visited his mother and stepfather, the Ainsworths, in Los Angeles county until the death of Mr. Ainsworth in 1955, at which time he returned to Los Angeles county to care for his mother, Mrs. Ainsworth.

When Lola was about twelve years of age she was brought, at the request of her grandmother Ainsworth, to the grandmother's home. A witness described the visitation by stating that the deceased was there and that he greeted the child by putting his arms around her and inquiring about how she was getting along, which pleased the grandmother. The deceased would say, "How is my Lola?"

During the funerals of both of the Ainsworths, Lola sat in the family room reserved solely for the nearest of kin, and rode

to the graveside in the family car. When the services were completed the deceased introduced Lola, his daughter, to friends present whom she had not met theretofore.

Further, when Lola was about seventeen years of age she wanted to get married and told her mother about it. The mother advised her that she would have to secure the consent of her father. The mother Fern, Lola, and Lola's intended husband, Peter Reynolds, then drove to Nevada to talk with the deceased. At first the deceased stated that Lola was too young to get married, but later changed his mind, and when told that the wedding would cost about \$100, he gave Lola this amount and wished her well. Lola was married on April 1, 1950.

There was sufficient evidence, if believed by the trial court, for it to find that the decedent publicly acknowledged that Lola was his natural child, that the decedent took Lola into his family with the consent of his wife and that he otherwise treated her as if she were a legitimate child. Based upon such a finding, the court properly found that Lola was the legitimated surviving daughter of Canfield Wilson, deceased, and as such entitled to have letters of administration issued to her.

In *Blythe v. Ayres*, 96 Cal. 532, at page 576, 31 p. 915, at page 922, 19 L.R.A. 40, referring to section 230 of the Civil Code, it is said:

"This section of the Code is entitled to a liberal construction, because section 4 provides: 'The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.'"

In *re Estate of Lund*, 26 Cal.2d 472, at page 481, 159 P.2d 643, at page 648, 162 A.L.R. 606, states, "It cannot be seriously disputed that the public policy of California



disavows the common-law tenets and favors legitimation."

Also, the court in the Lund case said, 26 Cal.2d at page 482, 159 P.2d at page 649: "The last quoted statute [Civ.Code, § 230] is that upon which petitioner relies. It is, on its face, primarily a law governing legitimation or status, but if under it the petitioner has attained the status of legitimacy 'for all purposes' in California then he is entitled to the benefit of the general succession statutes."

In the Blythe case, *supra*, referring to the use of the word "acknowledge" in the section under consideration, it is stated, 96 Cal. at page 577, 31 P. at page 922, 19 L.R.A. 40: "The word 'acknowledge' has no technical meaning, and in its ordinary acceptation is defined, by Webster, 'to own or admit the knowledge of.' It is not necessary to dwell at great length upon this special element necessary to satisfy the statute. Under the evidence it can hardly be considered debatable. Blythe declared the plaintiff to be his child to all persons upon all occasions. He was garrulous upon the subject. \* \* \* He acknowledged the child to its mother and to its grandmother before it was born, and subsequently in no single instance was he ever heard to deny its paternity."

Certainly, the evidence in the present case discloses that the decedent declared the child Lola to be his. He acknowledged to his wife that he was the father of a child to be born to Fern, and introduced the child many times as his own, and years later, at the funeral of his mother, he further introduced the child as his. These are but a few of the circumstances which appear very convincing to us.

It is true that the decedent did not have much of a family life as we know such generally, but in the first instance, when the child was born, and the visitations were made to the decedent's home, the child was received with the consent of the then wife into decedent's family. Under the circumstances of this particular case, we believe

that the child was received into decedent's family as such with the consent of his wife.

Passing to the remaining element of the statute which requires the father's "otherwise treating it as if it were a legitimate child." In this case there can be no doubt that the decedent did otherwise treat Lola as though she were his legitimate child. As the court stated in *Blythe v. Ayres*, *supra*, 96 Cal.2d at pages 580-581, 31 P. at pages 923, 19 L.R.A. 40: "If the father has publicly acknowledged the child to be his child, and has taken it into his family, it would seem but little remained to be done to wash away forever the stain of bastardy. The public acknowledgment of the child is the main fact. It is the important factor in the eyes of the statute. If the child was publicly acknowledged and received into the family, it would be a novel case where a court of equity would close its doors and refuse to declare a legitimation because the child was poorly clothed and illy fed. That case has not yet arisen, and it is hoped and believed it never will. The statute clearly means that the father must treat his illegitimate child as he would naturally treat his legitimate child, not as the majority of men in his financial circumstances would or should treat their children. Every man furnishes the rule by which he must be measured. No imaginary standard of excellence can be created, and then it be demanded that Blythe shall rise to that standard. If appellants' contention be true, a child whose father was an ignorant man, believing education an evil to be shunned, and who therefore denied an education to the child, could not be granted legitimation. \* \* \* It appears that at no time was she deprived of the necessities of life. She resided at all times either with her mother or her grandfather. Blythe furnished something near \$150 a year for her support. Certainly during her infancy this was entirely sufficient, and no complaints were made to him that more money was needed to meet her wants. At all these times he himself was either stopping in a log house in the mountains of Trinity, or

living with his mistress in lodgings in San Francisco, surrounded by his dogs, birds, and cats, while his hens were located upon the roof. It may well be inferred from the simplicity of his own life as indicated by the foregoing circumstances, that, if legitimate children had been born to him, they would have been treated, as far as pecuniary expenditures were concerned, upon the same lines as this illegitimate child was treated."

It was appropriately stated in *Re Estate of Lund*, supra, 26 Cal.2d at pages 494-496, 159 P.2d at pages 655, 656, 162 A.L.R. 606: "Likewise it must be accepted as true that once a child has been received into the family of its father, *it attains the de facto status of a member of that family*, and unless disavowed, such status (in a broad sense) continues with it for the remainder of its days. The word 'family' means not merely those who live in one house but, in equally wide usage, signifies all who are descended from a not too distant common progenitor. Webster's New Int. Dict. (2d ed.) Here the petitioner was received into the intimate family circle, the household itself; \* \* \*. It is not shown to have ever been disavowed or terminated. \* \* \*

"It is presumed 'That a thing once proved to exist continues as long as is usual with things of that nature' (Code Civ.Proc., § 1963(32)) and 'That a person is innocent of \* \* \* wrong' (Code Civ.Proc. § 1963(1)). \* \* \* Once the child had been unconditionally received into the family, he was received permanently and continuingly unless and until such reception was revoked (if in its nature it could be revoked), and a revocation of such reception would constitute an unnatural and wrong act. Such an act will not be presumed. \* \* \*

"\* \* \* The biological relationship of father and son, and the de facto family relationship which the father had established, are not transient or volatile things which may exist one moment and be non-existent the next, or which depend for their continuance upon repetitions of the origin-

al words or acts. Once proclaimed and established they exist as facts for all time and in all places."

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



164 Cal.App.2d 396

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Edward HOUSTON, Defendant and**  
**Appellant.**

**Cr. 6140.**

**District Court of Appeal, Second District,**  
**Division 2, California.**

**Oct. 20, 1958.**

Defendant was convicted in the Superior Court of Los Angeles County, Richard C. Fildew, J., for unlawful possession of heroin, and he appealed. The District Court of Appeal, Fox, P. J., held mere fact that defendant had been under arrest at time when he revealed and delivered to officers narcotics secreted within his body was merely a factor to be considered in determining whether he had voluntarily surrendered contraband, and that the question was one of fact.

Affirmed.

#### **I. Criminal Law** 394.4(2)

Arresting officer's statement that it would be better for defendant if he then surrendered any narcotics secreted in his body rather than have same found in jail was not improper and did not constitute duress or otherwise violate any of defendant's constitutional rights, and narcotics thereupon withdrawn by defendant from his own rectum were admissible in evidence in his subsequent prosecution for unlawful

possession of heroin. West's Ann.Pen. Code, § 4573.

## 2. Criminal Law ⇨394.5(3)

That defendant had been under arrest at time when he revealed and delivered to officers narcotics secreted within his body was merely a factor to be considered in determining whether he had voluntarily surrendered contraband; and the question was one of fact. West's Ann.Health & Safety Code, § 11500.

## 3. Criminal Law ⇨393(1)

Where defendant voluntarily produces evidence against himself, his constitutional rights are not violated.

Edward Houston in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was charged with possession of heroin in violation of section 11500 of the Health and Safety Code. It was also alleged that he had suffered a prior felony conviction for forgery and served a term of imprisonment therefor. A jury trial having been waived, the court found the defendant guilty as charged, and also found the alleged prior conviction to be true. Defendant was sentenced to the state prison. He has appealed from the judgment.

Sergeant Hall, of the Los Angeles Police Department attached to the Narcotics Division, had received information from two informants, whom he considered reliable on the basis of past performance, that defendant was a user and peddler of narcotics, and that he kept narcotics in his rectum. On the morning of July 8, 1957, Sergeant Hall also received information from a brother officer that defendant was then in possession of heroin and had it secreted as above indicated. Shortly thereafter, Sergeant Hall and his partner, Sergeant Bowser, went to defendant's apartment, Room 331 at 460 East Fourth

Street; they arrived there at about 10:30 a. m. Sergeant Hall knocked on the door; thereupon defendant opened the door, and stood back approximately three feet. Defendant was in the nude. The officer observed that there were needle marks and scars over the veins of each arm, indicating that defendant was a user of narcotics. Sergeant Hall advised defendant that he was a police officer and that he was under arrest on a narcotics charge. The officers did not have a warrant for defendant's arrest. They then entered and conducted a search of the room. No narcotics were found. Sergeant Hall inquired of defendant and whether he had any narcotics in or on his person, and defendant replied in the negative. After defendant dressed, the officers left for jail with the defendant in custody. On the way, Sergeant Hall had a conversation with the defendant in which the officer explained to him that they had information that he had narcotics secreted within his body, and asked defendant whether he would give permission for a body search. Defendant stated that he would give such permission. He was then asked if he would put it in writing, and defendant stated that he would not. Defendant was then informed that he was going to jail and would be booked and if he had any narcotic secreted in his body it would be better if he gave it to the officers rather than have it found in the jail. Thereupon defendant stated that he would give it to the officers, and at that time he inserted his fingers into his rectum and withdrew a latex bag containing six white paper bindles, which were found to contain heroin. In a conversation with the officers defendant stated that he had bought the narcotics from a woman on Sixth Street. Sergeant Hall testified that secreting narcotics in such fashion was not unusual.

Defendant did not take the stand and did not present any evidence in his behalf.

[1] Defendant asserts that the evidence of guilt was obtained by a "body search" in violation of his constitutional rights. There is not the slightest evidence that the officers searched defendant's person



The uncontradicted evidence is that defendant voluntarily withdrew the latex bag from his rectum and handed it to the officer when the latter told him he was going to jail, where he would be booked, and if he had any narcotics secreted in his body it would be better if he gave it to the officers rather than have it found in the jail. Since defendant had had previous jail experience, he of course knew he would be searched upon being booked, and that since the officers had information that he possessed contraband and where he concealed it, he naturally realized that it would be discovered. Having been previously incarcerated in a penal institution he was undoubtedly aware of the serious consequences of having contraband found in one's possession in such an institution. Hence he realized that the officer's statement was correct, as truly it was, for section 4573 of the Penal Code makes it a felony to bring narcotics into a jail. In the circumstances the statement of the officer was not improper and did not constitute duress or otherwise violate any of defendant's constitutional rights (see *People v. Woods*, 139 Cal.App.2d 515, 524-25, 293 P.2d 901), and the contraband handed over to the officers by defendant was admissible in evidence.

[2,3] Whether defendant's apparent consent to disclose and surrender the contraband was in fact voluntarily given was a question of fact. *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852. But, under the evidence, there can be only one answer to that question unless a contrary answer is dictated by reason of the fact that defendant was under arrest at the time he revealed and delivered the latex bag to the officers. Our Supreme Court has not passed upon this specific point. It did, however, reject, in *Rogers v. Superior Court*, 46 Cal.2d 3, 10-11, 291 P.2d 929, 933, the federal rule that a confession

made during a period of illegal detention is inadmissible. The case holds that the fact that a confession is made during an unlawful detention is "only one of the factors to be considered in determining whether the statement was voluntarily made." No good reason appears for holding otherwise relative to the consent of a defendant to disclose and hand over contraband while under arrest. *People v. Lujan*, 141 Cal.App.2d 143, 147, 296 P.2d 93. In the *Lujan* case, which involved an actual search and seizure, this court held that the mere fact that defendant was under arrest and in handcuffs at the time he gave his consent to search his home did not per se vitiate such consent. In the instant case defendant did not take the stand and did not otherwise challenge the testimony of the officer as to the circumstances under which he disclosed and surrendered the contraband. Where, as here, a defendant voluntarily produces evidence against himself his constitutional rights are not violated. *People v. Michael*, supra.

Since there was no search and seizure involved in this case, defendant having voluntarily disclosed and surrendered the evidence, the rule of *Priestly v. Superior Court*, 50 Cal.2d 812, 330 P.2d 39, relative to disclosing the identity of confidential informants, is not here pertinent.

The record reveals no basis whatever for defendant's assertion of misconduct either on the part of the judge or the prosecutor.

The statement of facts demonstrates there is no substance to defendant's claim that the evidence is insufficient to sustain his conviction.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

164 Cal.App.2d 442

Brenda FIELDS, etc., et al., Plaintiffs,  
Karen Fields, a minor, by her Guardian ad  
Litem, James H. Fields, Plaintiff and  
Appellant,  
and  
James H. Fields, Individually, and Opal Fay  
Fields, Plaintiffs, Cross-Defendants and  
Appellants,

v.

NAPA MILLING COMPANY, etc., Defend-  
ant, Cross-Complainant and Respondent,  
and

August Antone Rossi, Defendant and  
Respondent.

Civ. 18086.

District Court of Appeal, First District,  
Division 2, California.

Oct. 21, 1958.

Actions arising out of motor vehicle collision. The Superior Court, Contra Costa County, Wakefield Taylor, J., rendered judgment favorable to only one of the plaintiffs, and an appeal was taken. The District Court of Appeal, Martinelli, J. pro tem., finding no California authority as to effect of joinder on allowance of costs, held that mother and her two daughters, who were injured in collision between their automobile and defendant's truck, and their husband and father could have brought separate actions against owner and driver of other vehicle involved in collision, in which case defendants could have recovered their costs against unsuccessful plaintiffs; and held that mere fact that such plaintiffs had joined in bringing their actions and that one of them had been successful would be no reason to deny defendants costs against those plaintiffs who had failed to establish their causes of action.

Affirmed.

#### I. Automobiles ⇨245(14)

In cross actions arising out of intersection collision, evidence was sufficient to take to jury question as to whether driver of automobile on inferior road had been

negligent in entering intersection in view of proximity of truck traveling on four-lane through highway.

#### 2. Automobiles ⇨171(8)

Even if entering intersection on inferior road when truck was approaching intersection in far lane of four-lane through highway did not constitute negligence, continuing across through highway after automobile engine sputtered in middle of through highway, which was divided by a "painted island," constituted negligence.

#### 3. Automobiles ⇨244(59)

In cross actions arising out of intersection collision, evidence would sustain finding that truck driver on through highway had not had last clear chance to avoid colliding with automobile traveling on inferior road.

#### 4. Action ⇨1

The complementary Latin reciprocals "injuria absque damno" and "damnum absque injuria" mean that a wrong without damage does not constitute a cause of action for damages any more than damage without wrong constitutes (ordinarily) a cause of action.

See publication Words and Phrases, for other judicial constructions and definitions of "Damnum Absque Injuria" and "Injuria Absque Damno".

#### 5. Damages ⇨8

It was not error to deny even nominal damages to plaintiff who was not injured in automobile collision giving rise to action. West's Ann.Civ.Code, § 3360; West's Ann. Code Civ.Proc. § 1032.

#### 6. Costs ⇨100

Mother and her two daughters, who were injured in collision between their automobile and defendant's truck, and their husband and father could have brought separate actions against owner and driver of other vehicle involved in collision, in which case defendants could have recovered their costs against unsuccessful plaintiffs; and mere fact that such plaintiffs had joined in bringing their actions and that one of them had been successful would be

no reason to deny defendants costs against those plaintiffs who had failed to establish their causes of action. West's Ann.Code Civ.Proc. §§ 378, 427, 1032(b), 1048.

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Russell F. King, Richmond, for appellants.

Cresswell & Davis, Oakland, for respondents.

MARTINELLI, Justice pro tem.

Plaintiff Opal Fields and her minor daughters, Brenda and Karen, through James Fields, their guardian ad litem, sought damages for personal injuries arising from a collision involving a truck owned by defendant Napa Milling Company and driven by its employee, defendant August Rossi. James Fields, in his individual capacity as husband and father, sought to recover medical expenses incurred as a result of the accident. Napa Milling and Warehouse Company filed a cross-complaint seeking to recover for damage to its truck.

A trial without a jury resulted in a judgment awarding \$700 and costs to Brenda Fields, denying recovery to Karen Fields, and denying recovery to the remaining plaintiffs. Defendant Napa Milling and Warehouse Company was denied recovery upon its cross-complaint and was awarded its costs against all except Brenda Fields.

Plaintiffs Opal, Karen and James Fields appeal from the portions of the judgment denying them recovery and awarding costs to defendant.

The evidence shows that the accident occurred on Eastshore Boulevard (Highway 40) at its intersection with Fresno Avenue in Richmond, California. Eastshore is a through highway running in a general north and south direction and is 60 feet wide with four lanes divided by a "painted island" approximately 6 feet wide. On March 15, 1956, the date of the accident, the posted speed limit on Eastshore in the area of this intersection was 35 miles per hour. There was a stationary

stop sign located on Fresno Avenue approximately 20 feet west of the west edge of the highway for the purpose of controlling traffic crossing the highway from west to east.

At about 2:30 p. m. on March 15, 1956, appellant Opal Fields, accompanied by her two daughters, drove east on Fresno and stopped at its intersection with Eastshore. She testified that the only traffic she observed was respondents' truck over two blocks away approaching from the right in the outer (east) lane at approximately 30 miles per hour. Appellant started across the intersection traveling at a speed of approximately 8 to 10 miles per hour and when she reached the middle of the highway her engine sputtered. At this time respondents' truck was approximately a block away and was traveling at the same speed, approximately 30 miles per hour. There was conflicting testimony as to whether appellants' automobile stopped in the center strip. She testified that there was "very little" change of speed. Rossi testified that appellants' car made a "hesitation stop" at the center strip. A witness to the collision, Mr. Jackson, testified that when respondents' truck was within 50 to 60 feet of the intersection, appellants' car stopped in the middle of the highway. The deposition of another witness to the accident, Elaine Fay McDaniel, indicated that appellant proceeded slowly across the intersection without stopping.

There was conflict also as to the location of the point of impact. The Highway Patrol Officer who investigated the accident testified that the collision occurred at a point 4 feet east of the east edge of the traveled portion of Eastshore and 2 to 3 feet north of the center of Fresno Avenue. Jackson testified that the point of impact was on the paved portion of the highway in the east lane.

At the trial respondent Rossi testified that he was driving north on Eastshore Boulevard in the east lane at approximately 30 miles per hour. He stated that he first noticed appellants' car when it was



approaching the center of the highway and at this time he was approximately 60 feet from the Fresno Avenue intersection. The car stopped in the center strip and then began to move again and Rossi applied his brakes. The witness had previously testified when his deposition was taken that he first saw appellants' car at the stop sign, and at this time he was approximately a block from the intersection. There were other inconsistencies between his testimony at the time of the deposition and at the trial.

The trial court found that the collision and injuries were proximately caused by the negligence of respondent Rossi and the contributory negligence of appellant Opal Fields. He found that Karen Fields did not sustain any compensable injuries and that compensable injuries were sustained by Brenda Fields.

Appellants contend that there was no substantial evidence to support a finding of contributory negligence or in other words there was no substantial evidence indicating that respondents' truck constituted an immediate hazard within the meaning of section 552 of the Vehicle Code.

Appellants recognize that the power of this court "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]." *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184. They contend, however, that as a matter of law the evidence would not support a finding of contributory negligence.

In *McGuire v. San Diego Transit System*, 143 Cal.App.2d 509, 299 P.2d 905, the testimony of the driver of defendant's bus was to the effect that he stopped at the intersection and saw no traffic approaching from the north. He entered the highway and came to a rolling stop at the center island. At this point he observed a red truck approaching about 500 feet away at about 35-45 miles per hour. He saw no other vehicle and believing he had time

to cross he accelerated the engine and was traveling at the rate of 5-10 miles per hour when he was struck by plaintiffs' automobile. On appeal from a judgment for plaintiffs, one of the contentions was that the evidence was not sufficient to show negligence on the part of the bus driver. The appellate court held that a jury might well have believed that both the red truck and plaintiffs' car were so close to the intersection as to constitute an immediate hazard. Assuming that the defendant had the right of way at the time of his original entry into the intersection, the court stated that the fact that the bus stopped in the center portion of the highway and then continued on in the face of oncoming traffic might well justify a finding of negligence of the bus driver. Cf. *Smith v. Pellissier*, 134 Cal. App.2d 562, 286 P.2d 66.

[1,2] In the instant case, accepting appellants' contention that it did not constitute negligence to enter the intersection, there was evidence that the car stopped in the center of the highway. Appellant Opal Fields testified that her engine "sputtered." The trial court could have decided that it was contributory negligence even though there was no "immediate hazard" when entering the intersection to continue across the highway knowing that the automobile engine was not functioning properly. The question of whether respondents' truck was an "immediate hazard" was a factual question and the evidence would support a finding that it was contributory negligence to enter the intersection. *Lewis v. Doyle*, 149 Cal.App.2d 176, 181, 307 P.2d 965.

Cases are cited by appellants for the proposition that drivers crossing a through highway may reasonably misjudge the speed or distance of an approaching vehicle and the proximate cause of the accidents was the failure of the approaching driver to take reasonable preventive action. *Van Cise v. Lencioni*, 106 Cal.App.2d 341, 346, 235 P.2d 236; *Shivers v. Van Loben Sels*, 109 Cal.App.2d 286, 289, 240 P.2d 635; *Root v. Pacific Greyhound Lines*, 84 Cal.

App.2d 135, 137, 190 P.2d 48; *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 162, 195 P.2d 416. These cases do not aid appellants as they hold only that the jury could have found that appellants' vehicles did not constitute an "immediate hazard." "Whether a vehicle is or is not approaching so closely as to constitute an immediate hazard is a question of fact and not of law." *Van Cise v. Lencioni*, supra, 106 Cal.App. 346, 235 P.2d 236, 239. The evidence was sufficient to support the finding of contributory negligence.

[3] Appellants contend alternatively that respondent Rossi's testimony establishes that respondents were liable under the theory of last clear chance. "What constitutes a last clear chance depends on the circumstances, and is thus ordinarily an issue of fact, on which a finding by the jury is binding unless there is no substantial evidence to support it." 35 Cal. Jur.2d, Negligence, § 262, pp. 806-807. The evidence would support a finding that Rossi was entitled to assume that appellant intended to yield the right of way. It was for the trier of fact to decide whether Rossi was aware of the victims' dangerous position and whether he ought to have realized the inability to escape. There was evidence that when the truck was within 50 to 60 feet of the intersection, appellants' car was stopped and then "pulled out right in the path of the truck." If this evidence were accepted it would support a decision that respondent had no clear chance to avoid the accident.

Appellants contend that it was error to deny Karen Fields nominal damages and that her legal rights were jeopardized because this permitted costs to be assessed against her.

During the course of the trial appellants' counsel stated several times that Karen was not injured. At the close of plaintiffs' case their counsel stated "We will make a claim for nominal damages for her \* \* \*."

Appellants cite as authority for their contention Civil Code section 3360 which

provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

[4] It is fundamental that a negligent act is not actionable unless it results in injury to another (35 Cal.Jur.2d, Negligence, § 52, p. 549, enunciating the complementary Latin reciprocals "*injuria absque damno*" and "*damnum absque injuria*," which properly interpreted mean that a wrong without damage does not constitute a cause of action for damages any more than damage without wrong does not ordinarily constitute a cause of action). "Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred." *Prosser on Torts*, 2d Ed., p. 165.

[5] Since testimony of appellant Opal Fields and statements of her counsel would support the finding that Karen suffered no compensable injury, it was not error to deny her damages.

Appellants contend that it was error to award respondents costs as against Opal and James Fields. They argue that since it was found that respondents were negligent and since Brenda Fields recovered \$700 and respondent Napa Milling Company recovered nothing on its cross-complaint, appellants were in effect the prevailing parties and were entitled to costs under authority of Code of Civil Procedure section 1032.

[6] It has been held that defendants who defeat an action for damages by filing a claim against the plaintiffs for damages arising out of the same action are entitled to recover their costs, since they are the "prevailing party" under section 1032, subdivision (b). *Schrader v. Neville*, 34 Cal. 2d 112, 207 P.2d 1057; *Gerstein v. Smirl*, 70 Cal.App.2d 238, 241, 160 P.2d 585.

Whether viewed as a joinder of parties or a joinder of causes of action the instant case consisted of four separate causes of action. Code of Civ.Proc. §§ 378, 427. Appellants could have brought separate actions. *Colla v. Carmichael U-Drive Autos, Inc.*, 111 Cal.App.Supp. 784, 787, 294 P. 378; *Edgar v. Citraro*, 112 Cal. App. 183, 186, 297 P. 653. If the actions had been brought separately, they could have been consolidated for trial in the discretion of the trial court. Code Civ.Proc. § 1048.

While it would seem that there is no authority in California as to the effect of joinder on the allowance of costs, it has been stated that the consolidation of actions would not have the effect of depriving a plaintiff, in the event of a judgment in his favor, of the right to recover legal costs as to which his right had accrued. *Realty Const. & Mtg. Co. v. Superior Court*, 165 Cal. 543, 132 P. 1048, 1050. In that case a peremptory writ of mandate was sought to require the superior court to consolidate certain actions. The court stated that the question of clerk's fees "to and including the entry of judgment" appeared to be entirely immaterial in determining the question whether or not actions should be consolidated.

Authority in New York would indicate that costs could not be awarded to respondents.

"Under a statute authorizing joinder of plaintiffs generally, it is held that if one plaintiff recovers a bill of costs he recovers it for all plaintiffs. \* \* \*

"Only one bill of costs can be granted where several successful plaintiffs join in bringing suit under a statute authorizing joinder of parties whose right to relief arises out of the same transaction. \* \* \*" 20 C.J.S. Costs §§ 96, 97, p. 346, citing New York cases.

In holding that only one award of costs could be made where there was a joinder of plaintiffs the New York court stated "So far as costs are concerned, all plain-

tiffs and all defendants joined under section 209, Civil Practice Act, are one entity." *Antonietti v. Pearson*, 153 Misc. 803, 276 N.Y.S. 52, 54. This section 209 corresponds with the California Code of Civil Procedure, section 378, providing for joinder of parties.

In *Colla v. Carmichael U-Drive Autos, Inc.*, supra, [111 Cal.App.Supp. 784, 787; 294 P. 378, 380] the court stated, referring to section 378 "In the complaint filed, each 'case' or cause of action preserved its identity, and each plaintiff prayed for and obtained a segregated award based on the damages individually proved. The code section contemplates of course an action single in form, but with each 'case' or demand retaining its distinctive identity as though pleaded in an independent action. No plaintiff is interested in the entire complaint. The interest of each is in his own 'case' or cause of action; and the complaint as a whole is merely a series of 'cases' embodied in one document."

Section 378 provides that " \* \* \* judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled." It is settled that judgment may be given in favor of defendants who are not shown to be liable. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 20, 276 P. 1017.

If each party in the instant case had commenced a separate action, it would seem clear that respondents could have recovered their costs against appellants. Since each cause of action retains its distinctive identity where there is a joinder and each plaintiff recovers or fails to recover on his separate demand, there would seem to be no authority, purpose, or reason to deny respondents costs against appellants who failed to establish their causes of action.

The judgment is affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



164 Cal.App.2d 414

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Richard Paul GALLAGHER and Leonard  
Haas, Defendants and Appellants.

Cr. 6158.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 20, 1958.

Hearing Denied Dec. 17, 1958.

Prosecutions for kidnapping for purpose of robbery. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment of conviction of kidnapping and one defendant appealed from the judgment and denial of his motion for new trial, and codefendant appealed from the judgment. The District Court of Appeal, Shinn, J., held that where information alleged defendants kidnapped and carried away a woman with intent and for purpose of committing robbery, they could not have committed act of kidnapping and carrying away named woman for purpose of robbery without necessarily committing act of kidnapping, and therefore kidnapping was an offense for which they could be convicted being necessarily included within the crime of kidnapping for the purpose of robbery.

Affirmed.

#### 1. Indictment and Information ☞191

By statute, in a criminal prosecution, a jury is authorized to find an accused guilty of any offense, the commission of which is necessarily included in that with which he is charged. West's Ann.Pen. Code, § 1159.

#### 2. Indictment and Information ☞191

If, in committing acts denounced by one statute, the accused must necessarily violate another, the latter offense is necessarily included within the former.

#### 3. Indictment and Information ☞191

In determining what offenses are included within a charge, court must look to the language of the accusatory pleading

rather than to the language of the statute defining the offense charged.

#### 4. Indictment and Information ☞191

Where information alleged defendants kidnapped and carried away a woman with intent and for purpose of committing robbery, they could not have committed act of kidnapping and carrying away named woman for purpose of robbery without necessarily committing act of kidnapping, and therefore kidnapping was an offense for which they could be convicted being necessarily included within the crime of kidnapping for the purpose of robbery. West's Ann.Pen.Code, §§ 207, 209.

#### 5. Kidnapping ☞1

Where a victim of an alleged kidnapping has at first willingly accompanied the accused, the accused may nevertheless be guilty of kidnapping if he subsequently restrains his victim's liberty by force and compels the victim to accompany him further. West's Ann.Pen.Code, § 207.

#### 6. Kidnapping ☞5

Evidence sustained convictions for kidnapping.

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Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By amended information, Leonard John Haas and Richard Paul Gallagher were charged with kidnapping Irmgard Davis for the purpose of robbery. Pen.Code, § 209. It was also alleged that they inflicted bodily harm on Mrs. Davis. In a jury trial, defendants were found guilty of kidnapping (Pen.Code, § 207) and they were sentenced to state prison. Haas appeals from the judgment and the denial of his motion for new trial. Gallagher appeals from the judgment.

The convictions were based upon evidence of the following facts. Mr. and Mrs. George L. Davis spent the evening of June

6, 1957, celebrating their fourth wedding anniversary at a restaurant on Olvera Street in Los Angeles. They left the restaurant shortly before 2 o'clock in the morning and drove toward their home in Long Beach in the family car, which was a cream-colored 1956 Cadillac. Mr. Davis testified that as they proceeded south on Alameda Boulevard, his wife asked him to stop the car so that she could relieve herself. After considerable discussion, Davis stopped in a dark and lonely spot about a block north of a crossing known as Dominguez Junction and Mrs. Davis alighted, taking her purse with her. Davis then drove to the crossing, made a U-turn and drove back to the place where he had left his wife. She was nowhere in sight. After searching the area for half an hour, Davis went home. Between 9 and 10 a. m., his wife was brought home from the hospital in a nervous and distraught condition. Davis stated that at the time she left the car she had about \$200 in a billfold inside her purse and she was wearing three rings, including an expensive diamond cocktail ring. When she returned from the hospital she had neither the money nor the cocktail ring.

Mrs. Davis testified that after getting out of the car she walked a few feet off the road and relieved herself. She became frightened and angry when her husband drove away. Mr. Davis had had a few drinks and had been quarreling with her. She noticed a light coming from a building on the other side of Alameda Boulevard and proceeded to cross the street. A car passed her, going north, then stopped and backed up to where she was standing. Defendant Haas got out of the car, seized her arms and shoved her inside.

As the car started up in a northerly direction, Mrs. Davis was placed in the front seat between Haas and defendant Gallagher, who was driving. Haas told Gallagher to drive through unlighted streets and to stay in the dark. Gallagher stopped the car in an alley and the two men forced Mrs. Davis into the back seat. At this time, she no longer had her purse. Haas

got into the back seat and started to remove her clothes. He pinned her arms behind her back and had sexual intercourse with her against her will and over her resistance. Gallagher then changed places with Haas and had intercourse with Mrs. Davis while Haas drove the car. When Haas stopped the car in order to change places with Gallagher, Mrs. Davis screamed and attempted to escape. Haas struck her on the head with his fists, scratched her nose and slammed the door on her foot, which was partially outside the car. She lost her shoes during the struggle. Gallagher then told her: "You better not try any more like this again, we'll let you have it. We have a gun." Mrs. Davis asked for her purse and Gallagher said that she did not have a purse. Haas had intercourse with her a second time as Gallagher drove the car. While Haas was pressing her onto the back seat, she removed her cocktail ring and tried to hide it in her brassiere but Haas took the ring. (On cross-examination, she admitted stating at the preliminary hearing that Gallagher had taken her ring.) Shortly afterward, Mrs. Davis asked for a cigarette and Gallagher drove to an all-night market where he purchased several packs of cigarettes. When he returned to the car, Haas said: "You better step on it, I see the cops over there." At that moment, Mrs. Davis jumped out of the car and screamed for help.

Mrs. Davis further testified that when the police officers arrived, her dress was dirty and disarranged, although it had not been torn, and her panties and shoes were missing. She had bruises on her arms, shoulders, chest and face and scratches on her feet, face and knees. The officers retrieved her purse from the car and handed it to her, but the money was gone. Upon being shown a \$50 bill by the deputy district attorney, Mrs. Davis identified it as one of the bills she had had in her purse; the number "24" was written on it in pencil. The cocktail ring was never recovered.

Delano Manos, a Los Angeles County Sheriff's deputy, was one of the officers who came to the assistance of Mrs. Davis.

At 4:15 a. m. on June 7th, Manos and his partner, Deputy Kirkpatrick, were patrolling the Bell Gardens area. Manos testified that as they drove past an all-night market they observed a black 1949 Pontiac in an adjacent parking lot. There were three persons in the car, a woman and two men. The Pontiac started up and left the lot. As it entered the street, Mrs. Davis jumped out of the car and screamed "Help, police." When the officers ran over, she said: "They have a gun." Upon being asked by Deputy Manos what had happened, Mrs. Davis replied: "They took my money." At this time she was in a hysterical condition; her clothes were unbuttoned and disarranged. The officers took defendants into custody and searched the Pontiac. They found Mrs. Davis' purse and panties on the front floorboard on the passenger side of the car but they did not find the cocktail ring; there was no money in the purse. Defendants were searched and \$63 was found on the person of Haas and \$145, including a \$50 bill, was found on the person of Gallagher; the money was received in evidence. The officers ordered another police car to take Mrs. Davis to the hospital.

Defendants were taken to the sheriff's station where they were questioned by Officers Manos and Kirkpatrick. When asked where they obtained the money found on their persons defendants replied that it was part of their accumulated wages from a merchant seaman's trip. Upon being asked by Kirkpatrick whether he had raped Mrs. Davis, Haas said that he had tried to do so, but was deterred by her struggling and crying. Gallagher denied having sexual relations with Mrs. Davis. He told Officer Manos that Mrs. Davis had flagged down the Pontiac and entered it willingly.

Dr. Albert H. Lerner was on duty in the emergency room of the Maywood Hospital on the morning of June 7th. At approximately 5 a. m., he made a pelvic examination of Mrs. Davis and took a vaginal smear which disclosed organisms resembling male spermatozoa. Lerner

testified that he did not notice any bruises on her face, although he saw some blemishes which might have been bruises. Mrs. Davis appeared nervous and anxious and he administered some demerol to calm her nerves. A few hours later, Mrs. Davis was examined by her family physician, a Dr. Rabin. Rabin testified that he found scratches on her nose, elbow and shoulders and bruises on her back, shoulders, legs and arms; one of her toes was severely bruised. Mrs. Davis was crying and in a state of extreme anxiety.

Defendants took the stand and denied their guilt. Gallagher testified that he had \$160 on his person on the night of June 6th; the money consisted of \$20 from his savings account and \$140 which he had saved from weekly disability checks; he had been injured on his job and was not working on June 6th. Haas testified he had about \$75 which he had saved from his salary; his employment terminated in late May.

Defendants testified they took Mrs. Davis into the car but denied the use of force and denied striking her or taking her rings or money from her purse. Gallagher stated that he did not have intercourse with Mrs. Davis. Haas testified that he had intercourse with Mrs. Davis on the back seat of the car with her consent and that they were planning to go to his (Haas') residence to spend the night. Both defendants corroborated the other witnesses as to the circumstances of their arrest.

The first contention to be discussed is that defendants were improperly convicted of kidnaping for the reason that kidnaping is not an offense necessarily included within the crime of kidnaping for the purpose of robbery. We cannot agree.

Penal Code, Section 209, as amended in 1951, provides in material part: "\* \* \* any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony \* \* \*." Section 207 provides: "Every person who forcibly steals, takes, or arrests any per-



son in this state, and carries him into another country, state, or county, or into another part of the same county, \* \* \* is guilty of kidnapping."

[1-3] The jury is authorized by Penal Code, Section 1159, to find an accused guilty of any offense, the commission of which is necessarily included in that with which he is charged. If, in committing acts denounced by one statute, the accused must necessarily violate another, the latter offense is necessarily included within the former. *People v. Chester*, 138 Cal.App. 2d 829, 831, 292 P.2d 573. Furthermore, we must look to the language of the accusatory pleading rather than to the language of the statute defining the offense charged in determining what offenses are included within the charge. *People v. Marshall*, 48 Cal.2d 394, 309 P.2d 456.

[4] The amended information alleged that Haas and Gallagher "did willfully, unlawfully and feloniously kidnap and carry away Irmgard Davis, an individual, with intent and for the purpose of committing robbery." A sufficient answer to defendants' argument is that they could not commit the act of kidnaping and carrying away Mrs. Davis for the purpose of robbery without necessarily committing the act of kidnaping.

A second contention is that the court committed prejudicial error in amplifying one of its instructions to the jury.

At the People's request, the court gave the following instruction: "Every person who unlawfully and forcibly steals, takes, or arrests any other person in this state, and carries him into another country, state or county, or into another part of the same county, doing so against the will or without the consent of the person so carried, is guilty of kidnapping."

On the second morning of their deliberations, the jurors returned to the courtroom to "have a broader interpretation on the paragraph on kidnapping." Whereupon the court stated: "Well, I think the definition as given is as simple as can be given, except I might say this, that the

taking of my [sic] person into a vehicle against their will, transporting for any distance, would be simple kidnapping; *even going further than that, the law is that if I get into a vehicle voluntarily and then they refuse to let me get out and we go further, I mean transport me further, that becomes simple kidnapping, you see.*" (Emphasis added.)

[5] Defendants assign error to the italicized portion of the foregoing statement. In this connection, they argue that the offense of kidnaping consists of the forcible seizure and asportation of another person; that a mere unlawful detention, with or without the use of force, constitutes the offense of false imprisonment; and that the statement of the court told the jury in effect that it might convict defendants of kidnaping Mrs. Davis upon proof of facts amounting to no more than false imprisonment. The argument cannot be maintained. The challenged remarks correctly stated the law. It is settled that where the victim has at first willingly accompanied the accused, the latter may nevertheless be guilty of kidnaping if he subsequently restrains his victim's liberty by force and compels the victim to accompany him further. *People v. Trawick*, 78 Cal.App.2d 604, 606, 178 P.2d 45, and cases cited.

[6] The final contention to be considered is the insufficiency of the evidence to sustain the convictions. Defendants assert that the testimony of Mrs. Davis was inherently improbable. Their arguments are not persuasive. The contention is obviously untenable. The testimony of Mrs. Davis has already been related and it is unnecessary to restate it. The weight to be accorded to her testimony and the resolution of any inconsistencies were questions for the trier of fact, not for a reviewing court. *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836; *People v. Dragoo*, 121 Cal.App.2d 322, 324, 263 P.2d 90. Mrs. Davis' account of her ordeal, together with the testimony of her family physician and of the arresting of-

ficers, was amply sufficient to establish defendants' guilt of kidnaping.

As to Haas, the judgment and order appealed from are affirmed; as to Gallagher, the judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



164 Cal.App.2d 269

Square CAUSEY, Plaintiff and Appellant,  
v.

Robert Leon CORNELIUS and Pacific In-  
termountain Express, Defendants  
and Respondents.

Square CAUSEY, Plaintiff and Respondent,  
v.

Robert Leon CORNELIUS and Pacific In-  
termountain Express, Defendants  
and Appellants.

Civ. 23123.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 16, 1958.

Hearing Denied Dec. 10, 1958.

Action was brought for injuries. The Superior Court of Los Angeles County, Frederick F. Houser, J., entered judgment in favor of the plaintiff and entered an order granting motion of defendants for new trial, and both plaintiff and defendants appealed. The District Court of Appeal, Ashburn, J., held that Superior Court abused its discretion in granting defendants a new trial merely because plaintiff's counsel in voir dire examination of defendants' witness brought out that witness was employed by an insurance company after the witness testified that he was an investigator and worked for an "insurance exchange," and because plaintiff's counsel mentioned the insurance company thereafter four more times.

Order granting a new trial reversed, and judgment affirmed.

#### 1. New Trial ⇐31

Allegedly improper questions concerning insurance could not be capitalized upon motion for new trial, where no objection was made to any of the questions, no motion was made to strike any questions or answers, no motion was made for a mistrial, and no cautionary instruction to the jury was requested.

#### 2. Trial ⇐127

Where defendants' witness in personal injury action stated on voir dire examination by plaintiff that he was an investigator and worked for certain "insurance exchange," it was not improper for plaintiff's counsel to ask whether the "insurance exchange" was an insurance company, in order to clarify the identity of the employer of the witness.

#### 3. Trial ⇐127

Where counsel for plaintiff on voir dire examination of witness of defendants in personal injury action properly brought out fact that witness was employed by an insurance company after witness stated that he was employed by an "insurance exchange," the mention of such insurance company thereafter four more times by plaintiff's counsel did not amount to prejudicial misconduct.

#### 4. Trial ⇐133(3, 6)

If the repeated reference to an "insurance company" by plaintiff's counsel in personal injury action is deemed by trial judge to be inflammatory, trial judge should deal with such references like any other improper evidence, by prompt exclusion or prompt admonition to counsel and cautionary instruction to the jury.

#### 5. New Trial ⇐29

Superior court abused its discretion in granting defendants a new trial in personal injury action merely because plaintiff's counsel in voir dire examination of defendants' witness brought out that witness was employed by an insurance company after

the witness testified that he was an investigator and worked for an "insurance exchange," and because plaintiff's counsel mentioned the insurance company thereafter four more times.

#### 6. Appeal and Error ⇨206(2)

Where examination of witness of defendants by plaintiff's counsel was conducted without objection from defendants, defendants would not be heard to say on appeal that such examination by plaintiff's counsel was not *voir dire* or that such fact was of any consequence.

#### 7. Trial ⇨133(6)

If references by plaintiff's counsel to insurance in cross-examination of defendants in personal injury action were deemed by trial court to be improper, it was the duty of the trial court to act promptly and then admonish plaintiff's counsel and instruct the jury.

#### 8. New Trial ⇨70

Trial court did not abuse its discretion in refusing to grant defendants' motion for new trial, on ground of insufficiency of the evidence, in action for injuries sustained by plaintiff when automobile in which plaintiff was riding ran into rear of truck and trailer owned by one of the defendants and driven by other defendant.

#### 9. New Trial ⇨70

On motion for new trial on ground of insufficiency of the evidence, trial court has room for exercise of a broad discretion.

#### 10. New Trial ⇨70

Trial court, in order to grant a motion for new trial, on ground of insufficiency of the evidence, has to do more than disagree with the jury's verdict, and must be of the opinion that the verdict is clearly against the weight of the evidence.

#### 11. New Trial ⇨70

Trial court may sometimes properly deny motion for new trial, on ground of insufficiency of the evidence, in cases where, if submitted to trial court without a jury, trial court might, on the evidence, have made a different decision, and trial court

must be clearly satisfied that the verdict is wrong in order to grant the motion.

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Hecker & Dunford, Bruce L. Wolfson, Beverly Hills, for appellant-respondent Causey.

Early, Maslach, Foran & Williams, Victor Williams and Donald J. Pierr, Los Angeles, for appellants-respondents Cornelius and Pacific Intermountain Express.

ASHBURN, Justice.

This is an action to recover damages for personal injuries growing out of an accident between an automobile in which the plaintiff was riding and a truck and trailer of defendant Pacific Intermountain Express which was being operated by defendant Cornelius. The jury returned a verdict for \$5,000 in favor of plaintiff.

The trial court granted defendants' motion for a new trial on the theory that counsel for plaintiff improperly and prejudicially injected and emphasized the question of insurance on the so-called *voir dire* examination of a defense witness (an investigator for defendants' insurer) who was called to testify concerning a telephonic recording made by the witness of a conversation he had with the driver of the car in which plaintiff was riding. Plaintiff has appealed from the order. Defendants have appealed from the judgment.

Plaintiff and two friends, White and Conway, drove to Fontana on the evening of December 4, 1955, to have dinner with friends. They ate at about twelve o'clock and left Fontana about 2:00 o'clock in the morning on their return trip to Los Angeles. The accident occurred about half an hour later on the Etiwanda Road between Fontana and Los Angeles when the car in which plaintiff was riding collided with the truck and equipment in question, which was some 57 feet in length. A light mist was falling at the time. Plaintiff's testimony is that the car in which he was riding was following the truck, traveling at about the same rate of speed; that the truck stopped a couple of times but the driver of the car, White, was



able to avoid an accident by the sudden application of his brakes. White then decided to pass the truck but when he pulled out beside it he discovered a sign, "Stop Ahead," and realizing he could not pass the truck in the short distance between it and the sign decided to fall back behind the truck, whereupon it stopped suddenly and his car collided with the left rear of the truck, resulting in injuries to the plaintiff who was riding on the right side of the front seat.

According to the testimony of Cornelius, the truck driver, he made one stop in a normal manner for a boulevard stop about two miles from the scene of the accident; he later slowed down for a railroad crossing at which time he put on his blinker; as he came to the "Stop Ahead" caution sign he again put on his blinker lights and started slowing down; there was a warning sign on the right side of the highway and another painted on the highway itself, both about 500 feet from the intersection; before commencing to apply his brakes, he looked in his rear-view mirror and saw the lights of a car approximately 500 feet back; he gradually slowed down his trucking equipment until he reached a speed of eight to ten miles per hour when his vehicle was struck in the rear; the point of impact was 134 feet from the nearest line of the intersection. After the accident Cornelius went back to see if anyone in the car was hurt; White, the driver, was out of the car; according to Cornelius, White weaved back and forth as he walked; there was a strong odor of alcohol on the breath of all three men, but White was not "exactly drunk." Cornelius also said the other passenger, Conway, finished a Vodka bottle soon after the collision. Plaintiff testified that he had had one small drink of scotch and milk at four o'clock in the afternoon, and had nothing else to drink; during that same period of time he and White had been together and the latter had done no drinking; that there was no bottle in the car when they left Fontana nor did they take turns drinking. White swore that he had had one bottle of beer in the morning and nothing else that

day. Conway was in the east at the time of trial.

Officer Smith of the Highway Patrol testified that he detected no odor of alcohol on plaintiff, but the driver, White, had alcohol on his breath and there was a profound odor of same in the car. The officer gave White a roadside sobriety test which he passed; the officer concluded that, although White's ability was impaired, he was nevertheless able to drive a car properly. The witness saw no bottle. He further noted that the tail lights on the truck were lighted and that the brake light was operative. The automobile left 32 feet of locked wheel skid marks.

The record of the hospital signed by the doctor where plaintiff was taken showed that his "[a]ctions support intoxication; odor of alcohol; cooperation poor \* \* \*."

The so-called voir dire examination of the investigator (Weaver) was as follows:

"Q. Mr. Weaver, you say that you are an investigator? A. Yes, that's correct.

"Q. Working for whom? A. The Truck Insurance Exchange.

"Q. Is that an insurance company? A. Right.

"Q. And you were told by that insurance company to make this recording? A. Well, that was part of the job of investigating the accident, yes, interviewing Mr. White. \* \* \*

"Q. Yes. Now, this investigation that you made for this insurance company, was that made in reference to the accident that occurred on December 4, 1955? A. Yes, it was in connection with that accident. \* \* \*

"Q. At the time you informed Mr. White who you were you didn't tell him you were working for an insurance company, though, did you? A. No, I did not. I told him I represented the Pacific Intermountain Express [the other defendant], which, of course, I did.

"Q. Through the insurance company? A. I didn't say that I represented them through the insurance company. I said I represented the Pacific Intermountain Express."<sup>1</sup>

Counsel for defendant neither objected to this testimony nor did he move to strike the questions and answers.

We shall first consider the propriety of the court's ruling on the defendants' motion for a new trial.

The trial judge, though expressing the opinion that the verdict was wrong, expressly refused to base the granting of the new trial upon the ground of insufficiency of the evidence and caused a minute order to be entered granting the motion "on the grounds that plaintiff introduced insurance into the case and thereby prejudiced the jury in the plaintiff's behalf." The evidence is such that we would feel obligated to affirm the order had the ruling rested upon insufficiency of the evidence to support the verdict, but the form of the order precludes our considering insufficiency of evidence as a ground for sustaining the ruling. Code Civ.Proc. § 657. The ruling as made does not square with the authorities or with sound judicial administration.

[1] In the first place, the questions concerning insurance (assuming arguendo that they were improper) could not be capitalized upon motion for new trial because of the fact that no objection was made to any of them, no motion made to strike any question or answer, no motion for a mistrial, and no cautionary instruction to the jury requested. In *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 813, 117 P.2d 841, the cross-examiner brought out the fact that defendants' representative told plaintiffs immediately after the accident that defendants were insured. No objection or motion having been made at the time, defendants' counsel, after the witness was excused and both parties had rested, charged plaintiffs' counsel with misconduct

and moved for a mistrial, which was denied. The Supreme Court held there was no error in this ruling, saying 18 Cal.2d at page 813, 117 P.2d at page 849: "Defendants urge, however, that the injection of insurance into the case was done by plaintiffs' counsel designedly and with the intent to influence the jury and that therefore prejudicial error was committed. But even assuming that error did result, we do not believe that the defendants may successfully claim prejudice in view of all of the circumstances. It will be remembered that no objection was made by defendants until after the witness Meyers left the witness stand, and that even then defendants never at any time made a motion to strike either the question or the answer or asked the court to instruct the jury to disregard the reference to insurance. In fact they expressed the thought that they did not want the jury so instructed. They contented themselves with a charge of misconduct and a motion for a mistrial made after the witness was excused and at the close of the evidence in the case. The court on its own initiative instructed the jury that insurance was not involved in the case." The judgment was affirmed. In the case at bar the court at defendants' request and at the close of the case instructed the jury as follows: "You are reminded that no insurance company is a party to this action and that whether (either) (any) party is insured has no bearing whatsoever on any issue that you must decide. Therefore, the oath you took as jurors requires that you refrain from any inference, speculation or discussion about insurance."

In *Gluckstein v. Lipsett*, 93 Cal.App.2d 391, 209 P.2d 98, a physician upon cross-examination brought out the existence of insurance. In rejecting the claim of prejudicial misconduct the court said, 93 Cal. App.2d at page 404, 209 P.2d at page 106: "It is obvious that defendant did not give the court a chance to rule or to admonish the jury. It is also obvious that the wit-

1. These questions were not in immediate sequence as the above quotations might seem to indicate.

ness was a bit anxious to volunteer statements which he thought would help the plaintiff's case. The failure of the defendant to ask for a ruling on his assignment of misconduct would indicate that he did not consider it particularly serious at the time. Also he should have asked that the testimony be stricken from the record, as was done in *Packard v. Moore*, 9 Cal.2d 571, 71 P.2d 922." And, 93 Cal.App.2d at page 405, 209 P.2d at page 107: "It is not reasonable to assume that the verdict would have been any different if the witness had not made this statement." The judgment was affirmed.

In *De Liere v. Goldberg, Bowen & Co.*, 30 Cal.App. 612, 159 P. 197, the attorney for plaintiff, when examining the jurors on voir dire, had said defendant was indemnified by a named insurance company against liability for injuries such as those involved in the action. Considering the claim of prejudicial misconduct the court said, 30 Cal.App. at page 614, 159 P. at page 198: "We do not, however, deem it necessary to determine this disputed question in the instant case, for the reason that the record discloses that, during a later stage of the trial, the fact that the defendant was indemnified by the particular surety company adverted to was permitted to go before the jury in the form of evidence without objection, and that such evidence came from the lips of one of the defendant's own witnesses. This fact, taken with the further fact that the court did in the earlier stages of the case expressly instruct the jury to disregard all references to outside parties and confine their deliberations to the issues between the actual parties before the court, impels us to the conclusion that the question and suggestions of plaintiff's counsel cannot be held to have amounted to such prejudicial misconduct as to justify a reversal of the case."

*Hoel v. City of Los Angeles*, 136 Cal. App.2d 295, 307, 288 P.2d 989, does not control this case, for the facts calling for the trial judge's intervention were materially different from the situation at bar; and the case did not deal with any question

of insurance. The general rule that one cannot complain of evidence which he permitted to be received without objection (*Mullanix v. Basich*, 67 Cal.App.2d 675, 682, 155 P.2d 130; *Kershaw v. Tilbury*, 214 Cal. 679, 691, 8 P.2d 109; *Wills v. J. J. Newberry Co.*, 43 Cal.App.2d 595, 607, 111 P.2d 346) governs here.

It is time for a reappraisal of this insurance bugaboo. The first California case that announced it seems to be *Roche v. Llewellyn Iron Works*, 140 Cal. 563, 574, 74 P. 147, which was decided in 1903. This case and subsequent similar rulings are explained in 10 Cal.Jur. 10-Yr.Supp. § 29.1, page 629, as follows: "*The theory* on which the cases hold such an inquiry improper—and in some circumstances prejudicial—is that there is such a strong popular prejudice against surety or other insurance companies that juries trying issues in an action in which the liability of such corporations is sought to be established are apt to permit their judgment to be improperly swayed by such prejudice. In other words, the courts assume that a jury is more inclined to find a verdict against a defendant if it believes that he is indemnified than would be the case if it were understood that the defendant alone would be required to satisfy the judgment." Automobiles and automobile liability insurance were in their infancy when *Roche*, supra, was decided in 1903. "Certainly the public acquaintance with and attitude towards liability insurance is far different today than it was in the days of the *Wiersema* decision—1909. Its existence and impact upon our civilization is one of the facts of life." *Pinkerton v. Oak Park National Bank*, 16 Ill.App.2d 91, 147 N.E.2d 390, 394. This insurance rule, built upon the theory of prejudice against corporations and especially insurance corporations, has largely outlived its purpose and its justification.

So far as we are advised this is the only type of case in which the trier of fact is not entitled to know the identity of the real party in interest. Under familiar forms of liability insurance policies the defense of an action against the insured



is wholly controlled by the insurer; it selects and pays the attorneys, picks the witnesses, determines whether to compromise the case, retains the right to call upon the assured for such assistance as it wants, bars him from otherwise intervening in the conduct of the case, through its own attorneys and agents conducts the trial throughout, likewise conducts any appeal and pays any final judgment up to the limit of the coverage.

Today this insurance problem presents a strange picture. As soon as the subject of insurance is mentioned in the evidence many defense lawyers, particularly the younger ones, call for a bench conference and move for a mistrial—not because they want it (for they do not yet have any indication of what the outcome will be), but in order to “protect” the record against an adverse verdict. This is a daily occurrence. The underlying theory is that the jurors must not know who the real defendant is. While this has been going on in the court house, certain insurance companies in recent years have waged a campaign in the *Saturday Evening Post* and in *Life* magazine, designed to reach one out of three potential jurors (more than 70 million persons in all),<sup>2</sup> urging them to be conservative in their verdicts when serving as jurors,—to carry into the jury room the thought of insurance and to consider the impact of large verdicts upon their own insurance premiums. We quote a few such passages taken from the opinion in *People ex rel. Barton v. American Automobile Ins. Co.*, 132 Cal.App.2d 317, 282 P.2d 559: “‘Next time you serve on a jury, remember this: When you are overly generous with an insurance company’s money, you help increase not only your own premiums, but also the cost of every article and service you buy.’” 132 Cal. App.2d at page 319, 282 P.2d at page 560. “‘Your Insurance Premium is Being Determined Now. This could be any courtroom in the country—Behind the locked

door, twelve men and women are reaching a verdict involving a defendant protected by a casualty insurance company. What they decide affects your pocketbook. \* \* Casualty insurance companies have been losing an average of \$11 on every \$100 of earned automobile liability premiums. More accidents are partly responsible. So are excessive jury awards, rendered by jurors who feel they can afford to be generous with the “rich” insurance company’s money. Actually, jurors who are responsible for awards in excess of what is just and reasonable are soaking *you* by raising insurance rates.’” 132 Cal.App.2d at page 320, 282 P.2d at page 560.

The only justification for the rule excluding (with limitations) evidence of the existence of insurance is the supposition that jurors will be led into excessive verdicts if they become aware of defendant’s insurance coverage. Today this is a naive conceit. The use of automobiles has increased so prodigiously since 1903 and compulsory liability insurance, or almost compulsory insurance, such as our own Financial Responsibility Law (Veh.Code, §§ 410–418.5) and Security Following Accident statute (Veh.Code, §§ 419–423.1), has become so common that jurors naturally assume as they enter the jury box that defendant is insured against liability. Years of trial experience have shown it to be commonplace, rather than exceptional, for some juror, when asked on voir dire if he or she had ever been a party to a claim for damages for personal injury or property damage growing out of an automobile accident, to say: “Yes, but nobody was injured and my insurance company took care of it,” or: “Yes, but the insurance companies got together and settled the matter.” 5 *Stanford Law Review*, at 144: “Even if there is no mention of insurance during the trial, the common knowledge of the jurors that most automobile owners are insured must be considered.<sup>15</sup>” The footnote includes this: “The California Department

2. See quotation at page 321 of *People ex rel. Barton v. American Automobile Ins.*

330 P.2d—30½

*Co.*, 132 Cal.App.2d 317, 282 P.2d 559, at page 561.

of Motor Vehicles estimates that 80% of California motorists carry liability insurance. Letter of August 7, 1952, on file with the *Stanford Law Review*."

Our courts have taken cognizance of this fact from time to time. "It is not contended the verdict is excessive. Under the circumstances of this case we may not assume the plaintiffs were prejudiced by the question and answer complained of. It must be true that all jurors know most owners of automobiles carry indemnity insurance these times when motor vehicle accidents are so common." *Toomes v. Nunes*, 24 Cal.App.2d 395, 399, 75 P.2d 94, 96. "While attorneys may not deliberately drag in the fact that defendants are protected by an insurance company, it is very generally known in these days, to every person of understanding, that most owners and operators of automobiles are now protected by some form of insurance, and particularly do they believe that common carriers operating large trucks upon the highways are so protected, so we do not believe that the questions and answers heretofore referred to could have made any difference in the final outcome of the case, or in the amount that the jury awarded." *Moniz v. Bettencourt*, 24 Cal.App.2d 718, 725, 76 P.2d 535, 539.

Concerning the refusal of an instruction to the effect that no insurance company is a party to the action, it is said, in *Risley v. Lenwell*, 129 Cal.App.2d 608, 656, 277 P.2d 897, 928: "While we believe that the court might well have given the requested instruction we do not believe that upon the record in the instant case the failure to give it constitutes reversible error. The jury of course knew that no insurance company was a party to the action, and as stated by this court in *Moniz v. Bettencourt*, 24 Cal.App.2d 718, 76 P.2d 535, 539, it is very generally known to every person of understanding 'that common carriers operating large trucks upon the highways are so protected [by insurance].' We do not believe that the failure to give the requested instruction affected the final outcome of the case or the amount awarded."

*Lahti v. McMnamin*, 204 Cal. 415, 422, 268 P. 644, 646, "But, when the fact that defendant carries insurance is properly brought to the knowledge of the jury, either by the evidence on the part of the defendant, or indirectly in connection with proof of some material fact in the case, we know of no rule of law that empowers any court to set aside the jury's verdict upon the assumption that such evidence might have influenced the jury in rendering a verdict which was excessive in amount. If the verdict of the jury is excessive, then it should be set aside by the court, no matter what may have prompted the jury in the rendition thereof. On the other hand, if the verdict is not excessive, as we have held to be the case in this action, then it should be sustained, notwithstanding the fact that there is evidence in the record which might have tended to influence the jury in allowing excessive damages."

Mr. Justice Carter, dissenting in *State Farm Mutual Automobile Ins. Co. v. Superior Court*, 47 Cal.2d 428, 436, 304 P.2d 13, 18, had this to say: "Moreover, with all the recent publicity that has been given to insurance in automobile accident cases, stressing the effect on premiums for such insurance, it cannot be said that jurors are ignorant on the subject, nor that the insurers want them to be. The claimed danger of injection of insurance into the case has lost much of the sting assumed to exist formerly. In recent widespread publicity jurors have been told generally not to give large awards of damages and to avoid giving any except in the clearest cases. While it is true that in an ordinary personal injury action, with minor exceptions, the existence of insurance is not material to any issue, it must be assumed that the jurors know that all motorists carry insurance."

2 Witkin, *California Procedure*, § 12, page 1738: "[I]t seems highly unrealistic to suppose that automobile-owning jurors are unaware of the position of insurers in the defense of personal injury actions, particularly since the recent inauguration by these companies of a national publicity cam-

paign against high verdicts. And in operation the rule is largely one of form and tactics, for there are a number of situations in which the reference is either entirely proper or, if improper, does not constitute reversible error."

11 Southern California Law Review, at 414: "Indeed, no case can be found which goes to the extent of holding that the wrongful injection of insurance is prejudicial *per se*."

4 A.L.R.2d 761, Annotation, at page 764: "[I]n view of the fact that most automobile owners now carry liability insurance covering operation of their automobiles, the probability of prejudice resulting in the minds of the jury from some suggestion that the defendant in an automobile accident case carried liability insurance does not seem so real as it formerly did. While the courts still are careful to prevent unwarranted injection of the liability insurance factor, the more recent cases indicate less of a tendency to regard error in this regard as beyond cure by proper action of the trial judge." At page 817: "In view of the present almost universal custom among automobile owners of protecting themselves from liability for damages resulting from negligence in the operation of their automobiles by procuring liability insurance, and of the general knowledge of jurors of the prevalence of such a custom, it is probable that a reference by plaintiff's counsel suggesting that defendant is insured is not as prejudicial to the right of a defendant to a fair and impartial trial as heretofore."

[2] As shown above, defendants called as their witness one Weaver who stated on direct that he was an investigator and as such had a telephone conversation with Fate White, the owner and driver of the car in which plaintiff was riding, and that he made a recording of the interview with White's consent. When the recording was produced plaintiff's attorney requested and was granted leave to examine the witness on voir dire. It started as follows:

"Q. Mr. Weaver, you say you are an investigator? A. Yes, that's correct.

"Q. Working for whom? A. The Truck Insurance Exchange.

"Q. Is that an insurance company? A. Right."

There was no impropriety in counsel's reference to insurance up to this point. Plaintiff's counsel was entitled to ascertain for whom Weaver was working when he made the recording of his telephonic conversation with White. And when Weaver replied that he was working for the Truck Insurance Exchange, counsel was entitled to inquire whether that was an insurance company. The witness first used the word "insurance" and counsel rightly clarified the identity of the witness' employer. Cf. *Cozad v. Raisch Improvement Co.*, 175 Cal. 619, 624, 166 P. 1000; *Reneau v. Hirsch*, 88 Cal.App. 1, 8, 262 P. 1100; *Wilson v. Fredericksen & Kasler*, 94 Cal.App.2d 361, 364, 210 P.2d 741; *Moffitt v. Ford Motor Co.*, 135 Cal.App. 7, 17, 26 P.2d 661; *Brown v. McCuan*, 56 Cal.App.2d 35, 40, 132 P.2d 838; *Charter v. Olson*, 137 Cal.App.2d 636, 646, 290 P.2d 867.

[3-5] Counsel mentioned the insurance company four more times. The trial judge held it was improper for plaintiff's attorney to bring out the fact of insurance in the first instance, that he should have confined himself to showing that the witness was acting on behalf of the defendant,—i. e., the nominal one, not the real party in interest. In the circumstances here present, neither the first mention of insurance by counsel nor later repetition could amount to prejudicial misconduct; repetition of a known fact adds little if anything to the effect of knowledge already possessed. True, the subject of insurance, like the wealth or size of defendant or inflammatory pictures of a plaintiff's injuries, may be so presented as to be objectionable because of a tendency to lead the minds of the jurors away from the real issues; but such matters are easily controlled by the trial judge. If counsel's repeating of the



phrase "insurance company" was deemed by the judge to be inflammatory he should have dealt with it like any other improper evidence, by prompt exclusion or prompt admonition to counsel and cautionary instruction to the jury. The ruling at bar was in point of law an abuse of discretion.

[6] It is said that this cross-examination was not in fact *voir dire*. That may be true, but no such objection was made and counsel's avowed effort to show prejudice and bias of the witness was in some measure justified by later developments. Objection to receipt of the recording in evidence having been overruled, and playing of same having been started, the court soon interrupted and ruled that it was unintelligible so far as White's statements were concerned. It was decided to play the record again and the judge promptly stopped it, saying: "Let the record show that the Court stood directly over the recording machine,—the Court's hearing is average and is good, according to doctors—and that the Court could not distinguish the answers of Mr. White, and the only reason that they were intelligible at all was because the investigator, Mr. Weaver, repeated them after Mr. White gave the answer, so that we are not getting audibly the answers given by Mr. White in that conversation, and the record is therefore not admissible." This condition of the record would reflect directly upon the transcript of same to which the witness referred to refresh his memory. The examination having been conducted without objection from defendants, they cannot now be heard to say it was not *voir dire* or that that fact is of any consequence.

The examination in question occurred in the afternoon. The next morning, in chambers, the court opened the subject, saying: "I don't think it makes much difference in this case. But, in the Court's opinion, Mr. Wolfson, you went way too far in questioning that investigator the other day as to his insurance company connections, and so far, in the Court's opinion, if the jury brings in any verdict against both defendants, which they have to do,—

they have to bring it in against either both or none—The Court will grant a motion for a new trial so far as the individual defendant is concerned, in other words, so far as Mr. Cornelius is concerned, on the basis that your questions were prejudicial so far as Mr. Cornelius is concerned. Now, they came awfully close to being prejudicial, in the Court's mind, as far as the freight company was concerned. The only reason that I wouldn't grant a motion for a new trial, unless I change my mind—and I haven't made a final determination on it—but where you have a corporation involved, if the corporation is a substantial corporation of any size I don't think that the fact that there is insurance materially affects the verdict so far as the corporation is concerned." Counsel for defendants made no motion for a mistrial, no request for special instruction to the jury, no comment whatever, but elected to speculate upon a verdict for defendants, as the judge himself obviously was doing. Counsel had no right to do that. If he considered the examination as prejudicial he should then, at the latest, have sought to undo the harm by obtaining an appropriate oral instruction to the jury or even by declaration of a mistrial, but he could not remain silent and speculate upon the verdict. "It does not behoove a litigant to observe an error being committed and sit idly by and not mention it to his attorney or the court. Should he do this he puts himself in the position of saying: 'If I win I will say nothing; if I lose I will raise the error.' This is not fair to the court and the litigant should not be permitted to take advantage thereof." *Kershaw v. Tilbury*, 214 Cal. 679, 691, 8 P.2d 109, 114. "A party should not be permitted to remain quiet and take the chance of a favorable verdict, and then, if the verdict is unfavorable, raise the objection on appeal." *Aydlett v. Key System Transit Co.*, 104 Cal.App. 621, 628, 286 P. 456, 459.

[7] If the cross-examiner's references to insurance were deemed by the court to be improper, it was the duty of the judge to act promptly and to then admonish coun-

sel and instruct the jury;<sup>3</sup> it was no more appropriate for the judge to speculate upon a defendant's verdict than it was for defense counsel.

At the argument of the motion for new trial plaintiff's attorney, foreseeing the judge's ruling, offered to dismiss the case as to the individual defendant, Cornelius, who was the driver of the corporate defendant's truck. This the court rejected. At a later hearing on the same motion counsel for plaintiff offered to give Mr. Cornelius a covenant not to hold him liable on the judgment "and thus eliminate the prejudice that you have been referring to as to Mr. Cornelius' liability." But the judge said: "That doesn't cure the problem because the liability of the company is based solely on the liability of the defendant Cornelius. \* \* \* The point is that the jury might never have rendered this verdict if they thought that Mr. Cornelius was going to be liable, might never have rendered it at all if they thought Mr. Cornelius was liable. They figured that because of the insurance involved that Mr. Cornelius would not be liable and so they were willing to render the verdict." Counsel for defendants was given no opportunity to accept or reject this offer. The judge had made up his mind to grant the motion. We think the acceptance of the offer would have cured the (assumed) error. Speculation as to the jurors' reasoning, postulated upon the assumption that they obeyed the instruction that the verdict must be for or against both defendants but ignored the one to the effect that the presence or absence of insurance should not be considered, was improper.

3. "Many decisions justify an affirmance of the judgment upon the ground that the trial court admonished the jury to disregard the objectionable evidence. It is stated that an appellate court will not assume that members of the jury disregarded their oaths and failed to follow the admonition." 11 So.Cal.L.Rev. p. 417.

"Although some of the earlier cases appear to have taken a rather narrow view regarding the curing of error in this regard by instructions to disregard the evidence, remarks, questions or sugges-

The order granting a new trial must be reversed.

[8,9] The judgment must be affirmed. The only argument presented in support of the defendants' appeal from the judgment is that the court erred or abused its discretion in refusing to grant the motion for new trial upon the ground of insufficiency of the evidence. With this we are unable to agree. Upon this matter there was room for exercise of a broad discretion (4 Cal. Jur.2d, § 600, p. 479), and in that respect it cannot, upon this record, be said that there was an abuse of discretion.

[10, 11] The trial judge said in in part: "In other words, had I been deciding the case without a jury I would have decided on the basis of the evidence that there was assumption of risk, and because of that assumption of risk I would have given a judgment for the defendant. But I am not of the opinion and was not of the opinion at the time of the last hearing and so stated on page 10—I am not of the opinion that the evidence was so clearly in favor of the defendant that I should grant a motion for a new trial on the basis of the verdict being against the weight of the evidence, clearly against the weight of the evidence. In other words, the Court in order to grant a motion for a new trial has to do more than disagree with the verdict of the jury. The Court has to be of the opinion that the verdict is clearly against the weight of the evidence, and I don't think it was." This is a sound appraisal of the cases. *Green v. Soule*, 145 Cal. 96, 103, 78 P. 337, 340: "Of course, the judge should give due respect to the verdict

tions of insurance, the general rule now appears to be that in the absence of anything indicating the verdict returned was adversely affected, or anything to indicate persistent and studied attempts to bring the objectionable matter before the jury, prompt action in striking improper references to the defendant's insurance from the record, coupled with instructions admonishing the jury to disregard such matters, sufficiently protects the defendant's rights without requiring reversal of the judgment." 4 A.L.R.2d p. 821.

of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might, upon the evidence, have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand." See also *People v. Richard*, 101 Cal.App.2d 631, 633, 225 P.2d 938; *Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 905, 185 P.2d 396; *Imperial-Yuma etc. Credit Assn. v. Shields*, 74 Cal.App.2d 932, 935, 169 P.2d 671.

The order granting a new trial is reversed and the judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; SHENK, SCHAUER and SPENCE, JJ., dissenting.



164 Cal.App.2d 330

**ESTATE of James E. HARVEY, Deceased.**

**Annie B. HARVEY, Petitioner, Contestant and Appellant,**

**v.**

**Jesse M. HARVEY, Respondent.**

**Civ. 22912.**

**District Court of Appeal, Second District,  
Division 3, California.**

**Oct. 17, 1958.**

**Rehearing Denied Nov. 12, 1958.**

**Hearing Denied Dec. 10, 1958.**

Proceeding on petition of widow for judgment determining that entire estate of decedent was community property and that she was entitled to distribution of one-half thereof. From part of a judgment of the Superior Court of Los Angeles County, Newcomb Condee, J., widow appealed. The District Court of Appeal, Vallée, J., held that person who was executor of decedent's estate and one of the trustees named therein had authority to litigate widow's claim and since findings as to which property was separate and which was community were irreconcilable, judgment could not stand.

Part of judgment appealed from reversed.

See, also, 143 Cal.App.2d 368, 299 P.2d 712.

#### 1. Wills ⚡733(1)

Trustee is a devisee with his rights vesting as of the date of testator's death.

#### 2. Trusts ⚡246

Testamentary trustee who was also an executor had authority as trustee to litigate or resist claim of widow that the entire estate of testator was community property and that she was entitled to one half thereof.

#### 3. Wills ⚡665

Where will contained an in terrorem clause providing that any beneficiary contesting any provision of will should take nothing and will required widow to elect to take under will in lieu of community interests, action by widow for judgment declaring that the entire estate was community property and that she was entitled to one half thereof, constituted a contest of will whereby she forfeited all her rights thereunder.

#### 4. Declaratory Judgment ⚡393

Where widow instituted action for judgment declaring that entire estate of testator was community property and that she was entitled to one half thereof, and court on the one hand found that there had been an executed oral agreement transmuting separate property into community and on the other hand found that there was no such agreement with respect to property which had been acquired by decedent simultaneously with property found to be community, conflict in findings was clear, irreconcilable, and material, and judgment could not stand.

#### 5. Appeal and Error ⚡1071(1)

Where findings are contradictory and irreconcilable with respect to matters which are material to the merits of the case and to the determination of them one way or the other, judgment cannot stand.



Harry Boxer, Los Angeles, for appellant.

William F. Peters, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from part of a judgment determining interests in an estate.

James E. Harvey died testate on December 13, 1954. He was survived by his wife, appellant Annie B. Harvey, two daughters, Anita Fisher and Betty Ernestine Harvey, and a sister, Ruby Fulks. In his will, duly admitted to probate, he required his wife to elect to take under the will in lieu of her community interests; and declared that if she should elect to take her community rights as provided by law and not under the will, all provisions for her in the will should lapse.

The will declared that the home of the deceased and his wife was community property, devised it to the wife, and bequeathed various articles of personal property to her. The residue of the estate was left in trust, one-quarter of the net income therefrom to be paid to the widow, each daughter, and the sister. Jesse E. Harvey and Jesse M. Harvey were named trustees. The will contained an *in terrorem* clause which provided that any beneficiary who should contest any provision of the will should take nothing.

Appellant filed a petition for a judgment determining interests in the estate, alleging that the entire estate was community property and that she was entitled to distribution of half thereof. Jesse M. Harvey, executor of the will and one of the named trustees, filed a statement of his interest in the estate, alleging that the estate consists of separate property with the exception of an account in Bank of America which, he stipulated, was community property.

The court found that two parcels of realty, a life insurance policy, all automobiles owned by the decedent at death, a bank account in Bank of America, a half interest in another bank account, and clothing and personal effects were community prop-

erty and that appellant is entitled to have an undivided interest therein distributed to her; that the family home was held in joint tenancy by the decedent and appellant. The court further found that the remaining assets of the estate were separate property of the decedent and concluded they should, on petition therefor, be distributed to the trustees, excluding any interest on the part of appellant. Judgment followed accordingly. The appeal is from the judgment save and except those parts adjudging that certain items were community property and that the home place was held in joint tenancy.

[1,2] Appellant first claims that respondent, as executor, had no authority to litigate or resist her claims. The point is not tenable. Respondent is named as one of the trustees of the trust created by the will. The trustee is a devisee, his rights vesting as of the date of the testator's death. (1 Nossaman, Trust Administration and Taxation, 2d ed., 422, § 26.06, 429, § 27.01.) "In its capacity as trustee the appellant has a vested interest in the property of the estate and the terms of the trust impose upon it the duty of protecting that property from all unnecessary expenses and claims. There can be no doubt that in that capacity it had power to oppose the petition for sale, and has the right of appeal to this court from an adverse decision thereon." *In re Estate of Rawitzer*, 175 Cal. 585, 587, 166 P. 581, 582.

[3] The court found that appellant contested the will, and adjudged that by reason thereof she is not entitled to take under the will. Appellant asserts the finding is unsupported by the evidence. The point is untenable. There was evidence that appellant unsuccessfully contested the will. By contesting the will appellant forfeited all rights thereunder. *In re Estate of Fuller*, 143 Cal.App.2d 820, 300 P.2d 342.

Appellant and the decedent were married in January 1934 and lived together until his death in 1954. Beginning prior to 1920 and until about 1946 the decedent was engaged in the sand and gravel business

with two of his brothers, Jesse and Frank. The business was conducted by a corporation and a partnership. Frank died about 1946. In 1950 the corporation was dissolved and its assets and those of the partnership were distributed to the decedent, Jesse, and Frank's estate in equal parts. All of the property involved in this proceeding was owned by the decedent prior to his marriage to appellant except the bank account in Bank of America. Appellant's contention at the trial was that the decedent and she entered into an executed oral agreement by which the decedent's separate property was transmuted into community property.

The inventory listed these items as property of the estate: (1) bank account, Bank of America; (2) clothing and personal effects; (3) automobiles; (4) a parcel of realty at 2346-48 Hunter Street, Los Angeles; (5) a parcel of realty at 2342-42½ Hunter Street, Los Angeles; (6) a parcel of realty; (7) and (8) an undivided one-third interest in two parcels of realty; (9) a parcel of realty; (10) a parcel of realty; (11) miscellaneous auto and truck parts; (12) three power shovels; (13) miscellaneous office equipment; (14) a promissory note; (15) a half interest in another bank account. The appraised value of the estate is \$82,591.58.

The court found, concluded, and adjudged that items 1, 2, 3, 5, 10, 15, and a life insurance policy were community property. It found, concluded, and adjudged that the remaining items were separate property of the decedent.

Appellant contends the findings were prejudicially inconsistent and irreconcilable. We agree. Items 4, 6, 7, 8, 9, 11, 12, 13, 14, and 15 were acquired by the decedent about February 1950 by reason of the dissolution of his business enterprises and the distribution to him of his prorata share of the assets. His interest in the business was acquired prior to marriage. Items 5 and 10 were acquired by the decedent prior to marriage. The court found them to be community property.

Appellant, the two daughters of appellant and the decedent (testifying against their pecuniary interests), and several apparently disinterested witnesses testified to facts which showed that appellant and the decedent had entered into an executed oral agreement transmuting all, not part, of his separate property into community property. Respondent's position below was that all of the property standing in the name of the decedent was his separate property. There was no evidence that part of the property was community and part separate, yet the court found that items 5, 10, and 15 were community property and that items 4, 6, 7, 8, 9, 11, 13, and 14 were separate property of the decedent. There is no evidence in the record warranting a division of items 4 to 15, inclusive, into separate categories. On the evidence, they are either all community property or all separate property.

[4] The inconsistency in the findings is obvious. On the one hand the court found there was an executed oral agreement transmuting separate property into community, and on the other hand found there was no such agreement with respect to property which was acquired by the decedent simultaneously with the property found to be community. In other words, the court found there was an executed oral agreement transmuting separate property owned by the decedent at the time of his marriage into community property, and at the same time found there was no such agreement with respect to other property owned by him at the time of his marriage.

[5] The conflict in the findings is clear, irreconcilable, and material. It is impossible to harmonize them. Where the findings are contradictory and irreconcilable with respect to matters which are material to the merits of the case, and the determination of them, one way or the other, is essential to the correctness of the judgment, the judgment cannot stand. *Andrews v. Cunningham*, 105 Cal.App.2d 525, 529, 233 P.2d 563; *Malley v. Sierra Manufacturing Co.*, 118 Cal.App.2d 643, 650, 258 P.2d

522. "Although it is true that findings must be liberally construed to support the judgment if possible, it is equally true that, where there are contradictory, irreconcilable findings about matters material to a proper disposition of the case, the appellate court can do nothing but reverse the case." *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 131, 137, 17 P.2d 712, 714.

The part of the judgment appealed from is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



164 Cal.App.2d 335

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,  
v.

**William Henry DUNN, Defendant and**  
Appellant.  
Cr. 6194.

District Court of Appeal, Second District,  
Division 3, California.  
Oct. 17, 1958.

Defendant was convicted of petit theft with a prior felony conviction and from a judgment of the Superior Court of Los Angeles County, LeRoy Dawson, J., the defendant appeals. The District Court of Appeal, Shinn, P. J., held that the evidence sustained conviction and that permitting a witness to relate his conversation with the defendant was not error.

Judgment affirmed.

#### I. Larceny ☞65

Evidence sustained conviction of petit theft. West's Ann.Pen.Code, §§ 484, 667.

330 P.2d—31

#### 2. Larceny ☞40(2)

In a prosecution for petit theft, the people must prove an unlawful taking and asportation of property of some intrinsic value with the intent to deprive the owner thereof. West's Ann.Pen.Code, § 667.

#### 3. Criminal Law ☞1159(3)

The resolution of inconsistencies in testimony of witnesses and weight to be accorded to their testimony are questions for the trier of fact and not for a reviewing court.

#### 4. Criminal Law ☞412(1)

In prosecution for theft of dresses, permitting witness to relate his conversation with the defendant respecting the missing dresses was not error where the corpus delicti of the offense had been established by the witnesses' testimony that the dresses were in the showroom prior to the defendant's arrival and that they were missing after his departure and that the witness had given no one permission to take them. West's Ann.Pen.Code, §§ 484, 667.

William Henry Dunn, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, William Henry Dunn was convicted of a violation of Penal Code, § 667 (petit theft with a prior felony conviction) and was sentenced to state prison for the term prescribed by law. Dunn appeals from the judgment.

The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Jerry Miller of California is a dress manufacturing firm located on the fifth floor of a building at 722 South Los Angeles Street in the City of Los Angeles. The premises consist of an office, a show room and a factory; the rooms are separated by partitions. On June 25, 1957, Rita Appleby was em-



ployed by the firm as a bookkeeper. At about 1 p. m., appellant stepped off the elevator and entered the office, carrying a handful of loose papers. Mrs. Appleby testified that appellant told her he was a minister and asked her for a donation to send boys to camp, which she declined to give, stating that she had no authority to make donations. Mrs. Appleby told him to come back some other time. After talking to the witness for about 10 minutes, appellant left the office and walked across the hall, whereupon Mrs. Appleby went out to lunch.

Shortly thereafter, the proprietor, Jerry Miller, saw appellant enter the elevator; Dunn was carrying a bundle wrapped in newspaper under his left arm. The bundle was about a foot long and looked untidy, as if it had been wrapped in a hurry. An hour or so later, Miller went to the show room to get two new sample dresses for one of his salesmen. The dresses were originals; they sold for \$12.75 each at wholesale and \$24.95 at retail; Miller had last seen them just before Mrs. Appleby went to lunch. The dresses were missing and Miller had given no one permission to remove them from the show room. The witness identified a strip of fabric shown to him by the deputy district attorney as part of the material from which one of the dresses had been cut; the fabric was received in evidence without objection. No other dresses were made from the remnants.

<sup>1</sup> Several weeks later, appellant returned to the premises and had a conversation with Miller. When the deputy asked Miller to relate the substance of the conversation, appellant's counsel objected that the corpus delicti of the offense had not been established; the objection was overruled and it was not renewed. Miller testified that he asked appellant if he had been in the place before and appellant replied that he always came there for donations. When asked if he "got anything," Dunn said: "Well, you gave me things from time to time." Miller replied: "I never gave you a thing in my life. I never saw

you before in my life except I think you are the man who was up here once before and something very peculiar happened." Miller then asked appellant to stay in order to make sure that he had not taken any dresses; Dunn became very indignant. When Miller told appellant that he intended to call the police, Dunn said "Well, I won't stay" and promptly left. Miller accompanied him down the elevator and followed him for several blocks, whereupon appellant put his hand in his pocket and said: "Look, you get away from me or I will pull a knife on you." Appellant then ran across the street against a red traffic signal and Miller was unable to catch up with him.

John Montana was the elevator operator who conducted appellant to and from Miller's establishment on June 25th. On the way up, Dunn was holding a few papers. On the way down, Montana saw him wrapping a bundle under his arm; the bundle was not wrapped in newspaper; it contained some kind of material. When shown the fabric identified by Miller, Montana stated that it was similar to the material that was in the bundle.

Carl W. Rogers, a police officer for the City of Los Angeles, testified that he had a conversation with Dunn prior to his arraignment. The officer asked appellant if he had anything to say before he was brought into court and Dunn replied: "I will gladly plead guilty to petty theft, but I don't want to go back to the joint", and "If you will take me out to the Lincoln Heights Jail and book me petty theft I will plead guilty to it."

A former conviction of petit theft with a prior conviction of felony was established by evidence which was introduced without objection. Its sufficiency is not questioned on the appeal.

Appellant testified in his own behalf that he did not take any dresses belonging to Miller. He went to the premises on June 25th to solicit funds for the AME Church of Christ, of which he was an or-

dained minister; he did not have a license from the city to solicit funds. He spoke to Mrs. Appleby, who refused to give him a donation, whereupon he left; Mrs. Appleby was still in the office when he departed. On returning to the premises some weeks later, Miller asked him if he had taken the dresses, and he denied his guilt to Miller. Miller went down the elevator with him, but he did not run away from Miller or threaten him with a knife. A month later, some policemen came to his apartment, searched it and found two dresses and some other women's clothing in a footlocker. He had purchased the dresses at Grayson's Department Store in the company of his fiancée. Appellant denied stating to Officer Rogers that he would plead guilty to petit theft; he told the investigating officers that he was willing to plead guilty to soliciting funds without a license.

At the conclusion of Dunn's testimony, the deputy district attorney sought and obtained a several days' continuance in order to procure the attendance of the investigating officers who, he stated, "had recovered the property and could tie in the property to the evidence here." However, when the trial was resumed, the People introduced no further evidence.

Upon request for appointment of counsel on the present appeal, the court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeal. The matter was assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no valid ground of appeal. After we had examined the record, the request for appointment of counsel was denied. Appellant was duly so advised and his time to file a brief was substantially extended. Appellant has filed a brief in propria persona. His sole contention is that the evidence was insufficient to establish his guilt of an offense of theft. In accordance with our

practice, we have made a thorough study of the record. We have discovered no insufficiency of the evidence and no error at the trial.

[1,2] Theft is characterized as the felonious taking of property which is not one's own. Pen.Code, § 484; *People v. Moorhead*, 104 Cal.App.2d 688, 694, 232 P.2d 268. In a prosecution for petit theft, the People must prove an unlawful taking and asportation of property of some intrinsic value with the intent to deprive the owner thereof. *People v. Williams*, 73 Cal.App.2d 154, 157, 166 P.2d 63.

[3] In our opinion, there was sufficient evidence to prove appellant guilty of theft. Dunn admitted being on the premises shortly before the time when the dresses were found to be missing. The court could reasonably infer from the testimony of Miller, Montana and Mrs. Appleby, from the evidence of appellant's actions when accused by Miller and from his offer to plead guilty to petit theft, that Dunn went to the premises on a pretext of soliciting funds, waited until the bookkeeper went to lunch, and took the dresses from the show room, attempting to conceal them in a bundle under his arm. Appellant refers in his brief to several inconsistencies in the testimony of Montana and Miller, for example, that the two witnesses gave different descriptions of the bundle. But the resolution of inconsistencies and the weight to be accorded to their testimony were questions for the trier of fact, not for a reviewing court. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. White*, 35 Cal.App.2d 61, 69, 94 P.2d 617.

[4] The court did not commit error in permitting Miller to relate his conversation with appellant. The corpus delicti of the offense had been established by Miller's testimony that the dresses were in the show room prior to Dunn's arrival on June 25th, that they were missing after his departure, and that Miller had given no one permission to take them. *People v. Kross*,

112 Cal.App.2d 602, 609, 247 P.2d 44, and cases cited.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



164 Cal.App.2d 322

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Billy Otis McCARTY, Defendant and**  
**Appellant.**

**Cr. 6136.**

**District Court of Appeal, Second District,**  
**Division 2, California.**

**Oct. 17, 1958.**

Defendant was convicted of second degree robbery and from a judgment of the Superior Court of Ventura County, E. Perry Churchill, J., the defendant appeals. The District Court of Appeal, Herndon, J., held that evidence tending to prove that defendant was guilty of three crimes other than that for which he was on trial was not inadmissible and that the defendant's arrest in Los Angeles County by an officer from Ventura County without a warrant was not invalid.

Judgment affirmed.

#### **1. Criminal Law** ⚡369(2)

Evidence of a distinct substantive offense cannot be received unless there is some clear connection between that offense and the one charged from which it may logically be inferred that if guilty of one the defendant must be guilty of the other.

#### **2. Criminal Law** ⚡369(15)

In prosecution for robbery of a Western Union office where there was a series

of four robberies, evidence tending to prove that defendant was guilty of three robberies of other Western Union employees was admissible where the essential question in view of the claim of alibi was whether the prosecution witnesses were mistaken in their identification of the defendant as perpetrator of the crime charged.

#### **3. Criminal Law** ⚡369(15)

In robbery prosecution, where the evidence portrayed a series of four robberies similar in pattern and design, admitting evidence of such robberies for the purpose of identification of defendant as perpetrator of the offense was not improper on the ground that the trial court admitted an excessive quantity of evidence to show common plan or design.

#### **4. Arrest** ⚡63(1)

The fact that an officer could have obtained a warrant of arrest does not of itself render illegal an arrest or an incidental search and seizure without a warrant.

#### **5. Arrest** ⚡63(4)

An arrest of defendant in Los Angeles by a police officer from Ventura County was not unlawful on the ground that it was made without a warrant, where the actual commission of a felony was admitted and the victim had made a positive identification of defendant as the perpetrator in the presence of the officer only a few hours before the arrest was made, since under the circumstances a private person could have made the arrest without a warrant, and a peace officer did not have less authority. West's Ann.Pen.Code, §§ 817, 836, subd. 3, 837, subd. 3.

#### **6. Arrest** ⚡70

Where defendant was arrested in Los Angeles by an officer from Ventura County, fact that after his arrest defendant was taken before a magistrate in Ventura County was not improper on the ground that defendant was not taken before the nearest magistrate in the county in which the arrest was made. West's Ann.Pen.Code, §§ 145, 849; West's Ann.Const. art. 1, § 8.



**7. Arrest**  $\Rightarrow$ 70

Where defendant was arrested in Los Angeles by an officer from Ventura County, officer's conduct in taking defendant before a Ventura County magistrate, if unlawful, did not make illegal the antecedent arrest or the search and seizure.

**8. Criminal Law**  $\Rightarrow$ 394.1(3)

Unlawful activity which does not produce the evidence sought to be suppressed and which is entirely unrelated and collateral to the securing of such evidence affords no basis for applying a rule of exclusion.

Erich Auerbach, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura County, Andrew J. Marsh, Deputy Dist. Atty., Ventura, for respondent.

**HERNDON, Justice.**

Convicted by a jury of second degree robbery, defendant seeks a reversal of the judgment on the basis of two contentions: (1) that the trial court erred in admitting evidence tending to prove that he was guilty of three crimes other than that for which he was on trial, and (2) that defendant's arrest in Los Angeles County by an officer from Ventura County without a warrant was invalid and that evidence procured in the incidental search was improperly admitted.

The sufficiency of the evidence to sustain the verdict being clear and unchallenged, the facts may be briefly stated. On May 21, 1957, at about 8:30 p. m. Rena Lively was the sole employee in charge of the Western Union office in Oxnard, California. Miss Lively testified that defendant entered the office just as she had finished dealing with two Mexican Nationals who promptly left the office, leaving her alone with the defendant. Defendant inquired whether she had a money order for one

Weber. After checking her files, she informed defendant that she had no such money order. Thereupon, the defendant pulled a gun and in a low voice ordered her to turn over her money to him. He kept the gun partially concealed by his coat so that she was able to see only a portion of it. Miss Lively testified that she was frightened and that she promptly complied by giving defendant the money as demanded. After taking the money, defendant followed her to a restroom and ordered her to remain inside. She stated that the defendant was polite, calm and quiet spoken. He was wearing a light blue suit, a white shirt and no tie. One Richard Martin, a taxi driver, testified that he saw defendant in the Western Union office between 8:20 p. m. and 8:30 p. m. on the night of the robbery. He stated that defendant was in the office at the time the Mexican customers were present.

Detective Sergeant Patton of the Oxnard Police department testified that on the evening of May 27, 1957, he showed a photograph of defendant to Miss Lively who stated that he was the man who had robbed her. A few hours later, at approximately 2:20 a. m., Sgt. Patton and another Ventura police officer observed the defendant in Lynwood, California, driving an automobile. They stopped him near his home, placed him under arrest for robbery and proceeded to search his car. The officers had no search warrant nor arrest warrant at the time. The search of defendant's car produced a dark blue suit, a straw hat and a toy pistol. Defendant told the officers he had found the toy pistol on the lawn that morning and intended to give it to a friend's child. When accused by the officers of robbing the Western Union office in Oxnard, defendant denied it. Defendant was taken briefly to the Lynwood police department and was then transported to the Oxnard police department. Testifying in his own defense, defendant admitted that he had been convicted of armed robbery in Los Angeles County on March 17, 1954, and had been incarcerated for that crime, but

had been placed on parole in March of 1957. He testified that between 8 p. m. on May 21, 1957, the night of the Oxnard robbery, and 2 a. m. of the following day he was in a bar at Lynwood, California, during which time he was engaged in negotiating for the purchase of a car from the bartender. He denied that he was ever in the Western Union office at Oxnard at any time. The bartender gave testimony corroborating defendant's alibi.

Over defendant's objection, the trial court admitted evidence tending to prove that defendant was guilty of three robberies in addition to the one with which he was then charged. Miss Margaret Brislane and George Howell, both Western Union employees, testified that on April 15, 1957, at 1:20 a. m. defendant robbed Miss Brislane in the Western Union office located at 741 S. Flower Street in Los Angeles. Defendant denied being in this Western Union office at any time during that day. He testified that at the time of that robbery he was in Hollywood in a bar.

Mrs. Patty Dunagan and Mrs. Willard Jordan, Western Union employees, testified that on May 27, 1957, at 10:40 p. m. defendant attempted to rob Mrs. Dunagan in the Western Union office at Santa Ana, California, but left without taking any money when the victim feigned a faint. The defendant denied that he had been in the Western Union office at Santa Ana at any time on May 27, and testified that at the time in question he was in a bar in Norwalk.

Mrs. Mary Ward and Mrs. Elaine Bonar, both Western Union employees, testified that defendant robbed Mrs. Ward in the Western Union office in Wilmington, California, on May 10, 1957, at 2 p. m. Defendant denied that he had been in that office of Western Union at any time, and testified that at the approximate time of that robbery he was in the Lynwood branch of the Bank of America and that after leaving the bank he had gone to the Clover

Room, a bar in the same city where he had stayed "for a while."

[1] In urging that the trial court committed prejudicial error in receiving evidence of the other robberies, defendant relies mainly upon *People v. Channell*, 136 Cal.App.2d 99, 111-113, 288 P.2d 326; *People v. Lapin*, 138 Cal.App.2d 251, 259, 291 P.2d 575, and *People v. McCullough*, 158 Cal.App.2d 310, 322 P.2d 289, 290. These cases apply the rule " \* \* \* that evidence of a distinct, substantive offense cannot be received unless there is some clear connection between that offense and the other charged from which it may be logically inferred that if guilty of one he must be guilty of the other."

Since defendant denied the robbery and offered the defense of an alibi, it is obvious that the sole issue determinative of defendant's guilt or innocence was the question of his identity as the robber. In other words, the essential question was whether the prosecution witnesses were mistaken in their identification of the defendant as the perpetrator of the crime with which he was charged. The test of admissibility of evidence of other crimes for the purpose of identifying the defendant was stated as follows in *People v. Grimes*, 113 Cal.App. 2d 365, 371, 248 P.2d 130, 133: "[W]hether the facts pertaining to the other offenses allowed to be proved, show a general pattern, scheme, or plan, and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he committed the act charged." In *People v. Peete*, 28 Cal.2d 306, 318, 169 P.2d 924, it was held that evidence of another crime showing a similar *modus operandi* was admissible as tending to identify the defendant as the perpetrator of the crime immediately charged.

[2] The evidence in the case at bar portrayed a series of four robberies, including the one charged, so similar in pattern and involving a *modus operandi* with so many

distinctive and common features that the correctness of the trial court's ruling is not open to serious question. Whether proffered evidence of other crimes satisfies the applicable test is primarily a question for the trial court. *People v. Grimes*, supra, 113 Cal.App.2d 365, 371, 248 P.2d 130; *People v. Roach*, 148 Cal.App.2d 364, 368, 306 P.2d 523; cf. *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924.

All four robberies were perpetrated within a period of six weeks. In addition to the fact that all four robberies involved Western Union offices, the following similarities appear: (1) the approach to all four robberies was similar in that in each case before demanding the money, the perpetrator made a request of his victim that would allow him to survey the premises. In Wilmington, Santa Ana and Oxnard the defendant asked each of the respective victims whether she had a money order for a certain named person. In Los Angeles, he asked the victim for change for a \$5 bill. (2) During all four robberies the defendant was dressed in a similar and distinctive fashion in that on all occasions he was described as being neatly dressed, wearing either a light blue or dark blue suit without tie. (3) The weapon used and the manner of its use were similar in all four robberies in that on all occasions the defendant was armed with a gun and in each instance he made some apparent attempt to keep the weapon partially concealed from the victim. (4) The words and forms of expression used by defendant were remarkably similar in all instances. On each occasion defendant assured his victim that she would not be hurt if she complied with his demands. (5) During all the robberies, the defendant spoke in a very low tone of voice, so inaudible in fact that in three of the instances he had to repeat himself at least twice. (6) During all four robberies, the defendant exhibited similar mannerisms and was uniformly described as quiet, calm, mannerly and polite. (7) The victims of all the robberies were similar, being in each instance a woman employee of Western Union.

A comparison of the facts of the instant case with those appearing in the cited decisions shows that the "sufficient common features" test was more than adequately fulfilled in the instant case. Cf. *People v. Grimes*, supra, 113 Cal.App.2d 365, 371, 248 P.2d 130; *People v. Roach*, 148 Cal.App.2d 364, 368, 306 P.2d 523; *People v. Mazza*, 135 Cal.App.2d 587, 598-599, 287 P.2d 798.

[3] Defendant strongly argues that the trial court abused its discretion in admitting an excessive *quantity* of evidence to show the common plan or design. The substance of the argument is indicated by the following quotation from defendant's reply brief: "It is however, of extreme importance to emphasize that assuming, *arguendo*, that evidence of other crimes was admissible under Respondent's theory that it was relevant to prove a design or scheme, nonetheless the trial court indulged in a prejudicial abuse of discretion in allowing so great a mass of testimony related to such other offenses to be introduced. For even if it be conceded that some evidence of other crimes is admissible, in support of the People's case, nevertheless the Court must exercise a sound judicial discretion in limiting the quantum of such evidence so that defendant's right to be tried only for the offense committed, be not unduly prejudiced and vitiated."

We hold that the foregoing argument must be rejected. Had the prosecution limited its evidence to only one or two of the other similar robberies, defendant undoubtedly would have argued that the proven similarities were merely coincidental and that the examples were too few to establish a general plan or a common design. The prosecutor in this case cannot fairly be charged with excessive zeal in offering a sufficient quantum of incriminating evidence to remove any reasonable basis for obviously-to-be-anticipated arguments and to satisfy a jury beyond a reasonable doubt of defendant's identity as the perpetrator of the crime charged. By the same token, the trial court did not abuse its discretion in admit-



ting this quantum of evidence. Indeed, there seems to be an element of inconsistency in defendant's arguments (1) that an insufficient number of similar features were shown to establish a common pattern or design and (2) that the court erred in admitting an excessive cumulation of evidence directed to that purpose.

[4,5] We find no merit in defendant's contention that his arrest in Los Angeles by a police officer from Ventura County was unlawful because the officer was without a warrant. Without citation to any supporting authority, defendant urges " \* \* \* that the spirit of the law requires that where an officer is advised of the whereabouts of a suspect in another county, he is under a duty, at least absent emergency circumstances, to procure a warrant before making an arrest outside the territorial limits of his office." Defendant properly concedes that the fact that an officer could have obtained a warrant does not of itself render illegal an arrest or an incidental search and seizure without a warrant. *People v. Winston*, 46 Cal.2d 151, 162, 163, 293 P.2d 40; *People v. Chapman*, 151 Cal.App.2d 59, 62, 311 P.2d 190; *Lorenzen v. Superior Court*, 150 Cal. App.2d 506, 512, 310 P.2d 180. The authority of the arresting officer in the instant case cannot be denied. It is undisputed that he was a peace officer (Pen.Code, § 817) and as such he had authority under Penal Code § 836, subd. 3, to make the arrest without a warrant if a felony had in fact been committed and he had reasonable cause to believe that defendant had committed it. These conditions were fulfilled; the actual commission of a felony is unquestioned and the victim had made a positive identification of the defendant as the perpetrator in the presence of the officer only a few hours before the arrest was made. Under these circumstances a private person could have made this arrest without a warrant. Pen. Code, § 837, subd. 3. It would appear anomalous to hold unlawful an arrest by a peace officer when the same arrest by a private citizen clearly would have been law-

ful. *People v. Ball*, 162 Cal.App.2d 465, 323 P.2d 276.

[6] It appearing that after his arrest defendant was taken before a magistrate in Ventura County, the further contention is made that the arrest was rendered unlawful *ab initio* by the failure of the arresting officer promptly to take defendant before the nearest or most accessible magistrate in the county in which the arrest was made, as required by provisions of section 849 Penal Code then in effect. Prior to its amendment in 1957, section 849 appeared to be in conflict with section 145 of the same code. Under section 145 the arresting officer is guilty of a misdemeanor if he delays taking the arrested person before a magistrate having jurisdiction to take his examination. Under Article I, Section 8, of the California Constitution, only a magistrate in the county in which the offense charged is triable has jurisdiction to take the examination. This apparent conflict was eliminated by the 1957 amendment to section 849, which requires the arrested person to be taken before a magistrate in the county in which the offense is triable.

[7,8] But assuming, *arguendo*, that the officer's conduct in taking defendant before the Ventura County magistrate was unlawful, it would not follow that either the antecedent arrest or the search and seizure incidental thereto were illegal. There is nothing in the circumstances here shown to provide any basis for the application of the exclusionary rule of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. Unlawful activity which does not produce the evidence sought to be suppressed and which is entirely unrelated and collateral to the securing of such evidence affords no basis for applying a rule of exclusion. *People v. Maddox*, 46 Cal.2d 301, 305, 294 P.2d 6; *People v. Martin*, 45 Cal.2d 755, 763, 290 P.2d 855; *People v. Boyles*, 45 Cal.2d 652, 654-655, 290 P.2d 535.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

164 Cal.App.2d 218

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**  
**v.**  
**Lafayette SMYRE, Defendant and**  
**Appellant.**  
**Cr. 3424.**

District Court of Appeal, First District,  
 Division 2, California.

Oct. 16, 1958.

Rehearing Denied Nov. 14, 1958.

Hearing Denied Dec. 10, 1958.

Prosecution for violation of narcotic laws. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence was sufficient to sustain conviction and that trial court did not err in submitting two counts of indictment, one being for the possession of heroin and the second being for the sale, furnishing or giving away of heroin, to jury and then dismissing the possession count after verdict but before sentencing.

Affirmed.

**1. Poisons ☞9**

Evidence, which was entirely circumstantial, was sufficient to sustain judgment of conviction for possession of heroin and the sale, furnishing or giving away of heroin. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1099.

**2. Indictment and Information ☞144**

In prosecution for narcotic violations on indictment charging in one count the possession of heroin and in the second count the sale, furnishing or giving away of heroin, there was no error by trial court in submitting both counts of indictment to jury and then dismissing count one after the verdict. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 654, 954, 1099.

**3. Arrest ☞63(3), 71**

Where police officers followed party in hopes of obtaining sufficient evidence of prostitution to arrest her or to talk to her further about her activities and knocked on

her hotel room and were admitted by her and during police interrogation of her and the defendant who was in the hotel room they noticed defendant's attempt to conceal a small packet which contained heroin, under the circumstances, police questioning of defendant and other party was reasonable and proper as was the officer's desire after defendant's arrest, to examine defendant's coat in which a spoon containing heroin particles was found, and the packet of heroin and spoon were not obtained as result of illegal search and seizure.

**4. Criminal Law ☞260(11)**

Where party renting hotel room responded to police knock on door, question of whether party consented to entry of officers was a question of fact properly left to the trial court.

**5. Searches and Seizures ☞7(27)**

Where police officers entered hotel room occupied by party who had opened door for police officers, entry was with proper consent and not unlawful.

**6. Searches and Seizures ☞3(1)**

Once police officers, not having a search warrant, were in room by occupant's consent, officers were not required to close their eyes to readily visible contraband.

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Benjamin M. Davis, San Francisco, Yin Soon Wong, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Richard S. L. Roddis, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

On February 5, 1957, the defendant and one Mary Frazer were charged by information with the possession of heroin on January 18, 1957, in violation of Health & Safety Code, section 11500. The information was amended to allege three prior convictions as to Mary Frazer and one prior conviction as to the defendant for violation of Health & Safety Code, section 11500. The defendant entered a plea of not guilty and denied the prior conviction. Mary Frazer entered a

plea of not guilty and admitted the prior convictions. On March 7, 1957, defendant was charged by indictment with two counts of violation of Health & Safety Code, section 11500; one, for the possession of heroin on February 20, 1957, and the second, for the sale, furnishing or giving away of heroin on February 20, 1957. The indictment was amended to also charge a prior conviction. On April 5, 1957, defendant entered his plea of not guilty to each count of the indictment and denied the alleged prior conviction. Trial date was set for June 10, 1957. On June 10, 1957, the information was dismissed as to Mary Frazer, under Penal Code, section 1099, on motion of the District Attorney. By permission of the court the indictment and information as to the appellant were consolidated for trial. The defendant changed his plea to admit the prior conviction charge.

At the trial, after the conclusion of the prosecution's case in chief, the defendant moved to strike certain evidence, for an advised verdict on the information, and for a dismissal of the possession charge of the indictment. All of these motions were denied. No evidence was offered on behalf of the defendant. A jury trial resulted in a verdict of guilty on both counts charged in the indictment and on the charge of the information. On June 14, 1957, the court granted defendant's motion to dismiss the possession count of the indictment and denied defendant's motions for a new trial and in arrest of judgment. Defendant was sentenced to consecutive terms on the remaining two charges for the possession charged in the information and the sale and furnishing charge of the indictment. This appeal is taken from the judgment of conviction, the order denying a new trial and the order denying the motion for arrest of judgment.

On appeal defendant urges that the following prejudicial errors compel a reversal of the judgment.

1. Insufficiency of the evidence as to the sale count charged in the indictment.

2. The trial court submitted both the possession and sale counts of the indictment to the jury and then dismissed the possession

count after verdicts had been rendered on both.

3. The trial court instructed the jury that the defendant could be convicted on all offenses charged.

4. The erroneous admission of evidence obtained by illegal search and seizure to prove the possession of heroin charged in the information.

5. Insufficiency of the evidence as to the possession count charged in the information.

[1] As to defendant's first contention, the evidence is entirely circumstantial and amply supports the verdict of the jury. Agent Nickoloff, of the Federal Bureau of Narcotics, testified that on February 20, he first searched informant Howard and ascertained that Howard had no narcotics on his person. He then gave Howard \$20 in currency belonging to the United States Government, the serial numbers of which had been recorded. Nickoloff and Howard then drove to the intersection of Fulton and Webster Streets in San Francisco. They were looking for one "Smiley". After parking the car, Howard walked to Fillmore Street and continued walking north. Nickoloff followed Howard and kept him in view continually. Nickoloff watched Howard meet the defendant in Foster's Cafe. He saw that some object was passed between the two men but could not determine its nature. He then saw the defendant and Howard enter a pool hall and then a barbershop next door to the pool hall. The defendant went to the rear of the barbershop and disappeared from Nickoloff's view for about 30 seconds to a minute. Howard remained well in view in front of the barbershop. The two men left the barbershop and reentered the pool hall. There, he again observed a meeting of their hands. Howard then left the defendant, rejoined Nickoloff and handed him a small bundle which was later found to contain heroin. Nickoloff and Howard returned to the Bureau of Narcotics Office. Nickoloff again searched Howard and found no funds or narcotics. The defendant was arrested the next day. *People v. Richardson*, 152 Cal.App.2d 310, 313 P.2d 651, cited by the



defendant, is not applicable here; in that case the police did not witness the transaction and the purchaser was not searched.

[2] The trial court did not err in submitting both counts of the indictment to the jury and then dismissing count one after the verdict. Penal Code, section 954, expressly authorizes the prosecution to plead "different statements of the same offense," under separate counts. Penal Code, section 654, provides that a single act or omission may not be punished under more than one theory of criminal liability. Here, the count was dismissed before sentencing. It does not appear that the action of the trial court was erroneous or prejudicial. *People v. Lyons*, 50 Cal.2d 245, 324 P.2d 556. The same is true of the instruction that the defendant could be convicted of all the offenses charged. *People v. Smith*, 36 Cal.2d 444, 447-448, 224 P.2d 719.

Defendant's fourth contention is that the evidence introduced to prove the offense charged in the information, possession of heroin on January 20, was obtained by unlawful search and seizure. The facts of that occurrence, as related by the two police officers and Mary Frazer are as follows: About 5 A.M. on January 18, 1957, Officers Engler and Caulfield saw Mary Frazer leave an automobile in front of the New Fillmore Hotel with an unidentified male. She entered the hotel with the man, and after a brief conversation at the desk, the man left alone. Both officers knew Mary Frazer and from past observation and information suspected she was engaging in prostitution. The officers had previously talked to her at another hotel and asked her to cease her activities and leave the area. They saw Mary Frazer leave the hotel and enter a restaurant a few doors from the hotel. Mary Frazer testified that she met the defendant, then unknown to the police officers, in the restaurant and discussed narcotics with him. She stated she was then a user of heroin and that the defendant had told her he had some good heroin. About 5:30 A.M. she and the defendant left the restaurant and entered

the hotel in order to use narcotics. They walked up the hotel stairway without stopping at the desk. The officers followed them, and inquired at the desk about Mary Frazer's room number. They went up to room 133 and listened at the door for two or three minutes. They could hear a conversation but could not discern its content. One of the officers knocked on the door of the room, stated that they were police officers and wanted to come in to talk to her. She testified that after the knock on the door the defendant got up and went over to the sink and told her to wait a minute. About 30 seconds later the officers heard water running. About a minute and a half later, Mary Frazer said "Yes", and opened the door a few inches. On seeing the police officers, she opened the door  $\frac{3}{4}$ th of the way and sat down on the bed which was close to the door. The officers entered and noticed that Mary Frazer was partially disrobed. The defendant, fully dressed, except for his coat, was standing near the wash basin at the rear of the room. The officers talked to Mary Frazer and the defendant for about 15 minutes. Mary Frazer stated she knew the defendant only as "Smiley". Then the defendant reached in his coat which was hanging in a temporary closet at the rear of the room. One of the officers asked the defendant to stay away from the coat until he could examine it. The defendant had been previously patted for weapons but his coat had not been inspected. The officer observed that the defendant who had been calm during the prior period of questioning began to shake and generally appear to be in an agitated and nervous condition. As he stepped toward the defendant, the defendant dropped a number of keys and coins on the floor. The officer looked on the floor and saw a small white article projecting from beneath the defendant's left foot. The defendant's foot appeared to cover the article about  $\frac{3}{4}$ th of the way. The officer picked up the object which turned out to be a small packet of white powder, which was subsequently determined to be heroin.

Both the defendant and Mary Frazer denied knowledge of the packet. Both were placed under arrest and the room searched. The contents of a brown toilet kit belonging to the defendant was examined for weapons. The defendant dumped some of the articles in the kit on the bed. The officers returned the kit to the defendant. The defendant and Mary Frazer were taken to the police station and booked. During the booking the brown toilet kit was examined in detail. A red plastic spoon coated with white powder was found. The powder on the spoon was analyzed and found to contain heroin. Mary Frazer stated that she had not seen the red spoon in the hotel room and that it was not hers.

[3, 4] Defendant argues that the packet and the spoon were obtained as a result of an illegal search and seizure and therefore improperly admitted into evidence. He argues that the entry of the police officers into the hotel room was illegal. It is conceded that the officers did not have either a search or arrest warrant, and that they were following Mary Frazer in the hope of obtaining sufficient evidence of prostitution to arrest her or to talk to her further about her activities. It cannot be questioned that under the circumstances their suspicions were reasonable. *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855; *People v. Michael*, 45 Cal.2d 751, 290 P.2d 852. After they knocked on the door and stated their purpose, Mary Frazer opened the door a few inches. Upon seeing the officers, she opened the door further, stepped back and sat down on the bed. Under these circumstances she clearly consented to the entry of the officers. She was the person with proper authority to give consent. There is nothing in the rec-

ord to indicate that her consent was anything but voluntary. The question of her consent was a question of fact properly left to the trial court. Her expression of assent to the officers and her action in opening the door, suggests an affirmative invitation to the officers to enter. *People v. Holland*, 148 Cal.App.2d 933, 307 P.2d 703.

[5, 6] The entry of the officers into the room was made with proper consent and not unlawful. *People v. Burke*, 47 Cal.2d 45, 301 P.2d 241; *People v. Michael*, 45 Cal.2d 751, 290 P.2d 852; *People v. Bouchard*, 161 Cal.App.2d 302, 326 P.2d 646. Their questioning of defendant and Mary Frazer were reasonable and proper under the circumstances as was the officer's desire to examine the defendant's coat. Once in the room, the officers were not required to close their eyes to readily visible contraband. *People v. Roberts*, 47 Cal.2d 374, 303 P.2d 721; *People v. Bouchard*, 161 Cal.App.2d 302, 326 P.2d 646; *People v. Ambrose*, 155 Cal.App.2d 513, 318 P.2d 181. The spoon was found in a proper search made after the arrest. It follows that there was no unlawful search and seizure of the items complained of and that they were properly introduced into evidence.

From what has been said above, it is clear that there is ample evidence to support the judgment of possession.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DRAPER, J., and MARTINELLI, J. pro tem., concur.

51 Cal.2d 119

Peter O. MATTEI, Plaintiff and Appellant,  
v.

Amelia F. HOPPER, Defendant and  
Respondent.

S. F. 19806.

Supreme Court of California.

In Bank.

Oct. 24, 1958.

Purchaser's action for breach of contract by vendor who failed to convey real property in accordance with terms of deposit receipt executed by parties. The Superior Court, Contra Costa County, Wakefield Taylor, J., rendered judgment in favor of vendor, and purchaser appealed. The Supreme Court, Spence, J., held that contract for sale of real estate providing that agreement was subject to purchaser's obtaining leases satisfactory to purchaser was neither illusory nor lacking in mutuality of obligation and was enforceable by purchaser.

Reversed.

McComb, J., dissented.

Opinion, 326 P.2d 191, vacated.

#### 1. Vendor and Purchaser ⇨21

Where agreement to sell property was evidenced on form known as deposit receipt requiring deposit of \$1,000 and providing that agreement was subject to purchaser's securing satisfactory leases, a binding and enforceable contract arose giving purchaser power and privilege to terminate it in event he did not obtain such leases, and deposit receipt was not, vendor's offer which could only be accepted by purchaser notifying vendor that all of desired leases had been obtained and were satisfactory to purchaser.

#### 2. Contracts ⇨57

Where parties attempt to make contract in which promises are exchanged as the consideration, promises must be mutual in obligation, and, for contract to bind either party, both must have assumed some legal obligations, or agreement lacks con-

sideration and no enforceable contract has been created.

#### 3. Contracts ⇨57

Where parties attempt to make contract in which mutual promises are exchanged as consideration, if one of promises leaves a party free to perform or withdraw from agreement at his own unrestricted pleasure, promise is deemed illusory and it provides no consideration.

#### 4. Contracts ⇨10(5)

Contract for sale of real estate providing that agreement was subject to purchaser's obtaining leases satisfactory to purchaser was neither illusory nor lacking in mutuality of obligation and was enforceable by purchaser; disapproving *Lawrence Block Co. v. Palston and Pruitt v. Fontana*.

Jay R. Martin and William F. Sharon, Oakland, for appellant.

Carlson, Collins, Gordon & Bold, George R. Gordon, Martinez, John L. Garaventa, Concord, and Dean Ormsby, Martinez, for respondent.

SPENCE, Justice.

Plaintiff brought this action for damages after defendant allegedly breached a contract by failing to convey her real property in accordance with the terms of a deposit receipt which the parties had executed. After a trial without a jury, the court concluded that the agreement was "illusory" and lacking in "mutuality." From the judgment accordingly entered in favor of defendant, plaintiff appeals.

Plaintiff was a real estate developer. He was planning to construct a shopping center on a tract adjacent to defendant's land. For several months, a real estate agent attempted to negotiate a sale of defendant's property under terms agreeable to both parties. After several of plaintiff's proposals had been rejected by defendant because of the inadequacy of the price offered, defendant submitted an offer. Plaintiff accepted on the same day.



The parties' written agreement was evidenced on a form supplied by the real estate agent, commonly known as a deposit receipt. Under its terms, plaintiff was required to deposit \$1,000 of the total purchase price of \$57,500 with the real estate agent, and was given 120 days to "examine the title and consummate the purchase." At the expiration of that period, the balance of the price was "due and payable upon tender of a good and sufficient deed of the property sold." The concluding paragraph of the deposit receipt provided: "Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." This clause and the 120-day period were desired by plaintiff as a means for arranging satisfactory leases of the shopping center buildings prior to the time he was finally committed to pay the balance of the purchase price and to take title to defendant's property.

Plaintiff took the first step in complying with the agreement by turning over the \$1,000 deposit to the real estate agent. While he was in the process of securing the leases and before the 120 days had elapsed, defendant's attorney notified plaintiff that defendant would not sell her land under the terms contained in the deposit receipt. Thereafter, defendant was informed that satisfactory leases had been obtained and that plaintiff had offered to pay the balance of the purchase price. Defendant failed to tender the deed as provided in the deposit receipt.

[1] Initially, defendant's thesis that the deposit receipt constituted no more than an offer by her, which could only be accepted by plaintiff notifying her that all of the desired leases had been obtained and were satisfactory to him, must be rejected. Nowhere does the agreement mention the necessity of any such notice. Nor does the provision making the agreement "subject to" plaintiff's securing "satisfactory" leases necessarily constitute a condition to the existence of a contract. Rather, the whole purchase receipt and this particular clause must be read as merely making plaintiff's performance dependent on the obtaining of

"satisfactory" leases. Thus a contract arose, and plaintiff was given the power and privilege to terminate it in the event he did not obtain such leases. (See 3 Corbin, Contracts (1951), § 647, pp. 581-585.) This accords with the general view that deposit receipts are binding and enforceable contracts. (Cal. Practice Hand Book, Legal Aspects of Real Estate Transactions (1956), p. 63.)

[2, 3] However, the inclusion of this clause, specifying that leases "satisfactory" to plaintiff must be secured before he would be bound to perform, raises the basic question whether the consideration supporting the contract was thereby vitiated. When the parties attempt, as here, to make a contract where promises are exchanged as the consideration, the promises must be mutual in obligation. In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. *Shortell v. Evans-Ferguson Corp.*, 98 Cal. App. 650, 660-662, 277 P. 519; 1 Corbin, Contracts (1950), § 152, pp. 496-502.) Or, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration. See *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, D. C.N.D. Cal., 123 F. Supp. 484, 493. Whether these problems are couched in terms of mutuality of obligation or the illusory nature of a promise, the underlying issue is the same—consideration. *Ibid.*

While contracts making the duty of performance of one of the parties conditional upon his satisfaction would seem to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such "satisfaction" clauses have been given effect. They have been divided into two primary categories and have been accorded different treatment on that basis. First, in those contracts where the condition calls for satisfaction as to commercial value or quality, operative fitness, or me-

chanical utility, dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously (*Collins v. Vickter Manor, Inc.*, 47 Cal.2d 875, 882-883, 306 P.2d 783), and the standard of a reasonable person is used in determining whether satisfaction has been received. *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 296, 197 P. 105; *Fielding & Shepley, Inc., v. Dow*, 72 Cal.App. 2d 18, 21, 163 P.2d 908; *Fruit Growers' Supply Co. v. Goss*, 4 Cal.App.2d 651, 654, 41 P.2d 357; *Scott Co., Inc., v. Rolkin*, 133 Cal.App. 209, 212, 23 P.2d 1065; *Melton v. Story*, 113 Cal.App. 609, 612-614, 298 P. 1032; *Jones-McLaughlin, Inc., v. Kelly*, 100 Cal.App. 315, 321-325, 279 P. 1076; *Bruner v. Hegyi*, 42 Cal.App. 97, 99, 183 P. 369. Of the cited cases, two have expressly rejected the arguments that such clauses either rendered the contracts illusory (*Collins v. Vickter Manor, Inc.*, *supra*) or deprived the promises of their mutuality of obligation. *Melton v. Story*, *supra*. The remaining cases tacitly assumed the creation of a valid contract. However, it would seem that the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard as envisioned by this line of cases. Illustrative of some of the factors which would have to be considered in this case are the duration of the leases, their provisions for renewal options, if any, their covenants and restrictions, the amounts of the rentals, the financial responsibility of the lessees, and the character of the lessees' businesses.

This multiplicity of factors which must be considered in evaluating a lease shows that this case more appropriately falls within the second line of authorities dealing with "satisfaction" clauses, being those involving fancy, taste, or judgment. Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract. *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 702-705, 182 P. 428, 6 A.L.R. 1493; *Brenner v. Redlick Furniture Co.*,

113 Cal.App. 343, 346-347, 298 P. 62; *Kendis v. Cohn*, 90 Cal.App. 41, 66-68, 265 P. 844; *Schuyler v. Pantages*, 54 Cal.App. 83, 85-87, 201 P. 137; see also *Van Denmark v. California Home Extension Ass'n*, 43 Cal.App. 685, 687-689, 185 P. 866. Although these decisions do not expressly discuss the issues of mutuality of obligation or illusory promises, they necessarily imply that the promisor's duty to exercise his judgment in good faith is an adequate consideration to support the contract. None of these cases voided the contracts on the ground that they were illusory or lacking in mutuality of obligation. Defendant's attempts to distinguish these cases are unavailing, since they are predicated upon the assumption that the deposit receipt was not a contract making plaintiff's performance conditional on his satisfaction. As seen above, this was the precise nature of the agreement. Even though the "satisfaction" clauses discussed in the above-cited cases dealt with performances to be received as parts of the agreed exchanges, the fact that the leases here which determined plaintiff's satisfaction were not part of the performance to be rendered is not material. The standard of evaluating plaintiff's satisfaction—good faith—applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged.

Moreover, the secondary authorities are in accord with the California cases on the general principles governing "satisfaction" contracts. "It has been questioned whether an agreement in which the promise of one party is conditioned on his own or the other party's satisfaction contains the elements of a contract—whether the agreement is not illusory in character because conditioned upon the whim or caprice of the party to be satisfied. Since, however, such a promise is generally considered as requiring a performance which shall be satisfactory to him in the exercise of an honest judgment, such contracts have been almost universally upheld." (3 Williston, *Contracts* (rev. ed. 1936), § 675A, p. 1943;

see also 3 Corbin, Contracts (1951), §§ 644, 645, pp. 560-572.) "A promise conditional upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine." (Restatement, Contracts (1932), § 265, comment a.)

If the foregoing cases and other authorities were the only ones relevant, there would be little doubt that the deposit receipt here should not be deemed illusory or lacking in mutuality of obligation because it contained the "satisfaction" clause. However, language in two recent cases led the trial court to the contrary conclusion. The first case, *Lawrence Block Co. v. Palston*, 123 Cal.App.2d 300, 266 P.2d 856, 858, stated that the following two conditions placed in an offer to buy an apartment building would have made the resulting contract illusory: "O.P.A. Rent statements to be approved by Buyer" and "Subject to buyer's inspection and approval of all apartments." These provisions were said to give the purchaser "unrestricted discretion" in deciding whether he would be bound to the contract and to provide no "standard" which could be used in compelling him to perform. 123 Cal.App.2d at pages 308-309, 266 P.2d at pages 861-862. However, this language was not necessary to the decision. The plaintiff in *Lawrence Block Co.* was a real estate broker seeking a commission, his right to which depended upon the existence of a binding agreement between the buyer and seller. The seller had not accepted the buyer's offer as originally written, but had added other conditions. This change constituted a counter-offer. Since the latter was not accepted by the buyer, no binding contract was created and the broker was not entitled to his commission.

The other case, *Pruitt v. Fontana*, 143 Cal.App.2d 675, 300 P.2d 371, 377, pre-

sented a similar situation. The court concluded that the written instrument with a provision making the sale of land subject to the covenants and easements being "approved by the buyers" was illusory. It employed both the reasoning and language of *Lawrence Block Co.* in deciding that this clause provided no "objective criterion" preventing the buyers from exercising an "unrestricted subjective discretion" in deciding whether they would be bound. 143 Cal.App.2d at pages 684-685, 300 P.2d at page 377. But again, this language was not necessary to the result reached. The buyers in *Pruitt* refused to approve all of the easements of record, and the parties entered into a new and different oral agreement. The defendant seller was held to be estopped to assert the statute of frauds against this subsequent contract, and the judgment of dismissal entered after the sustaining of demurrers was reversed.

While the language in these two cases might be dismissed as mere dicta, the fact that the trial court relied thereon requires us to examine the reasoning employed. Both courts were concerned with finding an objective standard by which they could compel performance. This view apparently stems from the statement in *Lawrence Block Co.* that "The standard 'as to the satisfaction of a reasonable person' does not apply where the performance involves a matter dependent on judgment." 123 Cal. App.2d at page 309, 266 P.2d at page 862. By making this assertion without any qualification, the court necessarily implied that there is no other standard available. Of course, this entirely disregards those cases which have upheld "satisfaction" clauses dependent on the exercise of judgment. In such cases, the criterion becomes one of good faith. Insofar as the language in *Lawrence Block Co.* and *Pruitt* represented a departure from the established rules governing "satisfaction" clauses, they are hereby disapproved.

[4] We conclude that the contract here was neither illusory nor lacking in mutuality of obligation because the parties inserted a provision in their contract mak-



ing plaintiff's performance dependent on his satisfaction with the leases to be obtained by him.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

McCOMB, J., dissents.



164 Cal.App.2d 374

Thomas EISTRAT, Plaintiff and Appellant,  
v.

WESTERN HARDWOOD LUMBER  
COMPANY, a Corporation,  
Defendant and Respondent.

Civ. 22652.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 20, 1958.

Rehearing Denied Nov. 13, 1958.

Hearing Denied Dec. 17, 1958.

Action for conversion of lumber cut from timberlands owned by plaintiff. The Superior Court, Los Angeles County, Vernon W. Hunt, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Lillie, J., held that evidence sustained finding that lumber company, which under an agreement with plaintiff, entered his land and cut and logged timber, had title to lumber which it cut from such timber and sold to defendant and that defendant therefore was not guilty of conversion in asserting ownership over such lumber.

Affirmed.

#### 1. Trover and Conversion Ⓒ35

In action for conversion, plaintiff must prove either ownership with right of possession, or actual possession of the article claimed to have been converted at the time of the alleged conversion.

#### 2. Logs and Logging Ⓒ35

In action for conversion of lumber cut from timberlands owned by plaintiff, evidence sustained finding that lumber company which under an agreement with plaintiff, entered his land and cut and logged timber, had title to lumber which it cut from such timber and sold to defendant, and that defendant therefore was not guilty of conversion in asserting ownership over such lumber.

#### 3. Logs and Logging Ⓒ5

Timber severed from the soil under the provisions of an agreement, license or permit, before the expiration or revocation thereof, becomes the personal property of the buyer or licensee, and he is vested with the rights incident to ownership of personal property, and is entitled to remove it as his own.

#### 4. Logs and Logging Ⓒ5

One who has felled lumber under a purchase agreement retains title to the lumber after the agreement has been revoked.

#### 5. Logs and Logging Ⓒ35

Where timberland owner did not terminate an agreement with a lumber company for its cutting of timber on plaintiff's lands, until plaintiff discovered a violation of fire laws, defendant which purchased lumber from lumber company could not be deemed guilty of conversion as to lumber cut prior to termination of the agreement on theory that lumber company, by violation of fire laws prior to termination, and thus by violation of the cutting agreement, cut all timber wrongfully, with title not passing to it, nor to defendant.

#### 6. Judgment Ⓒ829(3)

Where plaintiff in a conversion action was a party to a bankruptcy action involving a lumber company which it authorized to go upon plaintiff's lands to cut timber, some of which lumber company sold to defendant, plaintiff was bound by federal court's finding that plaintiff waived certain defaults of lumber company by accepting

payments from it, as well as by accepting payments upon plaintiff's claim in bankruptcy.

#### 7. Logs and Logging ⚡35

Plaintiff, in a conversion action against buyer of certain lumber from a company which plaintiff authorized to go upon his land to cut timber, would be deemed to have affirmed title in lumber company to all lumber cut by it on plaintiff's property prior to a certain date, by instituting a suit on that date seeking to recover balance allegedly due for timber cut and logged under the logging agreement.

#### 8. Evidence ⚡317(4)

In conversion action, trial court did not err in refusing to permit a plaintiff's witness to testify as to a certain conversation outside of presence of defendant on theory it would prove joint venture, where record was bare of any evidence of a joint venture.

#### 9. Estoppel ⚡75

Timberland owner, by allowing a lumber company to come upon his property, set up a mill and cut timber, was estopped to assert title against buyer of lumber from lumber company.

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Thomas Eistrat, in pro. per.

Wright, Wright, Goldwater & Wright, Loyd Wright, Edgar R. Carver, Jr., Los Angeles, for respondent.

LILLIE, Justice.

The action in the court below involved a claim of damages for conversion of lumber cut from timberlands owned by plaintiff. The matter was heard by the court sitting without a jury. It is from the judgment for defendant, plaintiff appeals.

Viewing the evidence in a light most favorable to respondent, the essential facts are these: Plaintiff and his wife owned timber-bearing lands in Tulare County. On August 2, 1948, they entered into a timber sales agreement with Jones Lumber and Mill Company (hereinafter referred to as Jones Company) under which it was to

enter plaintiff's land and cut and log timber. The contract provided in paragraph Two: "that no title or ownership of any timber shall pass from seller until after the timber is cut," and payment therefor shall be made each week for all timber cut the preceding week. Paragraph Four required compliance with all laws, rules and regulations pertaining to logging; and paragraph Eleven provided that should Jones Company fail to cut and pay for timber as required it shall have no right to continue cutting without prior written authorization from plaintiff.

On August 6, 1948, Jones Company moved a small mill onto the property and proceeded to cut timber which it sold to various purchasers, including defendant. On October 8, 1948, plaintiff visited the premises, observed a lack of adequate fire protection and orally advised Jones Company he was terminating the agreement. He also notified it in writing on October 11, 1948.

Up to October 8, 1948, defendant, a prior customer of Jones Company, made from it considerable purchases of timber cut and logged, receiving 11 loads. Thereafter, defendant took 3 loads of lumber from plaintiff's property—2 on October 19, 1948, and 1 on October 21, 1948. In all, defendant bought from Jones Company, and fully paid for, 86,958 board feet of lumber. On October 25, 1948, defendant made to Jones Company its last payment in full for all lumber purchased by it, concluding their dealings.

Prior to October 11, 1948, plaintiff had received various payments from Jones Company for timber cut; and from that date through the beginning of December, 1948, plaintiff continued to receive and cash checks from Jones Company on account of lumber cut and logged by it, the last, in the sum of \$1,600 dated December 3, 1948. During the last of November or the first part of December, 1948, plaintiff, claiming he had not received all of the money due from Jones Company under the contract, told defendant's vice-president he intended to sue Jones Company for

monies due him; and on December 9, 1948, plaintiff's wife sued Jones Company in Tulare County. In this suit plaintiff and his wife acknowledged receipt of the payments from Jones Company on account of timber cut and logged under the agreement of August 2, 1948, and sued to recover the balance due. In that action certain monies due Jones Company in the hands of another of its customers, Brush Industrial Lumber Company, were attached.

Subsequently, on June 24, 1949, Jones filed a petition in bankruptcy in the Federal court, No. 6688, in which proceeding plaintiff's wife filed a claim based on the contract of August 2, 1948.

In 1949, after the filing of the bankruptcy proceeding, plaintiff asked defendant's vice-president to aid him in establishing his claim against Jones Company under the contract by supplying him with an account of the amount of lumber received by defendant from Jones Company and paid for. Defendant did so. Jones was adjudicated a bankrupt and on September 29, 1949, plaintiff filed a petition to reclaim his timber property in the Federal court, which petition was granted September 27, 1951. Its order was entered October 21, 1951.

Subsequent to the discharge of Jones as a bankrupt, plaintiff on August 15, 1951, made his first and only demand on defendant for the return of the lumber it had purchased from Jones Company and fully paid for, or its purchase price. This action for conversion resulted.

With respect to the lumber purchased by defendant from Jones Company, the trial court found that: "said Jones Lumber and Mill Company had title to said lumber and were the owners thereof and that the plaintiff and the said Elma Eistrat did not at any time subsequent to August 2, 1948, and do not now have, nor did either of them have at any time subsequent to August 2, 1948, nor now have, any right, title or interest in or to said lumber, or any part thereof."

Appellant has made a general attack on all of the court's findings, urging that

"there is no substantial support in evidence to support any of the findings as to any facts found." His real contention seems to be that since Jones Company violated the fire laws, and hence the terms of the agreement, all lumber cut by it was wrongfully cut, title did not pass to it, and therefore could not pass to defendant.

Basically, the main issue before this court is whether the trial court's finding that Jones Company had title to the lumber sold to defendant is supported by substantial evidence.

[1,2] If plaintiff failed to meet the burden of proving his ownership to the cut lumber and right to its possession, the judgment of the trial court must be affirmed. It is well settled that "(I)n an action for conversion, plaintiff must prove either (1) ownership with the right of possession, or (2) actual possession of the article claimed to have been converted at the time of the alleged conversion. (Citations.)" *Scutt v. Bassett*, 86 Cal.App.2d 373, at page 375, 194 P.2d 781, at page 782. Applying the foregoing rule to the evidence in the instant case, it is clear plaintiff failed to establish a cause of action for conversion. The record shows that plaintiff had neither ownership of the lumber with a right to its possession, nor actual possession of it; and that Jones Company had good title to all lumber it cut and logged under the August 2, 1948, contract, and sold to defendant.

[3,4] Nor is there evidence that the 3 loads of lumber taken by defendant from plaintiff's property after October 8, 1948, were cut after the termination of the contract, in fact, the evidence points the other way. Jones Company's mill was not in operation on October 8, 1948; on that day its logging contractor told Jones in plaintiff's presence that he would do no more cutting; and there is no evidence that any cutting took place after October 8, 1948. In its letter of October 14, 1948, to plaintiff protesting termination of the contract, Jones Company advised him that the felling of timber had run about 25,000 feet ahead



of the logging operation. Obviously, the 3 loads of lumber taken by defendant after October 8, 1948, were cut before the termination of the contract, although not all removed by defendant until October 21, 1948. As to whether Jones Company had title to the already cut timber it is clear both from the contract itself and the authorities that timber severed from the soil under the provisions of an agreement, license or permit, before the expiration or revocation thereof, becomes the personal property of the purchaser or licensee. He is vested with the rights incident to ownership of personal property and is entitled to remove it as his own. *Sorensen v. Jacobson*, 1951, 125 Mont. 148, 232 P.2d 332, 26 A.L.R.2d 1186; 54 C.J.S. Logs and Logging § 29(c), pages 730-731. One who has felled lumber under a purchase agreement retains title to the lumber after the agreement has been revoked. *Anderson v. Moothart*, 198 Or. 354, 256 P.2d 257.

[5] Appellant argues that although he did not terminate the agreement until October 8, 1948, when he discovered the violation of fire laws, since the first week of August, 1948, Jones Company had violated them and its right to cut lumber terminated the first week in August. This argument completely ignores the authorities heretofore cited governing ownership of timber cut before revocation of an agreement. It also overlooks the terms of the contract of August 2, 1948, as well as the evidence. Nothing in the contract precludes the application of general logging rules; in fact, the agreement specifically provides for passage of title after the lumber is cut, and payment each week for that cut the preceding week. The penalty for breach of any of the terms of the contract is not forfeiture of lumber cut, but a termination of the right to continue further cutting. Besides, any breach of contract by Jones Company prior to the termination of the contract by plaintiff could not in itself constitute the basis for a conversion. *Emmert v. United Bank Etc. Co.*, 14 Cal.App.2d 1, 57 P.2d 963. Factually as well as legally, there is no merit to appellant's contention,

because the evidence fails to point to any breach of the agreement of August 2, 1948, prior to October 8, 1948. In fact, plaintiff admitted that prior to October 8, 1948, he had no reason to believe Jones Company was not complying with the agreement, and had made prior visitation to the premises on September 4, 1948. Plaintiff was apparently satisfied with its operations under the contract until October 8, 1948, because he made no objection thereto, and received and cashed checks amounting to \$1,573.45 from Jones Company under the contract until October 6, 1948. On October 8th, he voiced his first complaint, and then it concerned only inadequate fire protection and the method of cutting. Of interest at this point is Finding V of the Federal Court in the bankruptcy action, U.S.D.C. No. 6688, made September 27, 1951. The lower court in that connection found as follows: " \* \* \* that said U.S.D.C. in its findings in support of said order entered October 1, 1951, among other things, declares that any default in the performance of the terms and conditions of said timber sales agreement (hereinabove referred to) were waived by Thomas Eistrat and Elma Eistrat by acceptance of payments for and on account of lumber cut and logged by the partnership and the bankrupt with knowledge of the delinquency of the partnership and the bankrupt in performance of said provisions, with the exception of those provisions relating to compliance with the forestry rules with respect to fire hazards."

[6] Appellant objects to the trial court's finding herein on the ground that the Federal court's finding upon which it was based was unnecessary to support the Federal judgment, was surplusage and therefore cannot bind plaintiff. There is no doubt but that plaintiff, a party to the bankruptcy action, is bound by the Federal court's finding that plaintiff waived certain defaults of Jones Company by accepting payments from it, as well as by accepting payments upon plaintiff's claim in bankruptcy. *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892; *Hardware Mut. Ins. Co.*

v. Valentine, 119 Cal.App.2d 125, 259 P.2d 70; Martin Music Co. v. Robb, 115 Cal. App. 414, 1 P.2d 1000. The payments referred to by the Federal court are those received by plaintiff from Jones Company after plaintiff notified it of its breach and terminated the agreement. The last payment accepted by plaintiff consisted of \$1,600 on December 3, 1948.

Appellant has cited for our attention the recent Supreme Court opinion in *Eistrat v. Cekada*, 50 Cal.2d 289, 324 P.2d 881, wherein he claims that the court found the Federal findings held that he and not Jones had title to the lumber. A reading of this opinion discloses a discussion concerning only the interpretation of a restraining order issued by the bankruptcy court to prevent actions against the bankrupt. Other findings relating to the ownership of the timber were not discussed.

[7] The trial court further found that plaintiff affirmed title in Jones Company to all lumber cut by it on plaintiff's property prior to December 9, 1948, by instituting a suit on that date in Tulare County in the name of his wife, in which they acknowledged receipt of certain payments on account of the timber cut and logged under the contract of August 2, 1948, and sought to recover a balance allegedly due for timber cut and logged under the agreement. Here again are presented questions of fact which the trial court decided adverse to plaintiff. The evidence is substantial to support the finding and the reviewing court will not disturb it. Furthermore, the Federal court heretofore made a similar finding in this connection which is binding on plaintiff.

Substantial evidence in the record also sustains the trial court's finding that plaintiff waived rights, if any he had against defendant in conversion, and elected to pursue his remedy against Jones Company. It is clear that originally plaintiff deliberately chose to proceed against Jones Company. He so advised defendant in early 1948. Later, after he had proceeded against Jones Company and wanted to file his claim in the

bankruptcy court against Jones, he even enlisted and received defendant's aid and assistance. It was not until he had exhausted his remedies against Jones Company and failed to satisfy his alleged claim that he decided to proceed against defendant, and then for the first time he made demand on it, after 2½ years. Appellant urges that the evidence shows that on October 11, 1948, plaintiff gave defendant notice that Jones Company did not have title to the lumber; but the trial court, as it had a right to do, rejected this testimony when defendant's vice-president testified to the contrary. Plaintiff also contends that the monies he accepted were only to hold as set-off or security collateral for damages; and that the attachment of funds held by Brush Industrial Lumber Company in the Tulare County action was without his authorization. Again the trial court decided from the evidence the factual questions how, in what manner and for what purposes the monies were received by plaintiff.

[8] Appellant argues that the trial court erred in refusing to permit his witness, Noral Sweem, to testify to a conversation between plaintiff and Jones outside of the presence of defendant. The record is not too clear what plaintiff wanted to prove since no formal offer of proof was made, but it discloses that Sweem hauled lumber to defendant from plaintiff's property in September and October of 1948. He testified that on October 8th, he was on the premises and heard an argument between Tom G. Jones and plaintiff. When plaintiff asked him the conversation, objection was made on the ground of hearsay. Asked by the court the purpose of the evidence, the plaintiff replied:

"Mr. Eistrat: I want to prove by this conversation my allegation. I have a joint venture allegation in my complaint, Third Amended Complaint, your Honor, and I believe all the participants in the joint venture are bound by the acts of the others in the venture, and I want to prove the facts.

"The Court: Is it your theory that the Western Hardwood Lumber Com-

pany was engaged in a joint venture within the meaning of the law defining joint ventures?

"Mr. Eistrat: Yes, your Honor."

"The Court: With Jones?"

"Mr. Eistrat: Yes, your Honor."

The objection was sustained on the ground that a proper foundation had not been laid, since there was no evidence in the record supporting a joint venture and it was hearsay as to defendant.

The record is bare of any evidence of a joint venture between defendant and Jones Company and the ruling was proper. Plaintiff claims some did exist and relies primarily upon \$3,000 defendant paid to Jones Company on August 18, 1948. But the record is clear that defendant had been a prior customer of Jones Company; had a contract with it for purchase of cut lumber and the \$3,000 was an advance payment on lumber to be later delivered; that 14 loads of lumber were subsequently delivered to defendant that the difference between the \$3,000 and the total amount was fully paid; and that all lumber delivered was paid for by defendant to Jones Company by October 25, 1948, on which date they concluded their business. Based upon this evidence, the trial court found that the \$3,000 was a loan to be, and was, repaid by Jones Company by loads of lumber and that no joint venture or partnership existed between them.

Appellant contends that because of the court's refusal to allow in the testimony of Mr. Sweem, and for other reasons, he was denied due process of law. We have already ruled on the propriety of the court's action in connection with Sweem's testimony; and it is clear that at no point during the trial was appellant denied due process of law. On the contrary, the record is replete with assistance given to plaintiff by the court. Plaintiff appeared in propria persona, and although he has had prior court experience in various cases involving his own litigation and some law training, the trial court was patient, courteous and helpful to him. He was fully heard and he had every opportunity to offer numerous

exhibits (40 in all), present his evidence and argue extensively. The record does not show that plaintiff was in any way precluded from putting on his case.

[9] On the issue of estoppel, appellant claims that assuming he is estopped because of his conduct in suing in Tulare County and accepting the money from Jones Company, an estoppel against defendant exists in his favor, which should place the parties on an equal basis. In the first place, the court did not and could not find from the evidence facts to support an estoppel favoring plaintiff. The record does not show evidence to support any kind of a finding that the defendant knew of Jones Company's violation of the fire laws; that defendant knew Jones Company did not own the timber; that defendant paid unconscionably low distress prices for it, or that any estoppel in plaintiff's favor existed. On the contrary in connection with plaintiff's contention that defendant, at the time it took the lumber, knew Jones Company did not own it, the authorities are clear that plaintiff, by allowing Jones Company to come upon his property, set up a mill and cut timber, is now estopped to assert title against defendant. There is no question but that defendant was a bona fide purchaser; that plaintiff in signing the agreement of August 2, 1948, knew Jones Company was going to take possession of the timberlands and sell lumber cut from the property, and that it was doing so and selling to defendant between August 2nd and October 8th. Assuming, under his theory, that plaintiff was the rightful owner of the lumber cut, under the law he would still be estopped from subsequently asserting title. In *Wendling Lbr. Co. v. Glenwood Lbr. Co.*, 54 Cal.App. 691, at page 696, 202 P. 929, at page 930, wherein plaintiff sold lumber to one Routt, a known dealer in lumber, and defendant without knowledge of the facts of the sale bought it from Routt, the court said: "These facts bring this within the rule that when the owner of a property clothes another with the apparent title to, or power of disposition of it and an innocent third party has thereby been induced to deal with the



apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title. (Citations)."

Further, in connection with estoppel, the evidence shows that plaintiff at no time advised defendant that Jones Company had no title to the lumber until after defendant's last transaction with it, when the lumber had been delivered and paid for in full.

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



51 Cal.2d 12

**Lewis GUERRIERI, Angela Lehman and Ophelia Divizia, copartners doing business under the firm name and style of Santa Fe Vintage Co., Plaintiffs and Appellants,**  
v.

**Phil J. SEVERINI and Severini Winery and Distillery, Defendants and Respondents.**

S. F. 19961.

Supreme Court of California,  
In Bank.

Oct. 17, 1958.

Action by wine buyer for damages for breach of contract by seller. The Superior Court, Fresno County, Strother P. Walton, J., entered judgment for seller and buyer appealed. The Supreme Court, Carter, J., held that where contract was entered into for purchase of wine and seller later stated that he would not deliver wine but buyer did not accept or act upon such statements at that time and later materially changed position by purchasing wine from another winery, buyer at that time exercised election to treat repudiation as a breach of contract.

Judgment reversed with directions.  
Opinion, 322 P.2d 561, vacated.

#### 1. Contracts ⇨313(2)

Anticipatory breach of contract occurs on part of one of the parties to an instru-

ment when he positively repudiates contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, and anticipatory breach must appear only with the clearest terms of repudiation of obligation of contract.

#### 2. Contracts ⇨313(1)

It is not within power of one party to a contract to discharge it by repudiating it.

#### 3. Sales ⇨405

Where contract was made for purchase of wine, even if it be assumed that seller's statement that he would not deliver wine amounted to a positive repudiation of contract, statement had effect of giving buyer right of election either to treat declaration as an empty threat and to wait until time for performance arrived, or to act upon declaration and treat it as a final assertion by seller and as a wrongful renunciation of contractual relation into which he had entered, and if buyer elected to pursue latter course it became a breach of contract excusing performance on buyer's part and gave him immediate right to recover upon it as such.

#### 4. Sales ⇨405

Where buyer had entered into contract for purchase of wine and seller then stated that it would not deliver wine, but upon being informed by buyer that executed order had been sent seller then stated that it would have to go through with the sale, and although seller's statement might have been considered as an anticipatory repudiation of contract it was not accepted or acted upon by buyer at that time, when buyer materially changed position almost a month later by purchasing other wine in order to obtain the quantity and quality of wines needed buyer exercised election to treat repudiation as breach of contract, and fact that buyer did not make payment in full within 48 hours as provided in contract was immaterial.

#### 5. Sales ⇨418(7)

Where wine buyer made contract for purchase of wine but subsequently seller

stated it would not deliver wine and buyer waited until almost a month later before purchasing wine from other source, purchasing of wine from other sources constituted election by buyer to treat repudiation as breach of contract of sale, and it could not be contended that buyer was required on day seller first repudiated contract to immediately buy wines of lesser quality than that contracted for in order to mitigate damages.

#### 6. Damages $\S$ 62(1)

Duty to minimize damages is predicated upon statutory ruling that a person is required to use reasonable care to prevent an unwarranted piling up of damages and extent of this duty is to use ordinary care and diligence to prevent enhancement of damages, but duty does not extend to necessity of going to extraordinary or unusual lengths to minimize damages. West's Ann.Civ.Code,  $\S$  1787, subds. 1-3.

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Wild, Christensen, Barnard & Wild, William R. Manson and Robert M. Barnard, Fresno, for appellants.

James Robert Nielsen, Iener W. Nielsen and Harold V. Thompson, Fresno, for respondents.

CARTER, Justice.

Plaintiffs, Lewis Guerrieri, and his copartners in the Santa Fe Vintage Company, brought an action for damages for the breach of a contract for the sale of approximately 200,000 gallons of wine against defendant, Phil J. Severini. In that action the trial court found that there was no contract entered into between the parties. On appeal the judgment was reversed and a new trial was ordered. *Guerrieri v. Severini*, 132 Cal.App.2d 269, 281 P.2d 879.

At the second trial, the court found that there was a valid written contract between the parties which had been breached by

defendant Severini but that plaintiffs had suffered no damage thereby.

Plaintiffs here contend that certain findings of the trial court are unsupported by the evidence. These findings will be discussed separately hereafter.

Plaintiffs, who are copartners, are the owners of the Santa Fe Vintage Company which engages in the business of producing, buying, bottling and marketing wine. Their principal place of business is in Los Angeles. Defendant and his wife were the owners of the Severini Winery & Distillery. Fritz Kyer was an independent wine broker doing business in Fresno and in the case at bar acted as agent for both plaintiffs and defendant. On approximately March 27, 1953, Kyer went to defendant and told him that he had an offer from the Santa Fe Vintage Company to buy defendant's wine and suggested a price of 36¢ per gallon therefor. Defendant accepted this offer and Kyer communicated the acceptance by telephone to Guerrieri at his place of business in Los Angeles. At Guerrieri's insistence Kyer prepared a written document which Severini read and signed on either March 30th or 31st.<sup>1</sup>

This document provided that approximately 200,000 gallons of sweet wines were "Sold to Santa Fe Vintage Co." and listed the quantities of each type of sweet wine involved. The price was stated to be 36¢ per gallon and it was provided that "All of the above wine to be out by August 1, 1953." This was "Accepted: Severini Winery & Distillery by Phil J. Severini (signed)." The contract was dated March 27, 1953 and its terms provided for "Cash for Entire Amount Immediately."

On the original appeal of this case the court noted that the provision for cash payment "immediately" meant "cash for entire amount within 48 hours"<sup>2</sup> (132 Cal. App.2d 269, 273, 281 P.2d 879, 882).

contract was signed on the 30th or 31st of March.

1. Severini testified that he signed the order on March 27th. Defendant's brief (pp. 10 and 13) appears to concede that this is erroneous and the opinion on the first appeal specifically states that the

2. In this connection it should be noted that the Reporter's Transcript on the

Right after Severini had signed the contract on March 30th or 31st Kyer talked to Guerrieri in Los Angeles on the telephone and at Guerrieri's suggestion immediately mailed the signed contract to him there. In the conversation Kyer told Guerrieri that Severini wanted him to send someone to gauge the wine in the tanks at the winery but Guerrieri said he did not think it was necessary and that he would take Severini's figures as to the quantity. Approximately one hour after Severini had signed the contract and it had been mailed to Guerrieri in Los Angeles, Severini called Kyer on the telephone and told him that due to some domestic difficulties he was having with his wife a restraining order had been placed against his disposition of the wine and that he would be unable to deliver it. Kyer testified that he told Severini that the signed order had already been mailed to plaintiff in Los Angeles. At the second trial Severini admitted that at the first trial, when informed that the written signed order had already been sent to Guerrieri, he had said "Well, if that's the case, that's all that can be done. We'll have to go through with it."<sup>3</sup>

When Kyer called Guerrieri on the telephone on March 30th or 31st to tell him that Severini had told him he would be unable to deliver the wine Guerrieri told him "you just have to get this wine because I want it. I tested and checked it and it is just the thing that we need."

The trial court, after finding (III) that the parties had entered into a binding, valid and enforceable contract "evidenced by a memorandum in writing, signed by the defendant" on March 27, 1953, found (V):

"That it was a term and condition of said contract that the plaintiffs were to have the wine tanks gauged at the Severini Winery and Distillery premises to deter-

mine the exact gallonage bought under the aforesaid contract within forty-eight hours of its execution, and that payment for the entire gallonage so bought was to be made by the plaintiff in cash for the entire amount immediately."

The record is uncontradicted that the gauging of the wine was no part of the contract; that which party was to do the gauging was never agreed on by the parties at any time.<sup>4</sup> In Finding VII the trial court found that the plaintiffs had not performed any of the terms, conditions and things on their part to be "done and performed under the said agreement, and specifically the plaintiffs did not gauge the said tanks of wine in accordance with the aforesaid contract, nor did they tender payment to the plaintiff [defendant] in accordance with its terms." It is uncontradicted that plaintiffs were at all times ready, able and willing to pay for the wine.

In Finding VI, it appears "That on March 27, 1956 [1953], subsequent to the execution of the aforesaid contract, and within twenty-four hours thereafter, the defendant, Phil J. Severini, *unconditionally repudiated* the contract and notified the plaintiffs that he would not deliver the wine in accordance with the said contract. That the refusal of the defendant to deliver the wine constituted a breach of the aforesaid contract." (Emphasis added.)

The record is uncontradicted that while the contract was dated March 27, 1953, it was actually signed on either March 30 or 31, 1953, and that approximately one hour after signing the contract Severini notified Kyer that he would not be able to deliver the wine. However, as has been heretofore set forth the record shows that when informed by Kyer that the written order had been mailed to Guerrieri in Los Angeles Severini said, "Well, if that's the case, that's all that can be done. We'll have to go

second trial is far from satisfactory and the record shows the difficulty the parties and witnesses had in recalling the events which occurred in 1953.

3. This same statement also appears in the first opinion on appeal (132 Cal.App.2d 269, 273, 281 P.2d 879, 882).

4. This also appears in the first opinion on appeal (132 Cal.App.2d 269, 272, 281 P.2d 879).



through with it." The record also shows that when Guerrieri was informed of Severini's repudiation he did not accept it but insisted that he wanted that particular wine and that Kyer would "have to get" it for him. The record also shows that at times subsequent to March 30 or 31, 1953, Guerrieri, Kyer and Severini tried to negotiate for the delivery of at least half of the wine which was the subject matter of the contract. A letter from Kyer to Guerrieri, dated April 29, 1953, which was introduced and marked as an exhibit, stated that "Phil [Severini] tells me that the wine he offered to give you is his exact half and represents all the wine he has in the winery with the exception of lees." Following a description of the wines and the quantities thereof, is a statement that the total gallonage is 88,000 gallons; that it was ready to ship, that Severini "would like for you to draw at least three truck loads a week until it is all out"; and the manner in which payment should be made. There is also a statement in the letter that "I did overlook mentioning that he [Severini] also told me that in case he got a release from his wife on the second half that you would be given first opportunity to buy it." The letter contains no mention of the price per gallon.

There is also in the record as an exhibit, a letter to Kyer from L. Kenneth Say as "Attorney for Severini Winery & Distillery" dated April 24, 1953, in which he refers to his client's "offer" of March 27th to sell 200,000 gallons of wine to the Santa Fe Vintage Company of Los Angeles and stating that since his "offer" has never been accepted by plaintiff's company "said offer is hereby withdrawn."

The record shows that with respect to the negotiations concerning the 88,000 gallons of wine which Severini represented to be one-half of the wine on hand at his winery, Guerrieri demanded to see Severini's Government Form 702 as evidence that the 88,000 gallons constituted one-half of the wine in the winery. This is, apparently, a government inventory of the wine in a winery. Severini refused to show him the Form 702.

On April 29, 1953, plaintiffs purchased the Morello Winery in order to get the quantity and quality of wine they desired. Prior to that time Kyer had been able to purchase for plaintiffs only about 74,000 gallons of such wine.

[1] The doctrine of breach of a contract by anticipatory repudiation is recognized in this state (*Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 104, 142 P.2d 741). "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof \* \* \*." *Crane v. East Side Canal, etc. Co.*, 6 Cal. App.2d 361, 367, 44 P.2d 455, 458. "Anticipatory breach must appear only with the clearest terms of repudiation of the obligation of the contract. *Atkinson v. District Bond Co.*, 5 Cal.App.2d 738, 43 P.2d 867; *Gold Mining & Water Co. v. Swinerton*, 23 Cal.2d 19, 142 P.2d 22; 4 Cal.Jur.Supp. 197." *Hertz Driv-Ur-Self Stations v. Schenley Distillers*, 119 Cal.App.2d 754, 760, 260 P.2d 93, 97.

[2] Even if we assume that Severini's statement to Kyer that he would not deliver the wine, which it will be recalled was followed by the statement that "We'll have to go through with it," amounted to that positive repudiation in the "clearest terms" required by the law, it is not within the power of one party to a contract to discharge it by repudiating it. *Main St. & A. P. R. Co. v. L. A. Trac. Co.*, 129 Cal. 301, 306, 61 P. 937; *Atkinson v. District Bond Co.*, 5 Cal. App.2d 738, 43 P.2d 867; *Tomboy Gold & Copper Co. v. Marks*, 185 Cal. 336, 197 P. 94; *Rehart v. Klossner*, 48 Cal.App.2d 46, 51, 119 P.2d 148; *Wilton v. Clarke*, 27 Cal. App.2d 1, 4, 80 P.2d 141.

[3] If we assume that Severini's statement amounted to a positive repudiation of the contract entered into by him to sell to plaintiffs 200,000 gallons of wine, it had the effect of giving the buyer, or promisee, Guerrieri, the right of election either to treat the declaration as an empty threat and

to wait until the time for performance arrived, or to act upon the declaration and treat it as a final assertion by Severini that he was no longer bound by the contract, and as a wrongful renunciation of the contractual relation into which he had entered. "If he elects to pursue the latter course, it becomes a breach of contract, excusing performance on his part and giving him an immediate right to recover upon it as such. Upon such election the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages. 6 Cal. Jur. 458-460; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356." Atkinson v. District Bond Co., 5 Cal.App.2d 738, 743, 744, 43 P.2d 867, 870. In Salot v. Wershow, 157 Cal.App.2d 352, 320 P.2d 926, 930, the rule was stated to be that "Among other requirements for application of the doctrine of breach by anticipatory repudiation are that the repudiatee treat the repudiation as a breach, and that there have [sic] been no retraction of the repudiation by the repudiator prior to the time for performance or prior to a detrimental change in position on the part of the repudiatee in reliance thereon. See Rauer's Law & Collection Co. v. Harrell, 32 Cal.App. 45, 162 P. 125." (Emphasis added.) And, see Abraham Lehr, Inc. v. Cortez, 57 Cal.App.2d 973, 978, 135 P.2d 684; Big Boy Drilling Corp. v. Etheridge, 44 Cal.App.2d 114, 117, 111 P.2d 953.

[4] When the uncontradicted facts shown by the record are considered in the light of the applicable law as heretofore set forth, it appears that while Severini's statement on the 30th or 31st of March that he would not deliver the wine, may be considered as an anticipatory repudiation of the contract,<sup>5</sup> it was not accepted, or acted upon, as such by Guerrieri, the promisee, at that time.

In other words, Guerrieri did not then elect to treat the repudiation as a breach of the contract. But when Guerrieri materially changed his position on April 29, 1953, by purchasing the Morello Winery in order to obtain the quantity and quality of wines needed by the Santa Fe Vintage Company, he exercised his election to treat the repudiation as a breach of the contract of sale.

The fact that Guerrieri did not make payment in full within forty-eight hours as provided in the contract is, under the facts here presented, immaterial. Guerrieri v. Severini, 132 Cal.App.2d 269, 273, 281 P.2d 879; Atkinson v. District Bond Co., 5 Cal. App.2d 738, 745, 43 P.2d 867; Fisher v. Chaffee, 49 Cal.App.2d 97, 100, 121 P.2d 51. As stated in section 320 of the Restatement of Contracts: "Manifestation by the injured party of a purpose to allow or to require performance by the promisor in spite of repudiation by him, does not nullify its effect as a breach, or prevent it from excusing performance of conditions and from discharging the duty to render a return performance.

*"Comment:*

"a. Although the effect of repudiation may be nullified \* \* \* it operates until so nullified not only as a breach but as a continuing excuse of conditions \* \* \* and as a continuing justification of the promisee's failure to perform a return promise \* \* \* even though the promisee has indicated a willingness to forgive the repudiation." See, also, Civ.Code, § 1440.

It appears, therefore, that Finding VI, as heretofore set forth, is not supported by the evidence.

Finding VIII is "That at the time of the defendant's refusal to deliver and *within twenty-four hours of the defendant's breach* of the said contract, there was available for purchase on the open market at Fresno, California, assorted sweet wines in suffi-

5. It would appear that Severini's statement on March 30th or 31st was not "distinct, unequivocal, and absolute" within the rule set forth in Atkinson v. District Bond Co., 5 Cal.App.2d 738,

748, 43 P.2d 867, 870; and Salot v. Wershow, 157 Cal.App.2d 352, 320 P.2d 926. The letter written by Severini's attorney on April 24, 1953, appears to constitute the repudiation.

cient quantities *and of a like quality as that contracted for* at an identical price per gallon.

"That the plaintiffs knew of the availability, *but that they unjustifiably refused to purchase the same.* That if plaintiffs had purchased the wine so offered to them, they would have suffered no damage whatsoever by reason of the defendant's refusal to deliver the wine under the aforesaid contract." (Emphasis added.)

[5] The record shows that prior to Guerrieri's purchase of the Severini wine he had examined samples of not only the wine referred to in Finding VIII, but other wines as well; that he had his winemaker examine them for alcohol sugars and quality. Guerrieri testified that "The result of that examination [of the Severini wines] was that they were very good wines. Some of them, especially the Muscat and Angelica, higher in balling sugar, which made them more valuable wines than the alcohol outside of the Angelica, which was 18.8 per cent"; that samples of other wines had been sent to him and rejected by him. The record shows that on March 30th or 31st when the contract was signed by Severini there was available a lot of 225,000 gallons of *unfinished* wine which was one of the wines which had been previously rejected by Guerrieri; that this wine was sold to a third person later in the day on March 30th or 31st after Guerrieri had been told of Severini's statement that he would not deliver the wine contracted for. The evidence is uncontradicted that this so-called available wine was unfinished wine, whereas the Severini wine was finished; that it was not as high in either alcohol or sugar content as the Severini wine, and that the Severini wine included muscat wine while this lot included muscatel.<sup>6</sup> Kyer testified that the 225,000 gallon lot of unfinished wine was available on the afternoon of the repudiation by Severini, but that it was sold later the same afternoon. There is no evidence in the record to show that wines similar in

alcohol and sugar content were available in the quantity desired by plaintiffs. If we were to hold, as contended for by defendant, and as found by the trial court, that plaintiffs were required, on the day Severini repudiated the contract, to buy immediately, within the hour, wines of lesser quality than that contracted for, and which had been previously rejected by them, we would be depriving the promisee of his election to treat the repudiation as a breach or continue to stand on the contract and would be forcing him to accept the repudiation as a breach of contract in violation of the rules of law heretofore set forth.

Kyer testified that on or about April 17, 1953, he purchased some 74,000 gallons of wine for Guerrieri at 40¢ per gallon; that the wine in the Morello Winery purchased by Guerrieri on April 29, 1953, was priced at 42½¢ per gallon. It appears from the record that on approximately April 7 or 8, 1953, the San Joaquin Valley experienced an unseasonable frost which resulted in the greatly increased prices of the same type wines. There is evidence in the record that after the frost muscat wine comparable to that which Severini had agreed to sell to plaintiffs and as high in sugar content was selling for 55¢ per gallon.

Section 1787, subdivisions 1, 2 and 3, of the Civil Code provide: "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, *the measure of damages*, in the absence of special circumstances showing proximate damages of a greater amount, *is the difference between the contract price and the market or current price of the goods at the time or times*

6. Muscat wine is made of 100% muscat grapes while muscatel is a blend of muscat and other grapes.



*when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.*" (Emphasis added.)

It is defendant's position that the buyer, Guerrieri, could have taken delivery of all of the wine at any time after the contract was signed; that no time, or times, were specified for delivery even though the contract provided that all of the wine must be taken from the winery by August 1, 1953. It is defendant's theory that there was no anticipatory repudiation in the case at bar; that an actual breach took place on March 30 or 31, 1953, and that the damages should be measured as of that time. From what we have heretofore said, it is obvious that defendant's argument is without merit inasmuch as he could not, by repudiating the contract, force the buyer into accepting the repudiation as a breach of contract. It appears to us that the actual breach took place on April 29, 1953, when the buyer elected to treat the repudiation as a breach by materially changing his position in buying the Morello Winery in order to obtain the quantity and quality of wine necessary to fulfill his needs and to replace that which defendant had agreed to sell.<sup>7</sup> Plaintiffs argue in their opening brief (p. 13) that they were forced to pay a 9¢ increase per gallon over the contract price in their purchase of replacement wine. The record shows that the wine at the Morello Winery was 42½¢ per gallon unfinished; that finishing would cost from 1¾¢ to 2½¢ per gallon. In this connection it should be noted that plaintiffs' complaint alleges that they have been damaged in the sum of \$78,000. This appears to be a typographical error inasmuch as they correctly compute the sum (according to their figures in their opening brief) as \$18,000.

Defendant contends that plaintiffs had a duty to mitigate damages by accepting the lot of wine which was available for a short time after defendant's repudiation on March

30th or 31st. Reliance is placed on the case of Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 400, 139 P. 1077, 1078, wherein it was held that defendant had not been damaged since it could have purchased large quantities of wine of the "same kind, quality, and quantity as it claimed was to be furnished and sold by plaintiff, at prices not in excess of the prices mentioned in the contract \* \* \*." In the Las Palmas case there had been an oral agreement for the purchase and sale of wine. This agreement specifically called for its confirmation in writing which was never done. The court emphatically pointed out that there was more than sufficient evidence in the record to support the trial court's determinations. In the case under consideration there is no evidence in the record to show that the "same kind, quality, and quantity" of wine was available for plaintiffs to purchase.

[6] With respect to plaintiffs' duty to mitigate damages, the rule is that "The duty to minimize damages is predicated upon the statutory rule that a person is required to use reasonable care to prevent an unwarranted piling up of damages. The extent of the duty is to use ordinary care and diligence to prevent the enhancement of damages, and the duty does not extend to the necessity of going to extraordinary or unusual lengths to minimize damages. *Jegen v. Berger*, 77 Cal.App.2d 1, 174 P.2d 489; *Baker v. Borello*, 136 Cal. 160, 68 P. 591; *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 P. 843." *Scott's Valley Fruit Exchange v. Growers Refrig. Co.*, 81 Cal.App.2d 437, 451, 184 P.2d 183, 191. And "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, \* \* \*." *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 846, 147 P.2d 558, 561. And see: *Crag Lumber Co. v. Crofoot*, 144 Cal.App.2d 755, 780, 301 P.2d 952; *Johnson v. Comptoir Etc. D'Exportation*, 135 Cal.App.2d 683, 689, 288 P.2d 151; *Questo*

7. It should be noted here that while plaintiffs' complaint alleges that defendant notified plaintiffs that they would not deliver the wines on May 13, 1953, there is no evidence in the record to substan-

tiate this date as the date of the repudiation. The dates of the various conversations and correspondence have been heretofore set forth and are uncontradicted.

v. Dorado, 136 Cal.App.2d 332, 336, 288 P.2d 529; Gagne v. Bertran, 43 Cal.2d 481, 491, 275 P.2d 15. It would be unreasonable and impracticable under the facts here presented to require plaintiffs, within an hour of the breach by anticipatory repudiation by Severini, to buy unfinished wine inferior in quality which had previously been rejected by them, in order to mitigate the damages caused by defendant's breach.

It is our conclusion that the judgment should be reversed with directions to the trial court to retry the cause on the sole issue of the amount of damages suffered by plaintiffs in replacing the wine covered by the contract breached by defendant Severini.

The judgment is reversed with directions to retry the case on the sole issue of damages.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control, State of California, Petitioner and Respondent,

v.

The ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California and Ronald C. Chaney, Defendants,

The Alcoholic Beverage Control Appeals Board of the State of California,  
Appellant.\*  
Civ. 22200.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 20, 1958.

Rehearing Denied Nov. 12, 1958.

Hearing Granted Dec. 17, 1958.

The Director of the Department of Alcoholic Beverage Control brought a

mandamus proceeding against the Alcoholic Beverage Control Appeals Board and applicant for transfer of an on-sale general alcoholic beverage license to review action of Appeals Board reversing a decision of the Department denying the transfer of the license. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment and order granting the petition and a peremptory writ, and the Appeals Board appealed. The District Court of Appeal, Vallée, J., held that the Appeals Board did not err, as a matter of law, in holding that Department was required to show more than a mere unintentional failure on part of applicant to list his arrest for larceny in a foreign state when he was 18 years old in his application in order to establish good cause for denying the application, and that the decision of the Department was not supported by the evidence, and that Appeals Board did not err, as a matter of law, in holding that the arrest and conviction of applicant for larceny and arrest for assault and battery while he was a minor were not of sufficient materiality to furnish a reasonable basis on which to deny application for transfer of the license.

Appeal from order granting petition and from peremptory writ dismissed, and judgment reversed.

Parker Wood, J., dissented.

#### 1. Constitutional Law Ⓒ72

The Alcoholic Beverage Control Appeals Board is a constitutional-created quasi-judicial body discharging judicial duties, and courts may not usurp the constitutional powers of the Board. West's Ann.Const. art. 20, § 22.

#### 2. Intoxicating Liquors Ⓒ69

The discretion of the Department of Alcoholic Beverage Control to deny a license, if the Department shall determine for good cause that the granting of such license will be contrary to public welfare or morals, is not absolute but must be

\* Opinion vacated 341 P.2d 291.

exercised in accordance with the law, and the provision of the constitution that Department may deny a license "for good cause" necessarily implies that Department's decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals. West's Ann. Const. art. 20, § 22.

### 3. Mandamus ☞172

In mandamus proceeding by Director of the Department of Alcoholic Beverage Control to review action of the Alcoholic Beverage Control Appeals Board in reversing a decision of the Department denying application for transfer of on-sale general alcoholic beverage license, Superior Court was not authorized to exercise its independent judgment on the evidence. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23077.

### 4. Mandamus ☞172

In mandamus proceeding by Director of the Department of Alcoholic Beverage Control to review action of the Alcoholic Beverage Control Appeals Board in reversing a decision of the Department denying application for transfer of on-sale general alcoholic beverage license, question before Superior Court was not whether decision of Department was supported by the findings or whether the findings of the Department were supported by substantial evidence in the light of the whole record, but question was whether Appeals Board abused discretion in reversing the decision of the Department. West's Ann. Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23077.

### 5. Mandamus ☞13

One aggrieved by a decision of the Department of Alcoholic Beverage Control denying application for a license must appeal to the Alcoholic Beverage Control Appeals Board before seeking mandate in Superior Court. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23077.

### 6. Intoxicating Liquors ☞103

Alcoholic Beverage Control Appeals Board did not err in holding that Department of Alcoholic Beverage Control, in order to establish "good cause" for denying application for transfer of an on-sale general alcoholic beverage license, was required to show more than a mere unintentional failure of applicant to list his arrest for larceny in another state when he was 18 years old in his application, and that decision of Department in denying application was not supported by the evidence. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23077.

### 7. Intoxicating Liquors ☞103

The Alcoholic Beverage Control Appeals Board did not err, as a matter of law, in holding that the arrest and conviction of applicant for transfer of on-sale general alcoholic beverage license for larceny and his arrest for assault and battery while he was a minor were not of sufficient materiality to furnish a reasonable basis for which Department of Alcoholic Beverage Control could deny the application for the license. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23077.

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Edsel W. Haws, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal by the Alcoholic Beverage Control Appeals Board from a judgment ordering that a writ of mandate issue commanding it to set aside its decision by which it reversed a decision of the Department of Alcoholic Beverage Control and to affirm the decision of the department which denied the transfer of an on-sale general license to Ronald C. Chaney.

On June 29, 1955, Chaney filed an application with the department for the trans-



fer to him of an on-sale general alcoholic beverage license. In support of his ap-

plication he filed an affidavit on a form furnished by the department which stated:

"Have you ever been arrested?———. If the answer is 'yes' state below in your own handwriting ANY and ALL arrests:

| <u>"Date:</u> | <u>Place Arrested:</u> | <u>Charged With:</u> | <u>Disposition:</u> |
|---------------|------------------------|----------------------|---------------------|
| <u>1946</u>   | <u>Hollywood</u>       | <u>Fight</u>         | <u>Prob"</u>        |

An investigation of the application was made by an agent of the department. In his report the agent stated that Chaney did not list in his application an arrest on June 11, 1949, at Memphis, Tennessee, for which he served sixty days at a penal farm and was fined \$10. The application was denied.

Chaney then petitioned the department for a hearing. A hearing officer conducted a hearing on the issue "Whether applicant misrepresented a material fact in application for license. And whether the issuance of the license would be contrary to public welfare and morals." After the hearing, he made these findings of fact:

"1. The records of the Bureau of Criminal Identification and Investigation, State of California, reflect the following arrests and dispositions thereof for Ronald Creighton Chaney:

"6-11-49 PD Memphis Tenn.  
45221

Inv. (Larc.)

Ronald Creighton  
CHANNEY

6-14-49 60 ds.  
Penal Farms & Fine  
\$10. 9-13-49

"2. It is true that in his affidavit made in support of his application for the transfer of an on-sale general license petitioner failed to include or mention the arrest and conviction of June 11, 1949 at Memphis, Tennessee for which he served sixty days at a Penal Farm and was fined \$10.00, but did include and disclose a prior arrest at Hollywood, Calif. in 1946 when he was charged with the crime of assault and as a result placed on probation."

On these facts the hearing officer determined: "Petitioner misrepresented a material fact on his application for a license transfer. The granting of the petition, or issuance of the license would be contrary to public welfare and morals," and recommended that the petition be denied. The recommendation was adopted by the department. Chaney's petition for reconsideration was denied.

Chaney filed an appeal from the decision of the department with the appeals board. The board reversed the decision of the department on the grounds: the findings do not support the decision denying the li-

cense; there was no finding that Chaney knowingly or purposely omitted the fact of an arrest, the finding being that there was a failure to include or mention the arrest; for all that appeared, the omission was unintentional, resulting from an honest mistake or negligence; the evidence would not support such a finding had one been made; on questioning, Chaney openly and frankly admitted the arrest and fully disclosed all the circumstances surrounding it; Chaney testified it was his belief that only arrests occurring in California were required to be listed, and had he understood the application more clearly he would

have listed the arrest; there was nothing in the record to show that he was given information by departmental personnel contrary to his erroneous impression as to what was required.

The appeals board concluded that the unintentional or careless omission of the arrest does not constitute good cause under section 22 of article XX of the Constitution on which to base the denial of the license, and reversed the decision of the department.

The director of the department then filed in the superior court a petition for a writ of mandate to compel the appeals board to reverse its decision and for a writ of mandate or certiorari directing the appeals board to affirm the decision of the department. An alternative writ of mandate issued. The appeals board filed a return. The court found: there was substantial evidence to support the determination of the hearing officer; the department correctly determined that Chaney misrepresented a material fact on his application, and that the transfer of a license to him would be contrary to public welfare and morals under section 22, article XX, of the Constitution; the decision of the appeals board was arbitrary and unreasonable in that it substituted its own discretion for that of the department; the appeals board incorrectly determined the issues in the matter in that the findings of the hearing officer and the department were supported by substantial evidence in the light of the whole record; the suppression by Chaney of the 1949 arrest constituted good cause for the denial of his application.<sup>1</sup>

Judgment followed ordering that a writ of mandate issue commanding the appeals board to set aside its decision and render a new decision affirming the decision of the

department. The appeals board has appealed from the judgment.<sup>2</sup>

Speaking of the judgment in the present case, the Supreme Court in *Munro v. Alcoholic Beverage, etc., Appeals Bd.*, 50 Cal.2d 863, 326 P.2d 506, 507, stated:

"[T]he effect of the judgment is a determination that, as a matter of law, the appeals board could properly act in only one way (affirmance) and that its contrary action was without or in excess of its jurisdiction."

The evidence before the hearing officer was without conflict that the omission to list the 1949 arrest was unintentional. Chaney testified the reason he omitted to list that arrest was:

"I just thought it was a State license. I should have understood the application more plainly and I just didn't put it down. \* \* \*

"Q. And you testified, I believe, earlier, that when you filled out this affidavit, it was your understanding that the arrest that they were inquiring, wanting to know about arrests here in the State of California, because you were applying for a State license? A. That is true.

"Q. You signed this in front of Miss Dolores Blair? A. Yes, sir.

"Q. Do you recall her making any statement to you as to arrests in other states or federal arrests? A. No, not in other states. She had asked me if I ever been arrested, however—

"Q. But it was your understanding at that time it was just for arrests here in the State of California? A. Yes."

The affidavit filed with the application is all in typewriting with the exception of

1. The finding of the court that Chaney suppressed the facts went beyond the finding of the department. The department merely found that he "failed to include or mention the arrest." To suppress, in this sense, means the intentional withholding of some fact. *Murray v. Brotherhood of American Yeomen*, 180 Iowa 626, 163 N.W. 421, 428.

2. Respondent director moved to dismiss the appeal on the ground the appeals board is not a party aggrieved and therefore not entitled to appeal. The Supreme Court denied the motion. *Munro v. Alcoholic Beverage, etc., Appeals Bd.*, 50 Cal.2d 863, 326 P.2d 506.

"1946 Hollywood Flight Prob" and Chaney's signature; a Miss Blair in the office of the department typewrote it.

Chaney is married and has three children. He was 18 years of age at the time of the 1949 incident. Concerning that incident, he testified:

"Q. I call your attention to the date June 11, 1949 and ask whether you were arrested by the Memphis, Tennessee, Police Department on that date? A. Yes, I was.

"Q. What was the charge? A. Well, it was larceny.

"Q. Would you like to explain what happened; the circumstances surrounding this arrest? A. Yes, sir. Another fellow and I, we stole a fan, and we were arrested trying to pawn it.

"Q. And were you tried? A. Yes, sir.

"Q. And what was the disposition? A. Sixty days.

"Q. Did you spend sixty days in jail? A. Yes, sir."

Since 1949 he has resided in Borrego Springs, San Diego County, and has not been arrested or in trouble of any kind. For three years he engaged in carpentry work and a construction business. After that he managed a country club in Borrego Springs. A number of letters were introduced in evidence, all attesting to the fact that he has led a model life following his boyhood indiscretions. There was no contradiction of this evidence.

The Constitution provides that the Department of Alcoholic Beverage Control shall have the exclusive power, except as therein provided and in accordance with the laws enacted by the Legislature, to license the sale of alcoholic beverages in this state. The department has the power, in its discretion, to deny a license if it shall determine "for good cause" that the granting of such license would be contrary to public welfare or morals. Const. art. XX, § 22, as amended in 1956.

When any person aggrieved thereby appeals from a decision of the department denying a license for the sale of alcoholic beverages, the appeals board "shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. \* \* \* In all other appeals the board shall enter an order either affirming or reversing the decision of the department. \* \* \* Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order. \* \* \* The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions." Const. art. XX, § 22, as amended in 1956. See similar provisions in Bus. & Prof. Code, §§ 23084-23091.

[1] The constitutional scheme concerning alcoholic beverage control is an uncommon one. Two independent agencies are created: (1) the department which, as to the granting of licenses, acts as an administrative trial court; and (2) the appeals board, which is the administrative appellate court. There is no provision either in the Constitution or in the implementing legislation which authorizes direct court review of the decisions of the department. Section 23077 of the Business and Professions Code provides that the appeals board shall exercise such powers as are vested in it by section 22, article XX, of the Constitution, "and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required." The Constitution imposes the duty on the appeals board of reviewing the decisions



of the department. The appeals board is a Constitution-created quasi-judicial body discharging judicial duties. *Koehn v. State Board of Equalization*, 50 Cal.2d 432, 326 P.2d 502. The courts may not usurp the constitutional powers of the appeals board.

[2] The department's discretion under section 22 is not absolute but must be exercised in accordance with the law, and the provision that it may deny a license "for good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals. *Stoumen v. Reilly*, 37 Cal.2d 713, 717, 234 P.2d 969.

It was the duty of the appeals board in the present case to determine judicially whether the decision of the department is supported by the findings or whether the findings of the department rest on substantial evidence in the light of the whole record. The Constitution does not spell out the scope of court review of orders of the appeals board. It has been held that the scope of such review is limited to determining whether the decision of the appeals board is supported by substantial evidence, and that both the superior court in a mandate proceeding and a reviewing court on appeal therefrom are without authority to reweigh the evidence. 5501 *Hollywood, Inc., v. Dept. of Alcoholic Beverage Control*, 155 Cal.App.2d 748, 751, 318 P.2d 820.

[3] Section 1094.5 of the Code of Civil Procedure provides that where mandate is issued for the purpose of inquiring into the validity of any final administrative order or decision, the inquiry, where it is claimed that the findings are not supported by the evidence in cases in which the court is not authorized to exercise its independent judgment on the evidence, is whether there has been any prejudicial abuse of discretion; and abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. The final administrative order here is the order

of the appeals board. The court in a mandate proceeding to review the action of the appeals board is not authorized to exercise its independent judgment on the evidence. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545.

[4, 5] The question here is not whether the decision of the department is supported by the findings or whether the findings of the department are supported by substantial evidence in the light of the whole record. It is the function of the appeals board, acting in a quasi-judicial capacity, to determine those questions. The appeals board reviews the decision of the department; the court in a mandate proceeding reviews the order of the appeals board. The question before the superior court was whether the appeals board abused its discretion in reversing the decision of the department. And the question here is whether the court below erred in determining as a matter of law that "the appeals board could properly act in only one way (affirmance) and that its contrary action was without or in excess of its jurisdiction." *Munro v. Alcoholic Beverage etc., Appeals Bd.*, 50 Cal.2d 863, 326 P.2d 506. This view is fortified by the fact that judicial review does not lie from a decision of the department. A party aggrieved by a decision of the department must appeal to the appeals board before seeking mandate. The courts have no jurisdiction to entertain a proceeding in mandate if no appeal is taken. *Fiscus v. Dept. of Alcoholic Beverage Control*, 155 Cal.App.2d 234, 235, 317 P.2d 993; *Van De Veer v. Dept. of Alcoholic, etc., Control*, 155 Cal.App.2d 817, 820-821, 318 P.2d 686.

[6] The department found that Chaney "failed to include or mention the arrest" of 1949. It did not find that he did so intentionally, knowingly, or wilfully. For all that appears, the omission resulted through mistake, forgetfulness, negligence, or some other unintentional reason. From the mere fact that he failed to include or mention the arrest, it concluded that he misrepresented a material fact in his applica-

tion for a license transfer. It cannot be held, as a matter of law, that the appeals board erred in holding that in order to establish "good cause" for denying Chaney a license something more must be shown than a mere unintentional failure to list the 1949 arrest, and that the decision of the department is not supported by the evidence.

Black defines a misrepresentation as an intentional, false statement respecting a matter of fact. Concealment has been defined as the designed and intentional withholding of a material fact which in honesty and good faith ought to be communicated. *Sun Ins. Office, Ltd. of London v. Mallick*, 160 Md. 71, 153 A. 35, 43; *Lawson v. Southwestern Voluntary Ass'n*, 168 Va. 294, 191 S.E. 648, 649.

*Allegretti v. Bd. of Osteopathic Examiners*, 145 Cal.App.2d 435, 302 P.2d 694, was a proceeding in mandate to compel the respondent board to annul its order suspending the license of the petitioner, an osteopathic physician and surgeon. One of the charges was that the petitioner carried a professional advertisement using the suffix "M.D." in the classified section of the telephone directory. Holding a finding that the petitioner was negligent in not finding out what the charges for the advertising were for or how his name was listed was insufficient to justify a judgment affirming the order of the respondent board suspending the petitioner's license, this court stated (145 Cal.App.2d at page 440, 302 P.2d at page 698):

"Petitioner could have been negligent in these respects and yet innocent of any wrongful intention. Upon the other hand the finding that he was negligent does not acquit him of having acted in bad faith and with ulterior motives.

"The question is not merely whether petitioner had actual knowledge of the erroneous listing. It is rather the question whether he had reasonable cause to believe that his name was or might be incorrectly listed and refrained from making inquiry with the intention of taking advantage of the telephone com-

pany's mistake, if a mistake were being made. If his omission to make inquiry was wilful rather than innocent his lack of knowledge would be no defense to a charge that he made use of the suffix 'M.D.' The basic question, therefore, was whether his professed ignorance was the result of carelessness or culpability. \* \* \*

"It is not contended by respondent that a physician and surgeon can be subject to discipline for mere negligence. As applicable to physicians and surgeons there are in the Business and Professions Code some 26 specifications of acts which constitute unprofessional conduct. By their very nature they relate to acts intentionally performed and which would not be the consequence of mere negligence."

In *Marchica v. State Board of Equalization*, 107 Cal.App.2d 501, at page 509, 237 P.2d 725, at page 731, this court stated:

"The Sales Tax Act [Rev. & Tax. Code, § 6001 et seq.] prevents the retention of a tax paid after it is barred by the statute of limitations in the absence of fraud or an intent to evade. The existence of fraud or an intent to evade was essential to confer upon the board the power which it exerted. In the present case the deficiency assessment and the penalties were predicated on fraud. The fraud meant by the statute is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owed. [Citation.] The only evidence in this case is the failure to file correct returns. The burden of proving fraud is not sustained by merely establishing a deficiency. [Citation.] The failure to file a correct return does not necessarily constitute fraud. [Citation.] The mere omission from a tax return of items which should have been included does not show a fraudulent intent. [Citation.] If returns are filed a deficiency necessarily arises from an understatement in the returns. An understatement may have resulted

from ignorance, bad advice, honest mistake, negligence, or misinterpretation of law; none of which in itself would constitute fraud.

"Fraud is odious. It is never presumed; but must be established by proof. The presumption always is in favor of good faith, innocence, honesty and fair dealing, except, perhaps, where confidential relations are involved. This presumption has been held to approximate in strength that of innocence of crime. [Citation.] It is to be noted that any person who renders a false or fraudulent return is guilty of a misdemeanor. [Citation.] One asserting fraud, except, perhaps, where confidential relations are involved, has the burden of proving it."

*Sautter v. Contractors' State License Bd.*, 124 Cal.App.2d 149, 268 P.2d 139, was an appeal from a judgment ordering that mandate issue commanding the respondent board to set aside its decision revoking certain licenses of the petitioner and ordering that they be restored to him. The petitioner was a contractor. One of the charges before the board was that the petitioner had misrepresented his experience in an application for a license. The board found him guilty of the charge. The superior court found that he did not intentionally misrepresent his experience or any other fact. Section 7112 of the Business and Professions Code, dealing with causes for disciplinary action against contractors, provides: "Misrepresentation of a material fact by an applicant in obtaining a license constitutes a cause for disciplinary action." On the board's appeal the court stated (124 Cal.App.2d at page 156, 268 P.2d at page 144):

"Appellant states that the mere doing of the act is forbidden regardless of the state of mind of the wrongdoer, but cites no authority. Respondent maintains that in determining whether there is ground for disciplinary action, the matter of good faith is important. It was so held in *State Bar of California v. Rollinson*, 213 Cal. 36, 1 P.2d 428

and *In re Jung*, 13 Cal.2d 199, 88 P.2d 679."

*Nelson Valley Bldg. Co. v. Morrissey*, 135 Cal.App.2d 738, 288 P.2d 135, and *Federal Communications Commission v. WOKO, Inc.*, 329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204, cited by the director, are not helpful. In the *Nelson* case the applicant for a contractor's license "knowingly" made a false statement in his application. In the *WOKO* case the applicant for renewal of a license deliberately furnished the commission with false information and the deception had been carried on for about twelve years.

On the record the conclusion of the appeals board, that Chaney did not knowingly or purposely conceal the fact of the 1949 arrest in his application, appears to be a reasonable one. Indeed it is difficult to see how it could have come to any other conclusion. It could reasonably conclude that the evidence failed to establish any intent to conceal or to mislead the department. We think it cannot be said, as a matter of law, that "the appeals board could properly act in only one way (affirmance) and that its contrary action was without or in excess of its jurisdiction." It stated that under the authority granted the department by the Constitution the department could consider whether Chaney "knowingly or purposely" omitted the arrest; that in such a case "it is the omission itself coupled with intent to withhold information which becomes important in considering the character and suitability of the applicant"; that there was no finding that Chaney knowingly or purposely omitted the fact of an arrest, the finding being that there was a failure to include or mention the arrest; for all that appeared, the omission was unintentional, resulting from an honest mistake or negligence; that the evidence would not support a finding that Chaney knowingly or purposely omitted the fact of the arrest.

The appeals board held that the unintentional or careless omission of the arrest does not constitute good cause under section 22 of article XX of the Constitution on



which to base a denial of the license, and that the denial in the present case was an abuse of discretion. We cannot say that it was unreasonable for it to conclude that the decision of the department denying the license is not supported by the findings, and that the unintentional or careless omission of the arrest does not constitute good cause under section 22 of article XX of the Constitution on which to base the denial of the license.

[7] And it cannot be held, as a matter of law, that the appeals board erred in holding that the arrest and conviction in 1949 together with the arrest of 1946 are not of sufficient materiality to furnish a reasonable basis on which to deny the license. In this connection the appeals board said:

"The remaining question is whether the arrest and conviction in 1949 together with the arrest of 1946 are of sufficient materiality to furnish a reasonable basis upon which to deny the license. We think not. The arrest in Tennessee occurred when the appellant was 19 [18] years of age. Since that time the record shows that appellant has not been in any trouble and has pursued a useful and industrious course of conduct. The recommendations of several people which are contained in the record demonstrate that appellant is a responsible citizen and completely qualified to assume the responsibilities of a licensee. The unfortunate incidents of childhood furnish little, if any, basis for an appraisal of his present reputation and suitability. We think that the ends of justice will best be served by closing the book on those unfortunate incidents, thus allowing appellant to pursue his ways as a responsible citizen."

In *Jones v. Maloney*, 106 Cal.App.2d 80, 234 P.2d 666, the licensee whose license as an insurance agent was revoked had been convicted of two misdemeanors: disturbing a public assemblage, and disturbing the peace and resisting an officer. The

court stated (106 Cal.App.2d at page 91, 234 P.2d at page 672):

"The missing finding in our case is the fact that the licenses were obtained by the concealment. The findings say nothing about the licenses having been 'obtained' either by 'concealment' or by 'knowing misrepresentation' and the evidence in the case is not sufficient to have supported such a finding had one been made. The misdemeanor convictions were of ancient date. The offenses themselves bear no peculiar or apt relation to petitioner's qualifications for a license as an insurance agent. As there is no sufficient finding of fact to support it, the second charge must fall."

Also see *In re McCue*, 211 Cal. 57, 293 P. 47.

It follows that the finding of the superior court that the appeals board incorrectly determined the issues in the matter cannot be sustained, and that the judgment must be reversed.

The appeal from the order granting the petition and from the peremptory writ is dismissed; the judgment is reversed.

SHINN, P. J., concurs.

PARKER WOOD, Justice.

I dissent. In *Munro v. Alcoholic Beverage, etc.*, Appeal Bd., Cal.App., 329 P.2d 758, 760, which involved a question of fact, it was held that the "Appeals Board was simply called upon to determine whether the findings of the department were supported by substantial evidence in the light of the whole record. It was not permitted to exercise an independent judgment on the facts as contended for by appellant." In the present case, in my opinion, there was substantial evidence in the light of the whole record to support the findings, determination, and decision of the department in denying the application. The department was not required to accept the explanation offered by Chaney. The form of the affidavit, wherein he did

not answer fully regarding arrests, called specifically for his full statement as to arrests under the laws of California, or of any other state, or of the United States.

In my opinion the judgment should be affirmed.

Rehearing denied; WOOD, J., dissenting.



164 Cal.App.2d 210

**Louise FOOTE, Plaintiff, Cross-Defendant  
and Appellant,**

**v.**

**Gerald V. POSEY et al., Defendants,**

**Gerald V. Posey and Linda Posey, Defendants,  
Cross-Complainants and Respondents.**

**No. 17896.**

**District Court of Appeal, First District,  
Division 1, California.**

**Oct. 16, 1958.**

Quiet title action, wherein a cross-complaint was filed for determination as to validity of note and deed of trust. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., found the allegations of the cross-complaint to be true, and plaintiff appealed from the ensuing judgment. The District Court of Appeal, Bray, J., held that partner in joint venture has authority to bind his coadventurer but has no authority to write their signatures; however, the court held, one adventurer could not profit by another adventurer's thus exceeding his authority where third party had parted with value knowing that one adventurer was acting for others but without knowing that instruments given him, which appeared to bear another adventurer's signature, did not actually do so.

**Affirmed.**

### 1. Joint Adventures $\S$ 115

In cross action for determination as to validity of note and deed of trust, evidence would sustain finding that cross defendants were joint adventurers.

### 2. Joint Adventures $\S$ 7

Partner in joint venture has authority to bind his coadventurers but has no authority to write their signatures; however, one adventurer could not profit by another adventurer's thus exceeding his authority where third party had parted with value, knowing that one adventurer was acting for others but without knowing that instruments given him, which appeared to bear another adventurer's signature, did not actually do so. West's Ann.Civ.Code,  $\S$  1095.

### 3. Joint Adventures $\S$ 7

There is a difference in determining joint adventure relationship where third parties are involved and where issue is only between parties themselves; and in case of third parties, fundamental question is what those parties had right to believe from language of contract and from conduct of parties to it as affecting them, and not as affecting each other.

### 4. Frauds, Statute of $\S$ 116(3) Joint Adventures $\S$ 7

Authority of a joint adventurer to bind his coadventurers does not have to be in writing; and such authority may be oral or implied from circumstances. West's Ann.Civ.Code,  $\S\S$  1624, subd. 5, 2933; West's Ann.Code Civ.Proc.  $\S$  1973.

### 5. Principal and Agent $\S$ 137(1)

As to innocent third parties, joint adventurer who had authorized coadventurer to act for her would be estopped to claim benefit of Civil Code section requiring that power of attorney to execute mortgage be in writing. West's Ann.Civ.Code,  $\S\S$  1624, subd. 5, 2933; West's Ann.Code Civ.Proc.  $\S$  1973.

### 6. Judgment $\S$ 564(1)

Judgment not final could not be res judicata.

**7. Appeal and Error**  204(2)

Where no objection to introduction of file had been made, trial court could not be charged with error in admitting same.

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Leon H. Sorell, San Francisco, for appellant.

Depaoli, Cotter & DelCarlo, San Francisco, for respondent.

BRAY, Justice.

Plaintiff sued defendants Gerald V. Posey and Linda Posey to quiet title to real property hereafter referred to as 2094 Mission Street, San Francisco. Defendants answered, then filed an amendment to their answer and eventually a cross-complaint bringing in as cross-defendants with plaintiff, Emil Fritz and Frank Cotton. By these pleadings said defendants and cross-complainants alleged, in effect, that plaintiff and said Fritz and Cotton were partners or joint adventurers in the purchase of real property at the corner of 17th and Mission Streets, consisting of three pieces, namely, said 2094 Mission, 2090 Mission and 3312 17th Street; that Cotton acted as plaintiff's agent and managing partner and had the title to 2094 Mission placed in plaintiff's name; that subsequently Cotton on behalf of plaintiff, Fritz and himself negotiated the sale and transfer to cross-complainants of certain notes and deeds of trust, among which was a note dated October 17, 1955, in the amount of \$7,750, secured by a deed of trust on 2094 Mission. The cross-complaint alleged that a judgment had been entered in the superior court adjudging that plaintiff, Fritz and Cotton were each owners of an undivided one-third of 2094 Mission; that in its purchase the parties were partners or joint adventurers and that in the sale of said notes and deeds of trust to plaintiff, Cotton was acting under authority invested in him by plaintiff and Fritz, and that cross-complainants in the purchase of said note and deed of trust relied upon such authority. Cross-complainants prayed that the validity of said note and deed of trust be determined. Cross-

defendants Cotton and Fritz filed an answer admitting all of the allegations of the cross-complaint. The trial court found the allegations of the cross-complaint to be true; that plaintiff, Cotton and Fritz were joint adventurers; that it was not contemplated that the ownership of 2094 Mission was to be solely in plaintiff; that Cotton acted for the joint venture and that the note and deed of trust held by cross-complainants are a valid lien upon said property. Plaintiff appeals.

The judgment is a rather peculiar one. It provides that "defendants have judgment against plaintiff on the complaint and that cross complainants have judgment against the cross defendants on the cross complaint \* \* \*." Apparently this judgment established the validity of cross-complainants' lien upon 2094 Mission but leaves the determination of plaintiff's exact ownership to the other superior court action, the judgment in which was on appeal at the time of the rendition of the subject judgment, but which appeal was later dismissed by Division Two of this court. See *Fritz v. Foote*, 162 Cal.App.2d 622, 328 P.2d 522.

Questions Presented.

1. Was there a joint venture in which Cotton had authority to bind plaintiff in the execution of the Posey note and deed of trust?
2. Are section 1624, subdivision 5, Civil Code, section 1973, Code of Civil Procedure, and section 2933, Civil Code, involved in this case?
3. Effect of introduction of record of the other action.

1. Joint Venture.

[1-3] There can be no question under plaintiff's own testimony as well as the other evidence that there was a joint venture and that Cotton had full power to bind plaintiff in the transaction.

Plaintiff testified that she had known Cotton, a real estate broker, for a number of years. In June, 1955, she saw an advertisement for the sale of certain property. Answering it, she discovered that he



was the broker. She did not like the property offered. Shortly thereafter Cotton phoned her about another piece of property. She placed \$6,500 in escrow and Cotton negotiated the purchase of it for her. She did not remember the total purchase price, the \$6,500 being only the down payment. Apparently she paid nothing further. In twenty days he sold it for her for a profit of \$900. She signed some papers in connection with the transaction but does not know what they were. In July he told her about the three pieces of property at 17th and Mission, the total price of which was \$110,000. She was to put up \$5,000, and there were supposed to be seven investors each to put up \$5,000. (In her deposition she stated that there were to be several investors.) She was to be in partnership with those who put up the money. She was to give Cotton \$5,000 and he was to use it and similar amounts to be obtained from others, as a down payment. She gave Cotton \$5,000 and knew that Fritz had put up \$5,000. The three pieces were to be purchased as a unit. She did not know that any of the properties was to be taken in her name only. Cotton was to negotiate for them and divide them later and sell them separately. It was her understanding that Cotton was acting for and on behalf of her and Fritz in the entire transaction. She left the entire transaction up to his discretion, and at all times Cotton was acting in the capacity of her agent. He was to invest the \$5,000 for her. She signed no papers in connection with the transaction. Cotton collected the rents on the property after it was purchased. Apparently plaintiff never inquired of Cotton concerning the transaction up to the time the Poseys gave notice of default under the deed of trust. From her own testimony it is clear that she gave Cotton \$5,000 to use together with that of other investors, to purchase property whose price was \$110,000, and left the entire handling of the transaction to Cotton. Thus, a joint venture with authority in Cotton to act for her was proved, even though she did not know that Cotton

was to be one of the investors. She left the complete selection to him.

Cross-complainant Gerald Posey testified that he and his partner had purchased the property (the three pieces) from a Mrs. Hadsell with "a lengthy period of time for closing" (apparently they had merely an option to purchase) so that they might sell one or two pieces to complete the deal. Cotton negotiated for some time with him for the purchase of the property. The record is a little vague as to just what happened next. As nearly as we can make out from most confused testimony, the following is what happened: Posey was to get \$118,500 for the property, out of which he was to pay Mrs. Hadsell. Posey was to receive \$10,000 down and the balance was to be secured by mortgages. For some reason, Posey had Mrs. Hadsell convey the property as follows: one parcel (2094 Mission) to Posey, another parcel to Posey's partner, and the third parcel to an employee of Posey's. 2094 Mission was subject to a \$27,500 deed of trust, 2090 Mission to a \$40,000 deed of trust, and 3312 17th subject to a \$22,500 deed of trust. Then there was a second deed of trust for \$10,000 covering all three parcels. Then on each parcel there was a third deed of trust of \$6,166.67 or a total of \$18,500 on all three. With the down payment of \$10,000 the total of these mortgages came to \$118,500, the purchase price. Thereafter, Cotton sold the 17th Street property and 2090 Mission. From such sales the \$10,000 deed of trust which covered 2094 Mission as well as the other lots was paid off excepting \$1,583.33. Posey then conveyed 2094 Mission to plaintiff subject to the \$27,500 first deed of trust and a second deed of trust to him and Mrs. Posey for \$7,750 (the note and deed of trust in controversy). This amount was arrived at by adding to the \$6,166.67 third deed of trust above mentioned and whose lien was wiped out by the conveyance to plaintiff, the said \$1,583.33 balance due on the blanket deed of trust which likewise was reconveyed. Thus, after this more or less frenzied

finance, the situation immediately prior to foreclosure of the \$7,750 Posey deed of trust was that on a down payment of \$10,000 put up jointly by plaintiff and Fritz on a purchase price of \$118,500, for three parcels of land, two of the parcels were sold and the third, 2094 Mission, stood of record in plaintiff's name (but in a prior action was held to belong to plaintiff, Fritz and Cotton) subject to a first deed of trust to Mrs. Hadsell for \$27,500 and a second deed of trust to cross-complainants for \$7,750. There is no evidence as to what this property was or is worth.

Plaintiff did not sign or see any of the notes or deeds of trust given in these transactions. The \$10,000 blanket note and deed of trust, the \$6,166.67 note and deed of trust and the \$7,750 note and deed of trust all bear what appear to be plaintiff's signatures. However, admittedly they are not her signatures but were written by Cotton. Curiously enough, the evidence shows a notary public acknowledged her purported signature on the \$7,750 deed of trust. Probably the same is true of the other purported signatures. Posey testified that he had no knowledge that the signatures were not genuine.

Plaintiff makes much of the fact that Cotton "forged," as plaintiff calls it, plaintiff's signatures. Although a partner in a joint venture has, as here, authority to bind his coadventurers, he has no authority to write their signatures. If he signs their names he must indicate he is doing so as partner or agent. See Civil Code, § 1095. It would appear that Cotton without informing plaintiff decided to cut himself in as one of the partners in the venture and considered that his services in handling the transaction were of equal value to the \$5,000 which each of his coadventurers paid in. Apparently this arrangement was satisfactory to Fritz. Plaintiff's testimony shows that she was not concerned about who her partners were to be, but left the selection to Cotton. However, he had informed her that each partner-to-be would put in equal moneys with hers. We withhold comment as to the propriety of

Cotton's actions and the rights between him and plaintiff. As this is not an action between Mrs. Foote and Cotton, we are only concerned with the situation as between plaintiff and the Poseys.

A joint venture has been defined as an undertaking by two or more persons jointly to carry out a single business enterprise for profit with its existence dependent upon the intention of the parties as shown by an express agreement or by inference from their acts and conduct. *Lasry v. Lederman*, 1957, 147 Cal.App.2d 480, 485, 305 P.2d 663; *Beck v. Cagle*, 1941, 46 Cal.App. 2d 152, 161, 115 P.2d 613. There is a difference in the determining of the relationship where third parties are involved, as here, and where the issue is only between the parties themselves. In the case of third parties the fundamental question is what had those parties the right to believe from the language of any contract and from the conduct of the parties to it as affecting them, and not as affecting each other. *Westcott v. Gilman*, 1915, 170 Cal. 562, 150 P. 777.

Under the circumstances, plaintiff clothed her coadventurer, Cotton, with the authority to represent her in the joint venture. Poseys had the right to assume when Cotton, who had requested Poseys to deed the property to plaintiff, delivered Poseys a note and deed of trust purporting to be signed by plaintiff, the deed of trust bearing a notary's acknowledgment, that the documents were all they purported to be. Plaintiff, as well as Fritz (who admits it), held Cotton out as having the authority to fully represent her. Had he signed her name by him as agent or coadventurer there can be no question but that he was carrying out the transaction for her, which transaction she testified she left to his discretion. The fact that he signed her name without designating that it was not her signature, did not minimize his authority to bind her in a transaction where the third party parted with value, knowing that Cotton was acting for her as well as himself and Fritz, but without knowing that the instruments given him which ap-

peared to bear her signature did not actually do so.

Even though Cotton exceeded the authority which plaintiff intended him to have, she, in effect, held him out to Posey as having that authority. To hold that the property is not subject to the Posey deed of trust would permit plaintiff to have that property without paying the full purchase price, thereby profiting by Cotton's exceeding his authority, if he did, to the damage of the Poseys who were innocent in the transaction.

## 2. Code Sections.

[4, 5] Section 1624, subdivision 5, Civil Code, requires an agreement authorizing an agent or broker to sell or buy real estate for compensation or commission to be in writing. Section 1973, Code of Civil Procedure, provides that evidence of such an agreement cannot be received without the writing being produced. Obviously, Cotton was not acting as plaintiff's agent for compensation or commission. He was a principal along with her in the transactions. The authority of a joint adventurer to bind his coadventurers does not have to be in writing. The authority may be oral or implied from the circumstances. See *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, 1931, 115 Cal.App. 238, 246, 1 P.2d 1008. Section 2933, Civil Code, requires that a power of attorney to execute a mortgage must be in writing. As the Poseys are innocent third parties plaintiff, under the circumstances of this case, is estopped to claim the benefit of this section. None of these sections apply to the situation here.

## 3. Prior Record.

[6, 7] The court file in the prior action referred to in the cross-complaint was admitted in evidence without objection. Unfortunately, the judgment was not then final, so that it could not be res judicata. See *Witkin, California Procedure*, 1934-1935. It was an action brought by cross-defendant here, plaintiff there, Fritz, against plaintiff here, defendant there, Mrs.

Foote. Neither cross-defendant Cotton nor cross-complainants Posey were parties to it. It adjudged that Mrs. Foote, Fritz and Cotton were the owners of 2094 Mission. As no objection to its introduction was made, the trial court cannot be charged with error in admitting the file. Whether the court considered it in making its determination we do not know. The findings merely find that such an action was brought and what the judgment was. The evidence in our case was not conflicting. No facts contrary to the facts related herein were produced. Therefore, whether there was a joint venture in which Cotton had authority to bind plaintiff as a matter of law. Disregarding entirely the other action, such a venture under the evidence must be declared as a matter of law. Hence, it is immaterial whether or not the trial court considered the other action. With or without it, the court could have come to no other conclusion than it did.

The judgment is affirmed.

PETERS, P. J., and ST. CLAIR, J. pro tem., concur.



164 Cal.App.2d 225

**Edwin S. DOUGLAS, Plaintiff, Cross-Defendant and Respondent,**

**v.**

**Fay H. DOUGLAS, Defendant, Cross-Complainant and Appellant.**

**Civ. 22799.**

**District Court of Appeal, Second District,  
Division 1, California.**

**Oct. 16, 1958.**

**Hearing Denied Dec. 10, 1958.**

Proceeding on motion to vacate and set aside ex parte judgment obtained by wife. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., vacated judgment, and wife appealed. The District Court



of Appeal, White, P. J., held that where cross-complaint, under which 1944 order for alimony pendente lite was made, was dismissed in 1949 under section of Code of Civil Procedure providing for dismissal for failure to bring action to trial, wife's ex parte money judgment entered in 1956 for collection of alimony payments allegedly accrued from 1951 to 1956 was without warrant or authority of law and was properly vacated.

Affirmed.

See also 330 P.2d 659.

#### 1. Judgment ⇨304

Where error in decision is inherently judicial rather than clerical or inadvertent, court has no power to amend its decision and judgment can only be set aside in modes prescribed by statutory procedure. West's Ann.Code Civ.Proc. §§ 473, 663.

#### 2. Judgment ⇨303

Except for inadvertence of clerical errors, a judgment is reviewable only on appeal. West's Ann.Code Civ.Proc. §§ 473, 663.

#### 3. Judgment ⇨273(1)

Courts are clothed with inherent power to enter judgments nunc pro tunc and such order should be granted or refused as justice may require in view of circumstances present in a particular case.

#### 4. Dismissal and Nonsuit ⇨80

Where court dismissed cross complaint under section of Code of Civil Procedure providing for dismissal for failure to bring action to trial, court was without jurisdiction to proceed in action, filing of so-called supplemental cross complaint, whether it was a supplemental complaint or amended complaint, did not have effect of extending time of mandatory dismissal to five years after its filing, court should have dismissed supplemental cross complaint and court was justified in subsequently making nunc pro tunc order dismissing supplemental cross complaint. West's Ann.Code Civ.Proc. § 583.

#### 5. Divorce ⇨216, 219

While an application for alimony pendente lite is not a separate action, an order for such alimony is a judgment, independent of final judgment in action, and while such judgment is not vacated by dismissal of action, right to alimony awarded by it is terminated.

#### 6. Divorce ⇨277

Where cross complaint, under which 1944 order for alimony pendente lite was made, was dismissed in 1949 under mandatory provisions of section of Code of Civil Procedure providing for dismissal for failure to bring action to trial, wife's ex parte money judgment entered in 1956 for collection of alimony payments allegedly accrued from 1951 to 1956 was without warrant or authority of law and was properly vacated. West's Ann.Code Civ.Proc. §§ 473, 583, 663.

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Jerrell Babb, Los Angeles, for appellant.  
Bonpane & Dillon and Manuel Ruiz, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

Respondent is the plaintiff and cross-defendant in an action for divorce commenced by him in April, 1944, in the Superior Court of Los Angeles County.

On June 1, 1944, his wife, appellant herein, filed an answer and cross-complaint in which she named as cross-defendants respondent and his son, Edwin S. Douglas, Jr.

On October 30, 1944, the aforesaid court made and entered an order requiring respondent to pay appellant as defendant and cross-complainant, the sum of \$250 per month as alimony pendente lite.

On March 21, 1946, appellant, as cross-complainant, filed what she entitled a supplemental cross-complaint naming as cross-defendants one Grace Kunkle, Telegraphic Delivery Service, a corporation, Edwin S. Douglas, Jr., and respondent.

On July 5, 1949, the trial court, on its own motion, dismissed respondent's action

pursuant to the provisions of Section 583 of the Code of Civil Procedure.

On July 7, 1949, the same court dismissed the cross-complaint, but denied respondent's motion to dismiss cross-complainant's action and proceeded to try the case upon the supplemental cross-complaint.

After the cause was submitted a mistrial was declared. Thereupon, the cross-defendants therein, other than the respondent herein, applied to the District Court of Appeal for a writ of prohibition to restrain the superior court from taking any further proceedings against them, contending that the lower court was without jurisdiction and had abused its discretion in denying their motion to dismiss the action.

On November 2, 1949, the District Court of Appeal granted a peremptory writ of prohibition (Douglas v. Superior Court, 94 Cal.App.2d 395, 210 P.2d 853). The writ that issued so far as pertinent here, reads as follows: "\* \* \*, we do command you \* \* \* that you absolutely desist and refrain from taking any further proceedings against, or making any orders affecting petitioners herein in the above entitled proceedings \* \* \*" (Emphasis added.) In a subsequent decision involving a petition for a writ of prohibition (Douglas v. Superior Court, 143 Cal.App.2d 17, 18, 299 P.2d 285, 286), the District Court of Appeal noted that "No order has been made dismissing the supplemental cross-complaint, although undoubtedly petitioner (respondent herein) is entitled to have it dismissed." This statement finds substance in the language of the court in granting the aforesaid writ of prohibition (Douglas v. Superior Court, supra, 94 Cal.App.2d at pages 398, 399, 210 P.2d at page 854) wherein it is said that the mandatory provision for dismissal after the lapse of the statutory time without proceeding to trial, as well as the decisions therein cited that said period is not extended by the filing of an amended or supplementary complaint, are "equally applicable to the filing of an amended or supplemental cross-complaint" as in the instant action, and require that the cross-action be dismissed upon the

lapse of the statutory time after the filing of the original cross-complaint.

On July 20, 1956, appellant, on the basis of her affidavit, secured an *ex parte* judgment and a writ of execution against respondent to collect the amount of \$15,000, plus interest of \$2,699.86, which appellant contended was due and owing on the aforesaid *pendente lite* order made by the court October 30, 1944 for her support on her separate maintenance cross-complaint, said amount being claimed for the five years preceding the filing of her request for said *ex parte* judgment and writ of execution on July 20, 1956, viz., from July 20, 1951 to July 20, 1956.

On August 20, 1956, respondent filed a motion to vacate and set aside the aforesaid *ex parte* judgment of July 20, 1956. The motion was based on the grounds (1) that the dismissal of the cross-complaint in 1949 carried down with it all prior orders for support *pendente lite* and (2) that the valid decree of divorce granted to respondent in Nevada on June 10, 1949, against which there had been no successful attack, barred appellant from collecting payments, *pendente lite*, from and after said date of June 10, 1949, and (3) that additionally appellant abandoned this present action when she filed a new action in January, 1951 alleging the same grounds for separate maintenance as in this present action.

On August 20, 1956, respondent also filed a motion for entry of dismissal *nunc pro tunc* of appellant's aforesaid supplemental cross-complaint. This motion was grounded upon the claim that respondent was entitled to such order of dismissal under the holding of the District Court of Appeal in Douglas v. Superior Court, supra (94 Cal.App.2d 395, 210 P.2d 853), prohibiting any further proceedings upon said supplemental cross-complaint against the petitioners in the case just cited for the reason that the filing of the supplemental cross-complaint did not have the effect of extending the time of mandatory dismissal to five years after its filing.

On March 5, 1957, the trial court made its order granting both motions. From such order appellant prosecutes this appeal

Appellant first contends that the court erred in dismissing *nunc pro tunc* her supplemental cross-complaint, since that remedy was available only to correct the record as to clerical errors, and cannot be utilized to correct judicial error, if any there was.

[1] It is undoubtedly true, as urged by appellant, that no rule of law is more clearly or firmly established than the one which holds that where an error is inherently judicial rather than clerical or inadvertent the court has no power to amend its decision.

[2] The cases cited by appellant merely reiterate the foregoing rule that the power of a court to correct clerical error in a final judgment may not be used as a springboard to rectify its judicial errors. That where the error in a judgment is inherently judicial rather than clerical or inadvertent, it can only be set aside in the modes prescribed by statutory procedure, as for example, in Sections 473 and 663 of the Code of Civil Procedure. That subject to these exceptions, inadvertence and clerical errors, the judgment is reviewable only on appeal (*Johnson v. Superior Court*, 31 Cal.App.2d 111, 113, 87 P.2d 384; *Uhl v. Johnson*, 141 Cal.App.2d 659, 665, 297 P.2d 493; *Thomson v. L. C. Roney & Co.*, 112 Cal.App.2d 420, 425, 246 P.2d 1017; *City of San Diego v. Superior Court*, 36 Cal.2d 483, 487, 224 P.2d 685).

[3, 4] However, courts are clothed with inherent power to enter judgments *nunc pro tunc*. And such an order should be granted or refused as justice may require in view of the circumstances present in a particular case (*Norton v. City of Pomona*, 5 Cal.2d 54, 62, 53 P.2d 952). In *Douglas v. Superior Court*, supra, 143 Cal.App.2d 17, 18, 299 P.2d 285, 286, this court said: "No order has been made dismissing the supplemental cross-complaint, although undoubtedly petitioner (respondent herein) is entitled to have it dismissed." Therefore, when, on July 7, 1949, the court dismissed appellant's cross-complaint for separate maintenance under Section 583 of the Code of Civil Procedure, it should have dismissed the supplemental cross-complaint, for, as was said in

*Douglas v. Superior Court*, supra, 94 Cal. App.2d 395, 398, 399, 210 P.2d 853, 854: "It was thereafter without jurisdiction to proceed in the action as the filing of the so-called supplemental complaint, whether it be in fact a supplemental complaint or an amended complaint, did not have the effect of extending the time of mandatory dismissal to five years after its filing."

In view of the facts as revealed by the record herein, measured by the rule above stated, we conclude that the trial court was fully justified in making and carrying out its *nunc pro tunc* order.

[5, 6] We come now to a consideration of the correctness and validity of the action of the court in granting respondent's motion to vacate appellant's *ex parte* money judgment for *pendente lite* separate maintenance payments entered July 20, 1956, in the sum of \$15,000 plus interest amounting to \$2,699.86, from July 20, 1951 to July 20, 1956. We are satisfied that the order appealed from was proper. The original action herein was filed by respondent in April, 1944. On June 1, 1944 appellant filed her answer and cross-complaint. On October 10, 1944, the trial court made its order pursuant to the prayer contained in appellant's cross-complaint, that respondent pay to her the sum of \$250 per month as alimony *pendente lite*. It must be borne in mind that the complaint and appellant's cross-complaint, upon the latter of which the *pendente lite* alimony order was predicated were dismissed by the court below on July 7, 1949, more than two years prior to the date for which appellant's *ex parte* money judgment provided for allegedly due and unpaid alimony payments, to wit, July 20, 1951 to July 20, 1956. While an application for alimony *pendente lite* is not a separate action, an order for such alimony "is to all legal intents and purposes a judgment," independent of the final judgment in the action. Therefore, while such judgment is not vacated by a dismissal of the action, the right to alimony awarded by it is terminated (*Douglas v. Superior Court*, supra, 143 Cal.App.2d 17, 19, 299 P.2d 285). Since the cross-complaint, under which the order for alimony *pendente lite* was made,



was dismissed July 7, 1949 under the mandatory provisions of Section 583 of the Code of Civil Procedure, it necessarily follows, under the applicable rule, that appellant's *ex parte* money judgment entered July 20, 1956 for the collection of alimony payments allegedly accrued from July 20, 1951 to July 20, 1956, was without warrant or authority of law and was properly vacated.

The order from which this appeal was taken is affirmed.

FOURT and LILLIE, JJ., concur.



164 Cal.App.2d 230

**Edwin S. DOUGLAS**, Plaintiff, Cross-Defendant, and Appellant, and Respondent,

v.

**Fay H. DOUGLAS**, Defendant, Cross-Complainant and Respondent, and Appellant.  
Civ. 22673.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 16, 1958.

Rehearing Denied Nov. 13, 1958.

Hearing Denied Dec. 10, 1958.

Proceeding brought by wife in 1956 for execution against husband for amount of support payments due from husband under order for support money pendente lite entered in 1944 in divorce proceeding. The Superior Court, Los Angeles County, Emil Gumpert, J., rendered judgment for wife, and both parties appealed. The District Court of Appeal, White, P. J., held that where husband obtained Mexican divorce decree in 1945 and in 1949 obtained a second divorce decree in Nevada, second decree was conclusive determination of status of parties as husband and wife from date of marriage to dissolution of that relation by Nevada court, husband by his proceedings in Nevada court waived his right to assert

benefit of Mexican decree, and husband was not relieved of his obligations under pendente lite order for support until date of Nevada decree.

Affirmed.

See also 330 P.2d 655.

# 1. Divorce ⇐381, 391

Where wife obtained order directing husband to pay support money pendente lite in 1944, husband obtained Mexican divorce decree in 1945 and in 1949 obtained a second divorce decree in Nevada, second decree was conclusive determination of status of parties as husband and wife from date of marriage to dissolution of that relation by Nevada court, husband by his proceedings in Nevada waived his right to assert benefit of Mexican decree and husband was not relieved of his obligations under pendente lite order for support until date of Nevada decree. West's Ann.Code Civ.Proc. §§ 681, 685.

# 2. Divorce ⇐357(2)

Where a wife attacked jurisdiction of Nevada court in that forum in which husband obtained divorce, wife was foreclosed from attacking it subsequently in California court.

# 3. Appeal and Error ⇐983(3)

Decision resulting from exercise of discretionary power of court in proceedings with respect to whether execution should be permitted more than five years from date of entry of judgment will not be disturbed unless a clear abuse of discretion is made to appear. West's Ann.Code Civ. Proc. §§ 681, 685.

# 4. Appeal and Error ⇐930(1)

District Court of Appeal in reviewing evidence will resolve all conflicts in favor of respondent and all legitimate and reasonable inferences will be indulged in to uphold verdict if possible.

# 5. Appeal and Error ⇐989, 996

When verdict is attacked as being unsupported, power of appellate court begins and ends with determination as to whether

there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached and when two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions from those of trial court.

#### 6. Divorce ⇨263

In proceeding brought by wife in 1956 for execution against husband for amount of support payments due from husband under order for support money *pendente lite* entered in 1944 in divorce proceeding, conclusion that wife exercised due diligence required by statute which provides that judgment may be carried into execution more than five years from date of entry by leave of court upon motion accompanied by affidavits setting forth reasons for failure to proceed within five years, was supported by substantial evidence. West's Ann.Code Civ.Proc. §§ 681, 685.

#### 7. Divorce ⇨219

Where wife was awarded *pendente lite* support payments in divorce proceeding brought in California, subsequently wife unsuccessfully attacked jurisdiction of Nevada court in that forum, wherein husband obtained divorce, and California trial court subsequently made final order adjudicating validity of Nevada decree, whether courts of California were obligated under full faith and credit clause of constitution of United States to give Nevada decree recognition, they did so, adjudication of validity of Nevada decree was binding upon wife and *pendente lite* support payments were properly terminated as of effective date of Nevada decree. U.S.C.A.Const. art. 4, § 1.

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Bonpane & Dillon, Manuel Ruiz, Jr., Los Angeles, for plaintiff, cross-defendant, and appellant.

Jerrell Babb, Los Angeles, for defendant, cross-complainant and respondent.

WHITE, Presiding Justice.

After the five-year period authorizing the issuance of execution under Section

681 of the Code of Civil Procedure had expired, respondent, on March 29, 1955, filed in the superior court, a notice of motion, petitioning said court to nevertheless, issue execution pursuant to the provisions of Section 685 of the Code of Civil Procedure. The record reveals that said motion was predicated upon the following factual background. Appellant and respondent were married in 1941 and separated in 1944. On April 28th of that year, appellant filed an action for divorce against respondent on the ground of extreme cruelty. On June 1, 1944, respondent filed an answer and cross-complaint for separate maintenance against appellant. On October 30, 1944 the superior court made its order pursuant to the prayer of said cross-complaint, directing appellant to pay respondent support money *pendente lite*, in the sum of \$250 per month commencing November 15, 1944. Said payments were made by appellant to and including the month of February, 1946.

There was testimony by appellant that from February, 1946 to July, 1949 he was absent from the state of California and spent "most of the time in New Rochelle, New York". Appellant, however, contends that during this period he made frequent trips to Los Angeles to appear in court in connection with pending litigation between him and respondent, the trial of which was continuously postponed due to "dilatatory tactics" of respondent. In her affidavit respondent asserts that during these trips to Los Angeles, appellant "kept his whereabouts concealed" from her and that she could not, "with the exercise of due diligence, ascertain same until approximately the month of January, 1953, or for a total of seven years"; that she diligently sought at all times to ascertain appellant's whereabouts; and that she procured the issuance of writs of execution, all of which were returned unsatisfied. It further appears that in 1951, on the occasion of one of appellant's visits to Los Angeles, respondent, through the office of the district attorney, instituted criminal proceedings against him for failure to provide for a minor child, allegedly the son of appellant. In his af-

fidavits, appellant averred that in the early part of January, 1953, he returned to reside permanently in the city of Los Angeles since which time he has continuously lived in Los Angeles; that since the month of January, 1953, "appellant has been continuously in the employ of Telegraph Delivery Service; and the office of said Telegraph Delivery Service was conveniently located in a downtown building at 354 South Spring Street, Los Angeles, California.

"In the fall of 1955 said Telegraph Delivery Service moved its office to Beverly Hills, California, and is located at 292 La-Cienega Boulevard, Beverly Hills, California. Respondent has been always aware of the location and exact address of appellant's employment, and on numerous occasions, during the years 1954, 1955 and 1956, she caused appellant to be served with lawsuits, papers and orders to show cause. By reason of said lawsuits and numerous proceedings thereunder it became necessary for appellant to come into court any number of times throughout the year 1954 to attend court hearings of considerable length, conducted on various dates in the Superior Court before Judge Richards, Judge Walker, Judge McCoy and other judges of the Superior Court, which culminated in the dismissal in September, 1954, of fourteen Superior Court lawsuits filed by respondent, from time to time, in the last 10 or 12 years. Said lawsuits and proceedings were entirely unrelated to any attempt, under Sections 681 or 685, Code of Civil Procedure, to collect back payments allegedly due her.

"At no time whatsoever, within an entire period of ten years, between February 1946, and March 29, 1956, the date of the filing of notice of motion for writ of execution under Section 685, Code of Civil Procedure, did respondent take any action to secure a writ of execution on back payments, under Section 681, Code of Civil Procedure, although respondent knew, from February, 1946, at all times, the whereabouts of appellant, and saw him on his several trips back to Los Angeles, and knew that he was locally employed since January, 1953, and

yet waited until March, 1956, to file her motion for writ of execution."

Appellant further asserts that on March 14, 1945, he obtained a valid judgment of divorce from respondent in Mexico. That on March 28, 1945 he married his present wife. That thereafter, in 1951, respondent filed an action in the Superior Court of Los Angeles County, attacking the validity of said Mexican divorce, but, in September, 1954, she dismissed the action with prejudice. Appellant therefore, contends that the right of respondent to any further allowance of support *pendente lite* in the aforesaid separate maintenance action was terminated on March 14, 1945 by the Mexican divorce.

It might here be noted that on July 5, 1949, the Superior Court of Los Angeles County, on its own motion, dismissed appellant's divorce action pursuant to the provisions of Section 583 of the Code of Civil Procedure, and on July 7, 1949 the same court dismissed respondent's cross-complaint, upon which the order for support money *pendente lite*, here under consideration, was based.

On June 10, 1949, appellant filed an action and obtained a judgment of divorce from respondent in the Eighth District Court of the County of Clark, State of Nevada. Subsequently, respondent made a special appearance in said Nevada court wherein she challenged the validity of the judgment of divorce on the ground of fraud and lack of jurisdiction. The motion was denied, no appeal was taken therefrom, and the judgment has become final.

On March 29, 1946 respondent filed, in the Superior Court of Los Angeles County, her motion asking the court to issue a writ of execution pursuant to the terms of Section 685 of the Code of Civil Procedure after the expiration of the five-year period provided by Section 681 of the same code. Respondent's motion sought an execution and a judgment for accrued support payments allegedly due her from February, 1946 to July, 1949 under the *pendente lite* order granted on October 30, 1944, in her aforesaid separate maintenance action.



Appellant filed objections to respondent's motion, supported by affidavits, on two grounds:

(1) That appellant's judgment of divorce, obtained in Mexico on March 14, 1945, terminated respondent's right to further *pendente lite* support payments in her separate maintenance action;

(2) That in any event, respondent had no standing in court because she had failed to exercise the due and necessary diligence required by law, and by the provisions of Section 685, Code of Civil Procedure, on a request for the issuance of execution after the expiration of the five-year period provided by Section 681, Code of Civil Procedure.

The court granted respondent's motion and ordered the issuance of a writ of execution under Section 685 of the Code of Civil Procedure against appellant for the sum of \$15,928.54 representing payments due from appellant to respondent from March 1, 1946 to and including June 10, 1949 (the date of the aforesaid Nevada divorce), together with interest in the sum of \$6,203.54. From such order, appellant prosecutes this appeal.

As his first ground for reversal, appellant earnestly urges that the trial court committed prejudicial error in holding that the Mexican divorce decree entered in March, 1945 was not controlling to terminate the support payments under the aforesaid *pendente lite* order for separate maintenance and that the date of the Nevada divorce, entered in June, 1949 constituted the effective date of termination.

Under the facts and circumstances present in the controversy now engaging our attention, we are satisfied that the learned trial judge correctly disposed of appellant's contention. We therefore adopt as part of this opinion the following language taken from the "memorandum" filed by the judge of the court below when the cause was decided by him:

[1] "We need not concern ourselves here with the validity of the Mexican decree.

Subsequent to its entry, Mr. Douglas secured a second divorce from Mrs. Douglas, this time in Nevada. (Parenthetically, in other proceedings in this action he asserts the validity of and relies upon the Nevada judgment.) The latter decree was a conclusive determination of the status of the parties as husband and wife from the date of the marriage to the dissolution of that relation by the Nevada court ([In re] Estate of Lee, 200 Cal. 310, 314 [253 P. 145]). It being the later of the two adjudications, it is controlling. Mr. Douglas by his proceedings in Nevada waived his right to assert the benefit of the Mexican decree (Dillard v. McKnight, 34 Cal.2d 209, 219 [209 P.2d 387, 11 A.L.R.2d 835]; California Bank v. Traeger, 215 Cal. 346, 351 [10 P.2d 51]; 29 Cal.Jur.2d pages 174 and 258.)

"In support of the Mexican judgment, counsel for Mr. Douglas rely upon a dismissal 'with prejudice' by Mrs. Douglas on September 14, 1954, of a California action directly attacking it. This dismissal, they assert, was effective as a retraxit and was res judicata on the issue of the validity of the Mexican decree. (Citing Gagnon Co. v. Nevada Desert Inn, 45 Cal.2d 448 [289 P.2d 466].) The Court is thus called upon in effect to declare an estoppel upon an estoppel upon an estoppel. There are two answers to the above: (a) The California action attacked both the Mexican and the Nevada judgments. If the dismissal operated as an adjudication, it determined the validity of both decrees, and as above indicated, the later of the two must control as to the status of the parties; (b) The record here shows a fourth adjudication. After such dismissal 'with prejudice' this court in this very action made a final order establishing the validity of the Nevada judgment. (See the November 10, 1954, order of Judge Philbrick McCoy.) \* \* \*

[2] "The Nevada judgment, if valid, terminated eo instante the award of temporary maintenance herein. (Chirgwin v. Chirgwin, 26 Cal.App.2d 506 [79 P.2d 772];

28 A.L.R.2d 1402; 42 C.J.S. [Husband and Wife § 626, p.] 274.) Mrs. Douglas attacked the jurisdiction of the Nevada Court in that forum. She is thus foreclosed from attacking it here. (Tomkins v. Tomkins, 89 Cal.App.2d 243, 247-[248, 200 P.2d 821], and state and federal cases there cited.) Additionally, as heretofore stated, the Nevada decree was found valid by a final order of this court on November 10, 1954. Accordingly, any recovery herein must be based on amounts accruing prior to June 10, 1949, the date of the Nevada judgment."

We are not impressed with appellant's argument that because divorce laws are established for "public reasons" (Civil Code, Section 3513), and the state has an interest in the marital status, its continuance and its dissolution, the provisions of his Mexican divorce could not be waived by him. When appellant sought the aid of the Nevada court in seeking dissolution of his marriage he represented to that court that respondent herein was his lawful wife. He is an attorney at law, and whatever may have been his reasons, it is manifest he did not rely upon the validity of his Mexican divorce when he invoked the powers of the Nevada court to dissolve the bonds of matrimony existing between him and respondent herein. It would be a mockery of laws governing marriage and divorce and amount to a trifling with judicial process and tribunals if a person might obtain a series of divorces in various jurisdictions and use one of them when that particular decree might, in his opinion, best serve his purpose or interest. Law and good morals should be one and inseparable. The trial court was correct in holding that the Nevada decree having been found valid by a final order of the courts of this state, was the proper one to be used in determining when appellant was relieved of his obligations under the *pendente lite* order for support herein.

In an opinion this day filed (Douglas v. Douglas, 330 P.2d 655) we affirmed an order of the Superior Court of Los Angeles County made March 5, 1957 vacat-

ing an *ex parte* judgment of said court and a writ of execution obtained by respondent herein against appellant herein, to collect support money allegedly due the former under the aforesaid *pendente lite* order of October 30, 1944 on appellant wife's separate maintenance cross-complaint, from July 20, 1951 to July 20, 1956. In the case just cited (330 P.2d at page 658) we held that the right of respondent herein to support money under her cross-complaint terminated with the dismissal of that pleading by the court below on July 7, 1949. However, since the order now engaging our attention concerns alleged unpaid *pendente lite* support money payments from March 1, 1946 to June 10, 1949, such order is unaffected by our holding in Douglas v. Douglas, 330 P.2d at page 657, that the right of respondent herein to such payments did not terminate until July 7, 1949.

We come now to appellant's final contention that the court abused its discretion in granting respondent's motion for issuance of execution under Section 685 of the Code of Civil Procedure.

Without question, appellant introduced evidence that he was in Los Angeles and employed by Telegraph Delivery Service in January, 1953, and thereafter. That respondent knew of appellant's residence in Los Angeles and served him with a series of legal documents during this period. That during the time he lived in New York, appellant made frequent trips to Los Angeles. That on one of such occasions, respondent took advantage of appellant's presence in Los Angeles to have him arrested through the district attorney's office for failure to provide for a child who respondent insisted was appellant's son.

However, these assertions by appellant were challenged and contradicted by respondent in her supporting affidavits and oral testimony at the hearing. We have heretofore narrated in some detail the contents of respondent's supporting affidavit and shall not here repeat them. Suffice it to say that there was presented to the judge

of the court below a distinct conflict on the question of whether respondent had set forth good and sufficient reasons for her failure to proceed in compliance with the provisions of Section 681 of the Code of Civil Procedure.

[3] The rule is well settled that the discretionary power of a court in proceedings of this character will not be disturbed unless a clear abuse of discretion is made to appear. Even though the correctness of the ruling may be doubted, nevertheless, an appellate tribunal is not warranted in substituting its own opinion, for to do so would divest the trier of facts of that discretionary power primarily reposed in him. In the instant case the trial court had before it not only the affidavits of the parties, but had the opportunity to hear their oral testimony, to observe their demeanor on the witness stand, their candor or lack of candor, and to form an opinion of the verity of both the oral testimony and the averments in their respective affidavits. The prerogatives of an appellate court on appeal when reviewing the sufficiency of the evidence to support the conclusion arrived at by the trial court is thus stated in *Re Estate of Bristol*, 23 Cal.2d 221, 223, 224, 143 P.2d 689, 690:

[4, 5] "The rule as to our province is: 'In reviewing the evidence \* \* \* all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary \* \* \* principal of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court,' \* \* \* (*Crawford v. Southern Pacific Co.* (1935), 3 Cal.2d 427, 45 P.2d 183). The

rule quoted is as applicable in reviewing the findings of a judge, as it is when considering a jury's verdict. The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical \* \* \*".

See also *Jackson v. De Benedetti*, 39 Cal. App.2d 574, 579, 103 P.2d 990.

As to his appraisal of the intrinsic value of the conflicting evidence, and the credibility of the affidavits and testimony of appellant and respondent herein, the trial judge in his "memorandum", had this to say:

"No. 2. The Court is completely satisfied that Mrs. Douglas has shown due and reasonable diligence in pursuing her statutory remedies. A review of the voluminous evidence submitted to and carefully considered by the Court is not necessary to this memo. Suffice it to say that Mr. Douglas (appellant), by every means at his disposal (including the absenting of himself from California and the transfer of his assets to his children), has sought to avoid, and has successfully avoided, the payment of the amounts accruing herein. The evidence discloses numerous efforts on the part of Mrs. Douglas to uncover assets of Mr. Douglas and to enforce payment of sums owing her. The Court is convinced that the issuance of writs of execution



during the past years would have been productive of no recovery. \* \* \*

"No. 3. \* \* \* The Court is unwilling to accept Mr. Douglas' bare and unsupported statements regarding payments totalling \$8000.00. His testimony and witness demeanor at best, affords no basis for sustaining any such claim, and the Court does not accept it \* \* \*"

[6] In view of the prevailing rule of law as announced in *Re Estate of Bristol*, supra, 23 Cal.2d at pages 223, 224, 143 P.2d at page 690, we cannot hold that the conclusion arrived at in the trial court that respondent exercised the due diligence required by Section 685 of the Code of Civil Procedure in this case is unsupported by any substantial evidence.

We are inclined to the view that apropos of the case at bar is the following quotation from *Demens v. Huene*, 89 Cal.App. 748, 753, 265 P. 389, 391, which was quoted with approval in *Atkinson v. Atkinson*, 35 Cal.App.2d 705, 708, 96 P.2d 824, and in *Troendle v. Clinch*, 74 Cal.App.2d 480, 484, 169 P.2d 55:

"It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure. \* \* \*

#### Cross Appeal.

Respondent has filed a cross appeal from that portion of the order limiting her recovery to the date of June 10, 1949 "under a theory of validity of the Nevada divorce",

and also from that portion of the order denying respondent interest on the back-payments of alimony *pendente lite*, from June 10, 1949 to date of the order.

Cross-appellant relies heavily on the case of *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987, but in that case the holding was that unless the Nevada court had personal jurisdiction over the wife, it was without power to terminate a husband's obligation to provide her support as required in a pre-existing decree of another state (*Lewis v. Lewis*, supra, 49 Cal.2d at page 393, 317 P.2d at page 990).

This case is therefore authority for the holding of the trial court that the Mexican divorce decree entered in March, 1945, could not effectively terminate the pre-existing *pendente lite* support order entered by the Superior Court of Los Angeles County, California, on October 30, 1944. This, for the reason that in the Mexican divorce proceeding the court had no personal jurisdiction over cross-appellant.

[7] However, in the case at bar, as found by the trial court, cross-appellant unsuccessfully attacked the jurisdiction of the Nevada court in that forum, and thereafter the trial court herein made an order, now final, in this very action, adjudicating the validity of the Nevada decree. Whether or not the courts of California were obligated under the Full Faith and Credit Clause of the Constitution of the United States, art. 4, § 1, to give the Nevada decree recognition, they did so, and having jurisdiction over cross-appellant, the adjudication of the validity of the Nevada decree, was binding upon her. Therefore, it was not error to terminate the *pendente lite* support payments as of the effective date of the valid Nevada decree.

Concerning cross-appellant's final contention that the court erroneously denied her interest on the delinquent payments of support money *pendente lite* to the date of the order appealed from, the record reflects that interest was awarded on said back-payments, "from date of accrual thereof to

December 17, 1956", which was the date of the order.

The order appealed from is affirmed.

Each party to pay their own costs on appeal.

FOURTH and LILLIE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



164 Cal.App.2d 241

**NATIONAL CHARITY LEAGUE, INC., a**  
Non-Profit Corporation, Plaintiff  
and Respondent,

v.

**COUNTY OF LOS ANGELES et al.,**  
Defendants and Appellants.  
Civ. 22998.

District Court of Appeal, Second District,  
Division 1, California.

Oct. 16, 1958.

Hearing Denied Dec. 10, 1958.

Action to recover taxes paid. Judgment for the taxpayer in the Superior Court of Los Angeles County, Arthur Crum, J., and the defendants appealed. The District Court of Appeal, White, P. J., held that where at noon on tax day some trenches for foundation of a building of the taxpayer qualifying for a tax exemption under the welfare provisions of the Code had been dug and the building was thereafter completed without delay, the building was "in the course of its construction", so as to be entitled to tax exemption.

Judgment affirmed.

#### 1. Taxation ☞196

The constitutional provision restricting the exemption of property used exclusively for charitable purposes from taxation is purely permissive and not mandatory and the Legislature can refrain from exempting any of the property referred to

or it can exempt only such property as may meet the conditions specified therein and on such further conditions as it may see fit to impose. West's Ann.Const. art. 13, § 1c.

#### 2. Taxation ☞57

All property must be taxed unless an exception is authorized by the Constitution or granted by federal law.

#### 3. Taxation ☞204(2)

Provisions exempting property from taxation must be strictly construed to the end that the exemption will neither be enlarged nor extended beyond the plain meaning of the language employed.

#### 4. Taxation ☞251

Charitable institutions have the burden of showing that they clearly come within the terms of the exemption provisions from taxation. West's Ann.Const. art. 13, § 1c.

#### 5. Statutes ☞199

"In the course of" is another way of saying "during" and some of the synonyms for "construction" are "making," "framing," "assembling," "building," "erecting," and "creating."

See publication Words and Phrases, for other judicial constructions and definitions of "In the Course of", "During" and "Construction".

#### 6. Taxation ☞241(1)

Where at noon on tax day, some trenches for foundation of a building of the taxpayer qualifying for a tax exemption under the welfare provisions of the Code had been dug and the building was thereafter completed without delay the building was "in the course of its construction" so as to be entitled to tax exemption. West's Ann.Rev. & Tax. Code, §§ 214, 214.1; West's Ann.Const. art. 13, § 1c.

See publication Words and Phrases, for other judicial constructions and definitions of "In the Course of Construction".

#### 7. Taxation ☞241(1)

The phrase "in the course of construction" as used in the provisions exempting

from taxation property used exclusively for charitable purposes including a building in the course of construction applies to a building from the time of its commencement to its completion and an excavation which can be recognized by the landowner at the commencement of a building is the "commencement of a building" within the tax exemption. West's Ann.Rev. & Tax.Code, §§ 214, 214.1; West's Ann.Const. art. 13, § 1c.

See publication Words and Phrases, for other judicial constructions and definitions of "Commencement of a Building".

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Harold W. Kennedy, County Counsel, Los Angeles, by Alfred Charles De Flon, Deputy County Counsel, Hollywood, for appellants.

Walter H. Young, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendants County of Los Angeles, City of Los Angeles, Los Angeles City School District, Metropolitan Water District of Southern California, and Los Angeles County Flood Control District appeal from a judgment against them and in favor of plaintiff National Charity League, Inc., a Non-Profit Corporation, in its action to recover taxes for the year 1955-56 paid under protest. The judgment requires the refund of the amount of taxes collected, excepting therefrom only the portion collected for the Flood Control District.

According to the Pre-Trial Conference Order made February 25, 1957, plaintiff and defendant at that conference stipulated that plaintiff qualifies for tax exemption under the welfare provisions of the Revenue and Taxation Code (Secs. 214, 214.1); that plaintiff is the owner of the land described in the complaint; that plaintiff intended to construct on said real property a building to be used in connection with its non-profit activity, and "if and when said building was either constructed or actually in the course of construction then said real

property and the building either completed or in the course of construction would have been exempt from taxation," that prior to the first Monday in March, 1955, "the plaintiff had cleared said real property, had dug certain trenches for foundations and had placed lumber upon said property, all of which activities were in furtherance of the construction of a building on said real property for welfare use;" that all plans and specifications had been filed with the proper officials and a building permit had been issued; that all financing had been arranged, and thereafter the building was prosecuted to completion and used for welfare purposes.

At the pre-trial hearing and at the trial, plaintiff urged that the building was, on and prior to noon of the first Monday in March, 1955, "in the course of construction" and exempt from taxation under Article XIII, Section 1c of the California Constitution.

Defendants contended at the pre-trial hearing, at the trial, and upon the instant appeal, that there was on Monday, March 7, 1955, no "building in the course of construction within the meaning of said section of said Article of the Constitution and section 214.1 of the Revenue and Taxation Code."

The pre-trial order limits the evidence to be taken to construction work done on said property prior to noon on Monday, March 7, 1955; and states that "the sole legal issue is, whether what the plaintiff had done on said premises prior to noon on the first Monday in March, 1955, constituted work which could be considered to result in a building 'in the course of construction' within the meaning of the Constitutional provision and said section of the Revenue and Taxation Code above referred to."

The trial court found that, as of noon on the first Monday in March of 1955, "excavations for the foundation \* \* \* had been made on the said property, foundation lines had been staked, surveyed and laid out, and foundation forms had



been partially constructed \* \* \*," and concluded that "there was a building in the course of construction on the plaintiff's land, which building, when completed, was to be used exclusively for charitable purposes and not conducted for profit," and that said building and land was then exempt from taxation under Section 214.1, Revenue and Taxation Code, and the California Constitution, Article XIII, § 1c.

It is appellant's position that the above quoted finding and the conclusion based thereon are "wholly unsupported by any evidence whatsoever."

The record includes, in addition to the stipulation at the pre-trial hearing that trenches for foundations had been dug, a photograph of the property taken on Friday, March 4, 1955, showing trenches, which, according to the testimony of John Meek, the general contractor, were dug by hand for the purposes of testing the soil and later were filled and leveled.

The witness, Jane Young, however, testified that she was on the property when the photograph of March 4th was taken; that there were two men there that day and they did more work on the property after the picture was taken; that she was also on the property at noon on Monday, March 7th; that more trenches had then been dug and there was some lumber on the lot. On cross-examination, she testified that before Monday noon the digging included "one of the corners of the new building," that more boards not shown in the picture of the 4th had been placed, and further digging had been done along those boards.

Mr. Meek testified that they had a superintendent in charge of the work on this building; that they generally use a foundation digging machine to put in foundations, and for this building "we did some machine excavation and some hand excavation;" their machine excavations were not commenced until after March 7th and no cement footings were in place before noon of that day. He testified that at noon on March 7, 1955, no part of the building was in place, and that any batter boards then

located would have been removed later. However, he testified that he was not on the property on March 7th. His testimony does not preclude the court from believing the testimony of Jane Young, who was there, and inferring therefrom that some of the trenches theretofore dug and the boards described by her as on the property at that time were excavations and forms for foundations.

From the entire record, it appears that although lumber had been stacked on the lot, the only permanent part of the building to be constructed which was on the property prior to noon of March 7th was a trench into which a portion of the foundation would later be poured.

Does such an excavation for foundation constitute a "building in the course of construction," within the meaning of the California Constitution and Section 214.1 of the Revenue and Taxation Code?

Said section 1c of Article XIII, as amended in 1954, includes the following language:

"In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for \* \* \* charitable purposes and owned by \* \* \* corporations organized and operated for \* \* \* charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. As used in this section, 'property used exclusively for \* \* \* charitable purposes' shall include a building and its equipment in the course of construction on or after the first Monday of March, 1954, together with the land on which it is located as may be required for the use and occupation of the building, to be used exclusively for \* \* \* charitable purposes."

[1] Section 1c of Article XIII of the California Constitution is purely permissive and not mandatory in character. Under its provisions the Legislature can refrain from exempting any of the property therein referred to, or it can exempt only such prop-

erty as may meet the conditions specified therein and such further conditions as it may see fit to impose. *Sutter Hospital of Sacramento v. City of Sacramento*, 39 Cal. 2d 33, 35, 244 P.2d 390.

[2] "In California all property must be taxed unless an exemption is authorized by the state Constitution or granted by the laws of the United States \* \* \*.

\* \* \* \* \*

"Section 1c is an enabling provision which empowers the Legislature to grant exemptions within certain general categories. In acting under this section the Legislature must necessarily construe the terms of the provision in order to determine the extent of the authority conferred upon it \* \* \*." *Lundberg v. County of Alameda*, 46 Cal.2d 644, 648, 651, 298 P.2d 1, 4.

Decisions of the courts of other states, or even California decisions based upon other and different provisions of the Constitution and statutes, are of little assistance in determining the exact extent of the exemption from taxation in California on March 7, 1955. The pertinent portions of the statutes then in effect are as follows:

"Property used exclusively for \* \* \* charitable purposes owned and operated by \* \* \* corporations organized and operated for \* \* \* charitable purposes is exempt from taxation \* \* \*." Sec. 214, Rev. & Tax.Code.

"\* \* \* 'property used exclusively for \* \* \* charitable purposes' shall include facilities in the course of construction on or after the first Monday of March, 1954, together with the land on which the facilities are located \* \* \*." Sec. 214.1, Rev. & Tax.Code.

As stated by appellants in their Opening Brief, we need not be concerned with any possible difference in the meanings of the words "building" as used in the Constitution and "facilities" as used in the statute, "because a building in the conventional sense was eventually erected on the land for which exemption was claimed on tax day, 1955." The question to be determined

on the instant appeal is whether that building was "in the course of construction," within the meaning of the phrases used in both the Constitution and the statute, at noon on Monday, March 7, 1955.

[3] "\* \* \* The ordinary rule of statutory construction, in respect to provisions exempting property from general taxation, is that such provisions must be strictly construed to the end that the exemption will be neither enlarged nor extended beyond the plain meaning of the language employed." *City and County of San Francisco v. San Mateo County*, 17 Cal. 2d 814, 817, 112 P.2d 595, 597, and cases there cited.

[4] "\* \* \* In this regard, [the charitable institutions] thus like other private owners of property, have the burden of showing that they clearly come within the terms of the exemption \* \* \*. This rule has been expressly recognized in this state in the application of the orphanage exemption \* \* \*.

"But the rule of strict construction does not require that the narrowest possible meaning be given to words descriptive of the exemption, for a fair and reasonable interpretation must be made of all laws, with due regard for the ordinary acceptance of the language employed and the object sought to be accomplished thereby." *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 743, 221 P.2d 31, 34, 15 A.L.R.2d 1045.

Therefore, on the basis of a "strict but reasonable construction" the dispute between the parties in the instant action must be determined.

[5] As heretofore stated, the sole question to be so decided is whether at tax time plaintiff's building was "in the course of construction." "In the course of" is another way of saying "during," and some of the generally accepted synonyms for "construction" are: "making," "framing," "assembling," "building," "erecting," and "creating." In other words, "the course of construction" of a building refers to that period of time between the commencement

and completion of the building. In the instant action, it is agreed that at tax time plaintiff's building was not completed. The remaining question is whether, at that time, the building had been commenced.

The Supreme Court of California, in *English v. Olympic Auditorium, Inc.*, 217 Cal. 631, 636, 20 P.2d 946, 949, 87 A.L.R. 1281, held that the notice of non-responsibility was posted by the owner after the "commencement of [the] construction" of the auditorium. At the time of the posting, there was some lumber upon the land, a temporary platform used only for ground-breaking ceremonies and then torn down had been built, and a test hole 6 feet by 10 feet by 6 feet had been dug "for the purpose of testing the character and weight-bearing qualities of the soil, which information was necessary in preparing the plans and specifications for the building. The test hole was thereafter used as a part of the excavation for the building." The Supreme Court in the case just cited followed *Simons Brick Co. v. Hetzel*, 72 Cal. App. 1, 236 P. 357, wherein it was held that a trench about 60 feet long and four feet deep excavated along the front of the lot "was sufficient to put the holder of the mortgage on notice of a building being under construction on the premises." Whether the building has been commenced is a question of fact to be determined by the trial court. In neither of the two decisions last above cited could it be held that, as a matter of law, the evidence of such excavations was not sufficient to support the finding that the building had been commenced.

[6] The evidence in the instant action that at noon on tax day some trenches for the foundation of the building had been dug is not, as a matter of law, insufficient to support the finding that the building had been commenced. A building having been commenced and not yet finished, unless abandoned, is "in the course of construction." In the instant action, it is stipulated that the plaintiff's building was completed without delay.

Appellant urges that the phrase "in the course of construction" has a different meaning when used in a statute exempting property from taxation, from the meaning of the same phrase when used in a statute creating and limiting liens of workmen as against landowners and contractors.

[7] We are satisfied, however, that the phrase "in the course of construction" applies to a building from the time of its commencement to its completion, and see no logical reason to hold that an excavation which can be recognized by the land owner or mortgagor as "the commencement of a building" (*Simons Brick Co. v. Hetzel*, supra, 72 Cal.App. 5, 236 P. 358) should not also be recognized by the tax assessor as the commencement of a building.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; CARTER, SCHAUER and SPENCE, JJ., dissenting.



164 Cal.App.2d 421

**Kenneth HAUSSLER and Marie Haussler,**  
his wife, Plaintiffs and Respondents,

v.

**Warner WILSON, Defendant and**  
**Appellant.**

Civ. 9233.

District Court of Appeal, Third District,  
California.

Oct. 20, 1958.

Hearing Denied Dec. 17, 1958.

Action by sellers of capital stock of bank against buyer to rescind sale on ground of fraudulent misrepresentation. The Superior Court, Yolo County, Ben R. Ragain, J., denied motion for new trial and granted decree rescinding sale and buyer appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence



sustained finding that when buyer, who was a director and the manager of the bank, told sellers the shares were worth about \$150 each he grossly misrepresented real value of shares.

Affirmed.

#### 1. Banks and Banking Ⓒ40

In action by sellers of capital stock of bank against buyer to rescind sale on ground of fraudulent misrepresentations, evidence sustained finding that when buyer, who was a director and the manager of the bank, told sellers shares were worth about \$150 each he grossly misrepresented real value of shares.

#### 2. Corporations Ⓒ316(3)

Under "special facts doctrine", which imposes upon corporate officer a limited fiduciary duty in transactions with shareholder involving transfer of stock, confidential relationship arises as result of officer's possession of special knowledge gained in his capacity as corporate fiduciary.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Facts Doctrine".

#### 3. Corporations Ⓒ316(3)

Corporate officer, in buying or selling to shareholder, must inform him of those matters relating to corporate business of which officer has knowledge and which shareholder has right to know about, so that latter may have benefit of such information in judging advantages of deal.

#### 4. New Trial Ⓒ108(2)

Refusal to grant new trial for newly discovered evidence in that seller, after successful action to rescind sale of bank stock on ground of fraudulent misrepresentation of buyer, director and manager of bank, as to value of stock, wrote letter to buyer stating that she was sure buyer acted in good faith, was proper.

Ehrman, White & McAuliffe, San Francisco, for appellant.

Pierce & Brown, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Respondents began this action to obtain a decree declaring rescinded a transaction whereunder appellant had purchased from them five shares of the capital stock of the Bank of Davis. The judgment granted this relief, and the court denied a motion for a new trial. This appeal followed.

By their complaint respondents alleged that the sale of the shares of stock had been induced by fraudulent representations made to them by appellant. The trial court found these allegations to be true. Appellant's attack on the judgment raises the single issue of the sufficiency of the evidence to support these findings.

The findings may be summarized as follows: Respondents were the owners jointly of five shares of the common capital stock of the bank. Appellant was a director and its manager. During the period here involved the total number of issued and outstanding common shares was 250. Respondents, on May 2, 1953, sold their shares to appellant for \$300 per share. During the negotiations for the sale appellant made certain representations which were false, fraudulent, untrue and were known by him to be so. Appellant represented to respondents that the actual reasonable value of the shares was materially less than \$300 per share, but that he was willing to pay \$300 per share because certain persons were challenging the control of defendant and his associates of a majority of shares. Respondents' shares were, therefore, needed by appellant in order to strengthen his position in the corporation. The shares were then of an actual and reasonable value of \$887.24 per share. Appellant represented that the bank was not earning sufficient profits with which to pay substantial dividends. In fact, the bank had earned large profits sufficient to enable it to declare a 100% stock dividend, which was done soon

after the sale, and appellant knew the directors had already decided to declare the stock dividend but concealed that knowledge from respondents. Appellant had been negotiating for the purchase of other shares of the bank, one block of stock being one for which the owner had demanded \$500 per share and another lot being one in which a tentative sale to appellant had been cancelled. The bank had built up reserves from earnings sufficient to retire its preferred shares and to build up its paid in capital by \$25,000 transferred from reserves and to build up a surplus by transferring \$55,000 from unallocated reserves to paid in surplus. These steps were taken within a month after respondents sold their stock to appellant. Appellant concealed this information as to the bank's condition from respondents during his negotiations with them for the purchase of their stock.

The court found that appellant had at all times voluntarily assumed and occupied toward all of the shareholders of the bank, including respondents, a relation of personal confidence and by reason thereof was a trustee of a trust in which the shareholders, including respondents, were beneficiaries; that in all matters connected with said trust, appellant was bound to act in the highest good faith towards respondents, but notwithstanding made said misrepresentations and concealed the matters hereinabove before found, and thus obtained and gained an advantage adverse to respondents in violation of his trust; that by reason thereof respondents were induced to enter into the contract of sale and to sell the shares to appellant and did so under the undue influence of appellant.

There is evidence of the following facts: The families of the parties have been residents of the Davis community for many years. Kenneth Haussler, who was thirty years of age at the time of the transactions involved here, had known appellant all his life. Appellant had been connected with the bank since 1929. Respondents' uncle, George Haussler, had for a long time prior to his death been a director and shareholder, and when he died the five shares here

involved were a part of his estate, and were purchased through probate sale by respondents. They paid \$150 per share. Kenneth is a farmer. He and his father before him had always banked with the Bank of Davis, and Kenneth had done no business through any other bank. Appellant had acted as financial adviser for Kenneth's father and for Kenneth. The families had been quite friendly for a long time. At the time of the sale the common stock of the bank was closely held. One hundred and twenty-two shares were owned or controlled by appellant and his aunt. Acquisition of respondents' five shares would give appellant and his aunt voting control of the corporation. Thirty-one shares were held by a trustee for the Bank of America or Transamerica. A Mrs. Flaherty held 16 shares. One Brinley, through his son, wife and brother-in-law, held 36 shares, and four family groups and individuals owned the balance. Before respondents sold their stock to appellant, Brinley purchased the Transamerica and Flaherty shares. When respondents sold to appellant, their 5 shares appeared to be the only shares available and if appellant could obtain them he and the interests he was working with would have voting control. If Brinley got them the voting control would shift.

Under the foregoing circumstances appellant began dealing with the Hausslers for their stock. The sale was the result of three conferences. The first occurred on the Haussler farm when appellant went there and talked to Kenneth. Between the second conference and the last appellant phoned the Hausslers several times, urging them to sell. The Hausslers went to the bank for the purpose of telling appellant they would not sell. They told him that their shares had been in the family a long time; that they liked to be a part of the organization they were doing business with. Responsive to appellant's statement that he was threatened with loss of control of the bank the Hausslers offered to "lend" him their shares. They told him they would vote the shares with him. His reply

was that the only way he could be secure in his position was to purchase the shares outright. He told them the shares were not a particularly good investment, not very valuable and were paying a very low dividend. He offered them \$300 a share, stating it was more than the shares were worth, was twice their value, but that because he wanted control of the bank he was willing to pay that price. He told them that the book value did not enter into the market price of stock. Finally he said that in the near future there would be additional shares available and he promised the Haussslers that they could then buy shares in the bank and again become shareholders and that he would see that stock was made available to them to replace the shares they were selling. The Haussslers sold.

[1] To establish the value of the shares, respondents called to the stand one Addison G. Strong. To qualify himself as an opinion witness on value, he testified that he was a certified public accountant and had been such for forty years, was a graduate of the University of California with the class of 1910, having majored in what is now called business administration; that he was a member of the American Institute of Accountants, of the State Society of Certified Public Accountants, and of the National Association of Cost Accountants. He said he had done general work involving banks along financial organizational lines; that over a number of years he had made an examination of a number of banks, some fairly large; that the assets of the banks he had examined ran from half a million dollars up to five hundred million; that he had done auditing in respect of such banks for boards of directors and that his work had involved going into the affairs of these banks with great particularity to determine their condition; that he had made a report with reference to the condition of the Bank of Davis as of the date the shares were sold to appellant. He said he had considered two published reports, one of June 30 and one of December 31, 1952, covering the examination of the Bank of Davis by the State Superintendent of

Banks; that these reports contained a statement of assets and liabilities in some detail with a recitation of the breakdown of certain of the assets and liabilities, the list of securities and their evaluation. He had examined analyses covering such items as the bank's premises, its earnings and reserves. He had examined the bank's income tax returns for the years 1950 to and including 1953. This witness arrived at a book value of \$887.24 per share. We think it is unnecessary to go into the details of his testimony wherein he substantiated his result. Appellant challenges his results and his methods; respondents defend them. We deem it unnecessary to repeat their arguments. Unquestionably the testimony of Mr. Strong supports a conclusion that the book value of the shares at least approached fairly closely the value the witness gave as above stated. In this respect it might be noted that the witness in his appraisal of net worth of the shares added nothing for good will, although pointing out that in evaluating the stock of a closely held corporation some amount could have been added for good will in determining actual value. The record supports the finding of the trial court that when appellant told the Haussslers their shares were worth about \$150 each he grossly misrepresented the real value of the shares. He was chargeable at the time with knowledge of the book value and of the fact that in some material respects the book value did not reflect the whole of the real value. In the case of a closely held corporation book value is a very material factor in ascertaining real value, yet when the Haussslers asked him about book value his reply was that it had little to do with market value. By thus brushing aside respondents' request for information which in his position as manager of the bank and director he must have had, appellant effectually concealed that which the testimony of the witness Strong revealed. As stated in *County Nat. Bank etc. Co. v. Sheppard*, 136 Cal.App.2d 205, 213, 288 P.2d 880, 886:

"The method now generally sanctioned and adopted for valuing stock



in a closely-held corporation whose stock is unlisted, and where there have been no sales, consists of ascertaining 'the value of the property which they represent, assigning to each share its proportionate worth.'"

The test in such a case as we have before us is stated in this way in *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374, 379:

"The actual value of corporate stock which has no market value, that is, where it is all common stock closely held and not listed or actively traded in on any stock exchange, as in the case at bar, is ordinarily determinable from the then net worth of the corporation divided by the number of bona fide shares issued and outstanding. For that purpose, evidence of the factors and elements, such as assets, liabilities, and all other matters pertinent to the value of the particular corporation involved, may be admitted and considered." (To the same effect see *Kendrick v. Schwartz*, 69 Cal.App.2d 171, 158 P.2d 405; *Gorham v. Massillon Iron & Steel Co.*, 284 Ill. 594, 120 N.E. 467; *Arneson v. Nерger*, 34 S.D. 201, 147 N.W. 982; 31 C.J.S. Evidence § 183, p. 901.)

[2, 3] The evidence herein brought appellant squarely within the scope of the rule declared in *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 433, 159 P.2d 958, 970:

"Under the 'special facts' doctrine a corporate officer owes a limited fiduciary duty in transactions with a shareholder involving the transfer of stock. The confidential relationship arises as a result of the officer's possession of special knowledge gained in his capacity as a corporate fiduciary. An officer, in buying or selling to a shareholder, must inform him of those matters relating to the corporate business of which the officer has knowledge and which the shareholder has a right to know about, so that the latter may have the benefit of such information in judging the advantages of the deal. Once

such disclosure is made, the officer has fulfilled his duty under this doctrine, and the resulting bargain is not subject to disaffirmance on the ground of unfairness to the shareholder. But without such disclosure the fiduciary duty of the officer in such a situation is not discharged."

It is unnecessary to discuss the findings other than those which show fraudulent representations and fraudulent concealment in connection with the value of respondents' shares. We have examined the record closely and think that, with perhaps minor exceptions, the trial court's findings as to other fraudulent representations are supported. But even if they were not the judgment would still have to be upheld because of the misrepresentations and wrongful concealment the court found as to value. As said in *Hobart v. Hobart Estate Co.*, supra, 26 Cal.2d at page 422, 159 P.2d at page 364:

"In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby."

The evidence in this case measures up to the foregoing test and the judgment appealed from must be affirmed.

[4] Appellant moved for a new trial upon the ground of newly discovered evidence and his motion was denied. He now claims an abuse on the part of the trial court in denying that motion. Mrs. Hausler had testified concerning the representations made to herself and her husband by appellant during negotiations leading up to the sale of their stock to him. After the trial was over she wrote him a letter reading as follows:

"Dear Warner

"Quite a little bit sadder and wiser than last week I am writing this note to say that I'm sure what you did was in good faith.

"By the same token all I care about is the rescinding of the shares and a more equal distribution of the management of the bank by the shareholders.

"Kenneth and I, as you probably realize, went into this on principle.

"May I say I have found you a worthy opponent."

She also wrote a letter to a mutual acquaintance, one Virginia S. Dixon, reading as follows:

"Dear Mrs. Dixon,

"This note is to apologize for an oversight of mine in the witness chair, yesterday. In my concentration on the dates in dispute, namely October 1950 to May 1953, I forgot about our pleasant and mostly earlier association in the Eastern Star. I'm sorry.

"I did so hope this would be settled between the two families out of Court. Since this could not be, I had no choice but to sustain the principles in which I believe."

Noting that the action was based upon the bad faith of appellant in procuring respondents' stock, her post-trial assertions to him that she was sure that he had been acting in good faith are declared by appellant to constitute newly-discovered evidence which could not have been presented by him at the trial even with the exercise of the greatest diligence. The letters, says appellant, not only absolve him of fraud but

admit special motives in connection with the litigation apart from a single desire to recover for damages claimed to have been inflicted through the alleged fraud. Mrs. Haussler filed an affidavit in opposition to the motion for new trial. She said that when she wrote to appellant that she was sure what he had done had been done in good faith and that she was trying to patch up the unhappy unpleasantness of the trial, she had been trying to be charitable; that she had tried to think that appellant in doing what he had done had wanted to obtain the Haussler shares so badly he had even rationalized his own conduct and behavior to himself; that she meant only to imply such rationalization by appellant to his own conscience; that in all she had said at the trial she had testified truly. It is to be observed that Mrs. Haussler's statement that she was sure appellant had acted in good faith in what he had done is conclusionary in nature. If she and the others had testified truly as to the facts it was the business of the trial court to draw the conclusion of good or bad faith. Mrs. Haussler did not testify, and probably would not have been permitted to testify, as to any opinion she might have held concerning good or bad faith. Notwithstanding her post-trial statements, the trial court in passing upon the motion could not in good conscience grant it if the court was still of the opinion that appellant had acted in bad faith. The court's denial of the motion indicates that such was the opinion of the court.

The judgment appealed from is affirmed.

PEEK, J., and WARNE, J. pro tem, concur.

164 Cal.App.2d 367

**Walter E. CHISHOLM, Respondent,**

v.

**CALIFORNIA JOCKEY CLUB, a California corporation, Appellant.**

Civ. 17784.

District Court of Appeal, First District,  
Division 2, California.

Oct. 20, 1958.

Rehearing Denied Nov. 19, 1958.

Action for death of race horse. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that even though no charge was made by race track operator for stabling of horses operator owed duty of ordinary care to owner stabling his horse at race track.

Affirmed.

**1. Livery Stable Keepers** Ⓒ7

San Mateo ordinances, setting up specific requirements for construction and maintenance of stables and keeping of horses and defining as nuisances affecting public health improperly covered accumulations of manure, were not designed exclusively to prevent sickness and death of human beings; and in action for death of race horse, as alleged result of negligence of race track operator, it was not error to instruct that violation of ordinances constituted negligence as a matter of law. West's Ann.Agric.Code, §§ 205-207.

**2. Livery Stable Keepers** Ⓒ5

Even though no charge was made by race track operator for stabling of horses, operator owed duty of ordinary care to owner stabling his horse at race track.

**3. Estoppel** Ⓒ110

Trial Ⓒ145

Waiver is an affirmative defense which is itself waived if not pleaded in answer; and in action for death of race horse, as alleged result of negligence of race track operator, it was not error to in-

struct jury to disregard waiver of liability contained in application for stable space where waiver had not been pleaded by defendant.

Alexander, Bacon & Mundhenk, McCarthy, O'Hara & Johnson, San Francisco, for appellant.

Philander Brooks Beadle, John T. Tully, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Plaintiff, Walter E. Chisholm filed a complaint seeking damages for the death of his race horse, Romanticon, allegedly caused by the negligence of the defendant, owner and operator of the Bay Meadows Race Track. Defendant appeals from a jury verdict in favor of the plaintiff on the grounds of certain prejudicial errors in the court's instructions to the jury.

Defendant conducts horse races at Bay Meadows and invites owners of horses to stable their horses at the track and enter them in the races. No fee is charged for the stabling of horses. The defendant, however, retains as its profit, a portion of the sums wagered on the races. In the Fall of 1950, the plaintiff, through his trainer, Hank Ross, applied for and was assigned stable space for several of his horses at Bay Meadows. Before the beginning of the fall races, Romanticon became ill and died on October 9, about three weeks after arriving at Bay Meadows. There was conflicting evidence as to whether Romanticon's death was caused by a parasite commonly associated with colic which the horse had previously had or from gastro-enteritis produced by fly-borne bacteria resulting from the unsanitary condition of defendant's stables. There was also conflicting evidence on whether defendant had exercised ordinary care to maintain its stables in a sanitary condition, and whether defendant had adequately removed manure from the stables twice a week as required by city ordinance. The sufficiency of the evidence to sustain the verdict of the jury is not questioned.



Rather, defendant argues that the court's instructions to the jury incorrectly stated the law. The first instruction complained of reads as follows:

"The violation of a statute or ordinance, except as to speed, constitutes negligence as a matter of law. Unless, however, such violation is a proximate cause of injury it becomes immaterial. There must appear to be a causal connection between the violation of law and the injury before it becomes material to the issue."

Plaintiff introduced into evidence two ordinances of the City of San Mateo. Ordinance No. 350 in its terms declared to be "necessary as an emergency measure for preserving the public health of the City of San Mateo." The ordinance sets up specific requirements for the construction and maintenance of stables and the keeping of horses, mules or cattle within the city limits. The relevant portion of the ordinance, Section 6, reads as follows:

"The manure, offal, soiled straw and other refuse from all stables, barns, sheds, stalls, corrals or other yards where such animals are kept shall be placed immediately upon removal therefrom in tight and closely covered receptacles, constructed of concrete or other approved material impervious to water, and kept covered until removed from the premises or destroyed.

"The contents of such receptacles shall be removed at least twice a week, or oftener, if ordered by the Health Officer of the City of San Mateo."

Ordinance No. 614 defines public nuisances affecting health, morals, decency and safety and provides for the abatement of such nuisances. The relevant portion of this ordinance, Section 2, reads as follows:

"Section 2. Health Nuisances. Subject to the definitions of Section 1 and in addition to any other provisions of this ordinance, the following are declared to be nuisances affecting public health, and shall be abated as such.

\* \* \* \* \*

"5. Improperly covered accumulations of manure or rubbish which are breeding places for flies, mosquitoes or vermin, or which give forth noisome gases. Abatement may be summary."

[1] Defendant argues that the above quoted instruction is erroneous as these ordinances do not prescribe a standard of care to prevent the sickness and death of a horse, but only a standard of care to prevent the sickness and death of human beings, or at the most a duty to the general public, citing *Boie-Hansen v. Sisters of Charity*, 152 Cal.App.2d 845, 314 P.2d 189, and *Routh v. Quinn*, 20 Cal.2d 488, 127 P.2d 1, 149 A.L.R. 215.

We do not think that the ordinances in question are as restrictive in their purpose as the defendant claims. "The term 'public health' is not susceptible to accurate definition since it takes on new definitions when new conditions arise, but, generally speaking, it means the wholesome condition of the community at large." 39 C.J.S. Health § 1, p. 811; *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 308 P.2d 537, 548. The health of horses and cattle is vital to the maintenance of public health. *Stickley v. Givens*, 176 Va. 548, 11 S.E.2d 631. In this state, public authorities have the right to quarantine or destroy diseased animals and certain diseased animals are public nuisances. See for example, *Agricultural Code*, §§ 205-207. If such property can be destroyed for the protection of public health, it cannot be argued that an ordinance which protects public health does not also protect property. An ordinance may be intended for the health and safety of the public in general and the protection of property rights of individuals as well. *Reid & Sibell, Inc. v. Gilmore & Edwards Co.*, 134 Cal.App.2d 60, 285 P.2d 364; *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729; *Alechoff v. Los Angeles G. & E. Corp.*, 84 Cal.App. 33, 257 P. 569. We conclude therefore that the above quoted instruction was not prejudicial to the defendant.

The court in its instructions indicated that apart from the standard of care set by the ordinances, the defendant owed certain duties of ordinary care to the plaintiff. The second instruction complained of is as follows:

"The duties owed with respect to chattels in the possession of a business invitee are the same as the duties owed to the business invitee personally. (Plaintiff's No. 8.)

"When plaintiff brought this horse, Romanticon, to the Bay Meadows race track, he did so at the implied, if not the express, invitation of the owners of the track, and plaintiff thereupon became a business invitee.

"Upon those owners the law places the duty of exercising ordinary care so as not unnecessarily to expose the invitee, or his horse, to danger or accident and, to that end, to keep it in a reasonably safe and sanitary condition the race track made available for the invitee's use, and which the latter is expressly or impliedly invited to use. (Plaintiff's No. 17.)"

[2] Defendant, seeking to bring himself within the rules applicable to gratuitous bailees, argues that because no charge was made, the plaintiff was at most a licensee, to whom the defendant owed no affirmative duties. The benefit to the defendant need not be measured in monetary terms. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729. The plaintiff was on the premises for the purpose of aiding in the carrying out of the defendant's business objective and clearly a business invitee. *Hovencamp v. Union Stockyards Co.*, 107 Tex. 421, 180 S.W. 225, holding that a stockyard must exercise ordinary care like a livery stable keeper. We think the above quoted instruction is correct.

[3] The third and final error complained of on appeal is the court's instruction to the jury to disregard the waiver of liability signed by the plaintiff's trainer in the application for stable space. This instruction was correct as the waiver was not

pleaded in any of the defendant's pleadings. It has long been the rule in this state that waiver is an affirmative defense which is itself waived if not pleaded in the answer. *Harris v. Nat. Union etc. Cooks & Stewards*, 98 Cal.App.2d 733, 221 P.2d 136; *Pohle v. Christian*, 21 Cal.2d 83, 130 P.2d 417.

We conclude that no prejudicial error appears in the record before us.

Judgment affirmed.

DRAPER, J., and MARTINELLI, J.  
pro tem., concur.



164 Cal.App.2d 510  
The PEOPLE of the State of California,  
Plaintiff and Respondent,  
v.

Raymond D. SMITH, Defendant and  
Appellant.  
Cr. 6217.

District Court of Appeal, Second District,  
Division 3, California.  
Oct. 24, 1958.

Rehearing Denied Nov. 6, 1958.

Hearing Denied Dec. 17, 1958.

Prosecution for having forged and uttered a check. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment upon verdict of guilty and accused appealed. The District Court of Appeal, Vallée, J., held that where accused had been convicted of forgery and placed under probation, subsequent conviction for same offense warranted revocation of order granting probation in earlier case and warranted sentencing him to prison, and evidence was sufficient to sustain conviction of having forged and uttered check.

Affirmed.

**1. Forgery** *§*44, 44(3)

Evidence was sufficient to sustain conviction of having forged and uttered a check.

**2. Forgery** *§*35, 44(3)

Conviction of forgery is sustained by evidence that in exchange for money defendant gave check he drew in another's name on nonexistent bank account, and signing of fictitious name where instrument has been uttered is sufficient to imply intent to defraud.

**3. Criminal Law** *§*1031(4), 1115(1)

Contention that accused was denied speedy trial because five days elapsed between his arrest and his arraignment before magistrate could not be considered on appeal where there was nothing in record showing facts stated and no such claim was made in trial court.

**4. Criminal Law** *§*566

In prosecution for having forged and uttered check, where witness testified positively that accused was person who presented deposit slip and check to her and who received money, accused was legally identified.

**5. Witnesses** *§*236(3)

In prosecution for having forged and uttered check, where accused was represented by counsel throughout trial, and at one point, while his counsel was examining witness accused directed remark to witness, fact that accused was silenced and his remark stricken was not error.

**6. Criminal Law** *§*670

**Witnesses** *§*269(2)

In prosecution for having forged and uttered check, court's refusal to allow accused to ask police officer on cross-examination if he had made any investigation of some other checks that were signed with certain name, was proper where question was outside scope of direct examination, no offer of proof was made and purpose of evidence sought to be elicited was not disclosed.

**7. Criminal Law** *§*1035(3)

Where accused did not raise any question with respect to conduct of his counsel in trial court, he could not raise point for first time on review.

**8. Criminal Law** *§*982.9(1)

Where accused had been convicted of forgery and placed on probation, subsequent conviction for same offense warranted revocation of order granting probation in earlier case and warranted sentencing him to prison.

**9. Criminal Law** *§*1182

Judgment in criminal action is the sentence, and affirmance of judgment carries with it affirmance of sentence.

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Raymond D. Smith, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLEÉ, Justice.

Defendant was convicted by a jury of having forged and uttered a check for \$500, and sentenced to state prison. He appeals from the judgment and sentence.

On August 13, 1957 defendant presented to Marilyn Kowalski, a teller at Lynwood Branch of Bank of America, a deposit slip and a check. The deposit slip was made to the account of "Georgia P. Smith" for "500 less 300." On the face of the deposit slip there appeared the signature "Reynold P. Smith" and under it, stamped thereon, "Signature of Depositor." The check, drawn on First State Bank of Lynwood, was for \$500, was signed "George P. Waxman," was payable to order of "Reynold P. Smith," and was endorsed "Reynold P. Smith." The teller accepted the check and deposit slip and gave defendant \$300.

The Lynwood Branch of Bank of America had no account in the name "Georgia P. Smith." The First State Bank of Lynwood had no account in the name of



"George P. Waxman" and had made no provision for extending credit to "George P. Waxman." An exemplar of defendant's handwriting was received in evidence. An expert testified the handwriting on the face of the check and the endorsement were written by the same person who wrote the exemplar; and the handwriting on the deposit slip was identical with that on the exemplar.

Defendant testified and denied any knowledge of the check and deposit slip, and denied having presented them to Miss Kowalski.

[1,2] First, defendant asserts the evidence is insufficient to sustain the verdict. The point is without merit. A conviction of forgery is sustained by evidence that in exchange for money defendant gave a check that he drew in another's name on a nonexistent bank account. *People v. Lamb*, 133 Cal.App.2d 179, 180-183, 283 P.2d 727. The signing of a fictitious name where the instrument has been uttered is sufficient to imply an intent to defraud. *People v. Weitz*, 42 Cal.2d 338, 350, 267 P.2d 295; *People v. Platt*, 124 Cal.App.2d 123, 134, 268 P.2d 529.

[3] Second, defendant claims he was denied a speedy trial because five days elapsed between his arrest and his arraignment before a magistrate. There is nothing in the record showing the facts stated. No such claim was made in the trial court. The complaint cannot be made for the first time on appeal. *People v. McCrasky*, 149 Cal.App.2d 630, 637, 309 P.2d 115.

[4] Third, defendant claims he was not legally identified because he was "pointed out" to the only witness on whose testimony the implied finding of identity was based. The point is wholly without merit. Miss Kowalski testified positively that defendant was the person who presented the deposit slip and check to her and who received the money.

[5] Fourth, defendant asserts the court erred in preventing him from questioning

a witness. Defendant was represented by counsel throughout the trial. At one point, while his counsel was examining a witness, he personally directed a remark to the witness. He was silenced and his remarks stricken. Obviously, there was no error.

[6] Fifth, defendant claims the court erred in refusing evidence with respect to other checks. The investigating officer was on the stand. On cross-examination he was asked, "Did you make any investigation of some other checks that were signed with the name of R. Smith?" The People's objection was sustained. The ruling was correct. The question was outside the scope of the direct examination, no offer of proof was made, and the purpose of the evidence sought to be elicited was not disclosed.

[7] Sixth, defendant contends he was prejudiced by the conduct of his own counsel in that: he failed to subpoena a key witness; he failed to vigorously pursue the issue of identity; he acquiesced in the court's exclusion of evidence as to other checks; and he referred to him (defendant) as an "ex-convict" in his remarks to the jury. Defendant was represented by a deputy public defender. On cross-examination defendant testified he had been convicted of forgery in 1953 and was still on probation for that offense. Defendant did not in the trial court raise any question with respect to the conduct of his counsel. The point may not be raised for the first time on review. *People v. Youders*, 96 Cal. App.2d 562, 569, 215 P.2d 743. We have examined the record and find no basis whatever for defendant's complaint. The deputy public defender defended him conscientiously, vigorously, ably, and adequately. Defendant was accorded a fair and impartial trial and the evidence amply sustains the verdict.

[8] In his brief defendant appeals from an order revoking his probation in the case in which he was convicted of forgery in 1953. Defendant's conviction in the case

at bar warranted revocation of the order granting probation in the 1953 case. *People v. Robinson*, 43 Cal.2d 143, 146, 271 P.2d 872; *People v. Karman*, 145 Cal. App.2d 806, 303 P.2d 74.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Marilyn R. POE, Defendant and Appellant.  
Cr. 6269.

District Court of Appeal, Second District,  
Division 3, California.  
Oct. 24, 1958.

Defendant has filed in this court what he calls "Amendment To Appeal." As we understand it, in this document he claims that if the violation of probation in the 1953 case constitutes the prior felony conviction he was wrongfully convicted on the basis of a prior felony inasmuch as the violation was antecedent to and based on the present case; but if his being on probation justified his being sentenced with a prior conviction, he was illegally sentenced in the 1953 case inasmuch as he had been already sentenced therefor. The contention is specious. In the present case defendant was charged in the information with having been convicted of forgery, a felony, in 1953. He admitted the charge. He was placed on probation in the 1953 case. He stood convicted of a felony at the time he was placed on probation. Assuming his probation in the 1953 case was revoked solely on the basis of his conviction in the present case, the court acted entirely within its discretion in sentencing him to state prison in the 1953 case. *People v. Robinson*, 43 Cal.2d 143, 146, 271 P.2d 872; *People v. McClean*, 130 Cal.App. 2d 439, 445, 279 P.2d 87.

Defendant was convicted in the Superior Court of Los Angeles County, Mark Brandler, J., for unlawful possession of heroin, and she appealed. The District Court of Appeal, Vallée, J., held that evidence would sustain finding that narcotics found in motel had been in joint possession of defendant and man with whom she shared occupancy of motel.

Affirmed.

#### 1. Criminal Law ⇨260(11)

It is not function of reviewing court to pass on weight of evidence, and finding by trial court will not be disturbed on review if there is substantial evidence to sustain it.

#### 2. Poisons ⇨9

In prosecution for unlawful possession of heroin, evidence would sustain finding that narcotics found in motel had been in joint possession of defendant and man with whom she shared occupancy of motel.

[9] As we said, defendant appealed from the "judgment and sentence." The judgment in a criminal action is the sentence. *People v. Tokich*, 128 Cal.App.2d 515, 519, 275 P.2d 816. Affirmance of the judgment carries with it affirmance of the sentence.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Joan D. Gross, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged with possession of heroin. By stipulation the cause was submitted to the court without a jury on the transcript of the preliminary hearing and additional evidence. Defendant was found guilty as charged. She

appeals from the judgment and the order denying her motion for a new trial.

About 10:45 p. m. on October 29, 1957 Officer Van Court of the Los Angeles Police Department received a telephone call from an unidentified person who told him defendant and Johnny Patterson were in possession of heroin in unit 4 of the Valley View Motel at 14918 Ventura Boulevard, Los Angeles.

Shortly thereafter Van Court, with Officers Olson and Hill, went to the motel and with the use of a pass key entered unit 4. As they entered, Van Court saw Patterson who was standing in the bathroom throw something into the toilet. Hill retrieved from the toilet a syringe that was nearly full of liquid and an eye dropper with a hypodermic needle attached. Defendant was standing near the bathroom door at the time. Immediately to the left of the bathroom door Van Court found four small gelatin capsules on the top of a dresser. Van Court gave defendant a light accommodation test of her eyes and concluded she was under the influence of narcotics. Defendant and Patterson were placed under arrest. The eye dropper and the capsules contained heroin.

At the police station defendant told Van Court and Hill she could not explain what had happened to her but she had had a "terrific yen" for narcotics over the weekend; she and Patterson had gone together, she had put in \$28 and Patterson had put in \$22; they scored 2½ grams in the Hollywood area; she had "shot two caps" of it about two hours before the officers entered the motel; she was using about two or four caps a day when she had it; Patterson had bought the narcotics and had given them to her.

Patterson testified: he bought the narcotics; he received no money from defendant; the narcotics were his; defendant had no interest in them; he did not see defendant take a "fix." Defendant testified: she did not use any narcotics on October 29, 1957; she did not have any narcotics at that time; she could not recall whether any physical

examination of her person was made at the time of her arrest; she did not tell the officers the matters related above; she did not see Patterson take a "fix" or use a hypodermic kit in the motel. Defendant admitted having given Patterson \$28 the day before but said she owed it to him, that it was not for narcotics; the capsules were right on top of the dresser; she did not know they were there; Patterson had a kit; she did not see his kit.

The conversation the police officers had with defendant was tape recorded. The tape was played to the court and introduced in evidence.

Defendant's only point is that the evidence is insufficient to sustain the implied finding of joint possession. No inquiry was made as to the identity of the informer. No question was or is raised with respect to the legality of the search and seizure.

[1,2] It is not our function to pass on the weight of the evidence. A finding by a trial court of constructive joint possession of narcotics will not be disturbed on review if there is substantial evidence to sustain the finding. The heroin was found in premises jointly occupied by defendant and Patterson. Patterson threw the syringe and hypodermic needle into the toilet. Defendant was standing nearby. The four capsules were found on the dresser. There was evidence that defendant was under the influence of narcotics when the officers entered the motel. Defendant in effect admitted to the officers that she was in possession of the narcotics. It is a reasonable inference that defendant and Patterson were closely associated in the unlawful possession. We are of the opinion the evidence sustains the implied finding of the trial court that defendant knew of the presence of the narcotics in the motel or had the right to exercise dominion and control over them and was therefore in joint possession of them. The evidence sustains the finding of guilt. *People v. MacArthur*, 126 Cal.App.2d 232, 271 P.2d 914, and cases there cited.



The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



164 Cal.App.2d 430

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Frank F. ARRIOLA, Defendant and**  
Appellant.

Cr. 3517.

District Court of Appeal, First District,  
Division 1, California.

Oct. 21, 1958.

Rehearing Denied Nov. 20, 1958.

Defendant was convicted of grand theft. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment, and the defendant appealed. The District Court of Appeal, Bray, J., held that instruction on intoxication was erroneous for failure to include statutory provision that where existence of intent is a necessary element of the crime, jury, in determining the intent with which defendant acted, may consider fact that defendant was intoxicated at the time, but that such error was not prejudicial error, where there was a lack of substantial evidence that defendant was intoxicated to the extent of not being able to form an intent to steal.

Judgment affirmed.

#### 1. Larceny ⚡3(1)

To complete the crime of grand theft, intent to steal or take property is necessary in addition to the actual stealing or taking. West's Ann.Pen.Code, §§ 484, 486, 487, subd. 2.

#### 2. Larceny ⚡71(1)

In grand theft prosecution, instructions on unconsciousness were not required to

contain statutory provision that where existence of intent is a necessary element of the crime, jury, in determining intent with which defendant acted, may consider fact that defendant was intoxicated at the time. West's Ann.Pen.Code, §§ 22, 26, subd. 5; §§ 484, 486, 487, subd. 2.

#### 3. Criminal Law ⚡53

The rule of law on unconsciousness does not apply where mental state of defendant is due to voluntary intoxication resulting from use of intoxicating liquor. West's Ann.Pen.Code, §§ 22, 26, subd. 5.

#### 4. Criminal Law ⚡774

In a case requiring proof of specific intent, instruction embodying first sentence of statute providing that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, must include second sentence providing that where existence of intent is a necessary element of the crime, jury, in determining intent with which defendant acted, may consider fact that he was intoxicated at the time, and the giving of only the first sentence of the statute without giving the second sentence is error. West's Ann.Pen.Code, § 22.

#### 5. Criminal Law ⚡774

In grand theft prosecution, trial court erred in failing to include in instruction on intoxication the statutory provision that where existence of intent is a necessary element of the crime, jury, in determining intent with which defendant acted, may consider fact defendant was intoxicated at the time. West's Ann.Pen.Code, §§ 22, 484, 486, 487, subd. 2.

#### 6. Criminal Law ⚡1173(2)

In grand theft prosecution, trial court's error in failing to include in instruction on intoxication the statutory provision that where existence of intent is a necessary element of the crime, jury, in determining intent with which defendant acted, may consider fact that defendant was intoxicated at the time, was not prejudicial error, where there was no substantial evidence that defendant was intoxicated to extent of not

being able to form an intent to steal. West's Ann.Pen.Code, §§ 22, 484, 486, 487, subd. 2.

John R. Golden, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from judgment of conviction of grand theft after jury trial. He admits the sufficiency of the evidence but contends the court erred (1) in giving instruction on unconsciousness; (2) in omitting "intent" from an instruction on intoxication.

Evidence.

Shortly before noon Fred Clapp was sitting at the bar of the Big Horn Bar drinking a cup of coffee. He occasionally did banking for the proprietor and on this occasion the proprietor had just given him \$175 in currency, a check and a bank book. Clapp had placed all three in the left breast pocket of a heavy outer shirt (mackinaw type) he was wearing. Defendant entered the tavern and obtained a bottle of beer. Louis Hanga sat down at the bar next to defendant and started to write down an address. Defendant was "kind of half laying on the bar, and kind of reaching over on my arm." Defendant touched Hanga's arms and shoulders. Police Officer Farnlacher, who was off duty and had come into the tavern to cash a check, observed defendant place his hands on Hanga's thigh. Hanga told defendant to move away. Defendant then sat on a stool next to Clapp and asked the latter "What is the matter? \* \* \* Why don't you like me" and when Clapp said "Don't bother me" defendant said "Just because I am Mexican, is that it?" Defendant tried to hold a conversation with Clapp but the latter made no reply but continued drinking his coffee. Defendant touched the left upper part of Clapp's breast and shoulder—"it was so quick I never paid much attention to it." Officer Farnlacher had noticed the bulge in Clapp's shirt pocket

and could see the bank book and part of the money. Farnlacher saw defendant press against Clapp with his left hand and then saw just the tip of defendant's right hand go into Clapp's left breast pocket and then into defendant's right hand pocket. Defendant then left the tavern. Ascertaining from Clapp that the money and bank book were gone, Farnlacher followed by Clapp left the tavern and saw defendant walking rapidly down the street. The officer then saw defendant put his right hand in his right coat pocket and "place something which had a green color in his left hand and put it in his left-hand pocket." Farnlacher ran up and caught defendant, showed him his star, informed him that he was an officer and that he was placing him under arrest. As Farnlacher attempted to handcuff defendant's left hand, defendant spun around, put his left hand in his left pocket and threw some of the money to the ground. One or two bills clung to the flap of his pocket. Apparently the check was thrown out at the same time. It and enough bills with those in the pocket to total \$175 were picked up. Defendant said "What the hell are you trying to do, frame me?" On the arrival of the patrol wagon a search of defendant revealed the bank book in defendant's right coat pocket.

As defendant's defense was intoxication to the point of not being able to form an intent to steal, we will now detail the evidence on that issue.

Defendant testified that he had been going from bar to bar drinking tequila all night. He started drinking again early in the morning of the theft. He had a detailed memory of the bars he had visited, the taxis he rode in, and whom he was with until a scuffle or fight which he claims took place the morning of the theft on the sidewalk near the Big Horn Bar. All is then a blank until he found himself in a jail cell. That morning two friends of his had given him a ride and let him off at a certain street corner. He then walked to 16th and South Van Ness. He said "I went to see a fellow I know. We talked in the street." He had a scuffle with this man. Later he said that it

was "just somebody I met on the street." When asked if he had ever seen the man before he said "Well, yes and no." When asked "\* \* \* is it 'yes' or is it 'no'" he replied "Well, it could be 'no' \* \* \*" He did not know whether the man was drunk or sober. The two of them just stopped on the street and started talking. He did not remember the conversation but there was a fight or scuffle. First he said he did not know whether he hit the other man, then he said he did not. Defendant remembers lying on the sidewalk, getting up bleeding, "full of blood," and walking away. That is the last he remembers. Defendant alluded to the fact that there was blood on his shirt and suit when he was at the jail. He was vague about the number of drinks of tequila he had, and said that ordinarily he did not drink beer.

Farnlacher testified that prior to the arrest he did not observe blood on defendant or his clothing. However, defendant resisted arrest and with only one cuff on him, Farnlacher had to throw defendant to the sidewalk in order to subdue him. When defendant arose Farnlacher noticed fresh blood on his chin and on his blouse or coat. Farnlacher talked to defendant at the police station. He appeared to understand the questions he was asked and the witness was able to understand him. At that time he said as he had at the time of his arrest, "What are you trying to pin on me?" and "I didn't do it." Farnlacher testified that at the time of arrest he could smell alcohol on defendant's breath and that "there was a certain slurring as to his speech" in talking to the officer. Later at defendant's cell defendant spoke without the slur. The witness would not say that defendant was intoxicated. "I would say that he had been drinking, but not to the extent of intoxication." When the witness ran after defendant, the latter did not stagger at all but walked straight "about the fastest you could walk without breaking into a run." Clapp testified that he smelled beer on defendant's breath and that when defendant came into the tavern he "kind of staggered \* \* I couldn't say he was drunk, but he kind of

was leaning on the bar. I couldn't say he was drunk. That I don't know, but I know he was drinking beer." All defendant drank in the Big Horn Bar was half a bottle of beer.

[1] Grand theft, insofar as is pertinent here, is the felonious stealing or taking of the personal property of another from his person. Pen.Code §§ 484, 486, 487(2). To complete the crime, the intent to steal or take the property is necessary in addition to the actual stealing or taking (*People v. Corenevsky*, 124 Cal.App.2d 19, 23, 267 P.2d 1048) and the court so instructed.

#### 1. Unconsciousness.

[2, 3] Defendant's position on these instructions is not clear. He apparently mentions them as not curing his claim of error in the intoxication instruction. However, he states without specification of any kind that he does not concede that they should have been given nor their correctness. They embodied the substance of section 26, subdivision 5, Penal Code, and were fully correct. They did not contain and are not required to contain the second sentence of section 22, Penal Code, hereafter discussed. It was so held in *People v. Baker*, 1954, 42 Cal.2d 550, 575, 268 P.2d 705; *People v. Anderson*, 1948, 87 Cal.App.2d 857, 860, 197 P.2d 839, and *People v. McNichol*, 1950, 100 Cal.App.2d 554, 557, 224 P.2d 21. The instruction contained a phrase to the effect that the rule of law on unconsciousness does not apply in a case in which the mental state of the person in question is due to voluntary intoxication resulting from the use of intoxicating liquor. While this statement is a proper one to be used in an instruction on unconsciousness occurring other than from the voluntary use of drugs and intoxicating liquor, here it may have aggravated the failure of the court to instruct upon the question of intent as related to voluntary intoxication from the use of liquor. It is questionable whether the instruction should have been given as defendant at no time claimed that his actions were due to unconsciousness resulting from the blows he



claims to have received. His defense was that by reason of intoxication he was unable to form the required intent. As held in the above cases, where intoxication is involved, even if it leads to unconsciousness or a temporary interference with the mental facilities, the situation is governed by section 22 and not by section 26, subdivision 5, dealing with unconsciousness from other causes. In any event, as they were correct instructions on the subject, there was no prejudice in giving them.

## 2. Intoxication.

The court gave Caljic No. 78-B which is an extensive instruction on intoxication intended, however, to be used where the crime charged does not require specific intent. It included the first sentence of section 22: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." It stated that intoxication was not a defense but "It may throw light on the occurrence and aid you in determining what took place." It did not include the second sentence to the effect that where the existence of intent is a necessary element of the crime the jury in determining the intent with which a defendant acted "may take into consideration the fact that the accused was intoxicated at the time \* \* \*

[4-6] It has repeatedly been held in a case requiring proof of specific intent that an instruction embodying the substance of section 22, Penal Code, must be given and that to give only the first sentence of that section without giving the second sentence is error. *People v. Coyne*, 92 Cal. App.2d 413, 415, 206 P.2d 1099; *People v. Romo*, 24 Cal.App.2d 119, 121-122, 74 P.2d 306. If the defendant, as here, offers no instruction upon the subject it is the court's duty to give it of its own motion. *People v. Baker*, supra, 42 Cal.2d 550, 576, 268 P.2d 705; *People v. Sanchez*, 35 Cal. 2d 522, 528, 219 P.2d 9. It is true that the evidence of intoxication, including defendant's own testimony on the subject, was quite weak. As hereafter pointed out, there

was no substantial evidence to support defendant's claim that he was intoxicated to the extent of not being able to form an intent to steal. It is very doubtful that it would have been error for the trial court to have refused to instruct on intoxication at all. However, as said in *People v. Coyne*, supra, 92 Cal.App.2d 413, 417, 206 P.2d 1099, the trial judge evidently felt that the evidence was sufficient to require an instruction on intoxication because he gave one. He should have given a proper one. The serious question is whether the giving of such a palpably erroneous instruction was prejudicial. In turn, this depends upon the question of whether there is any substantial evidence upon which the jury could have found that defendant was intoxicated to the extent of being unable to form an intent to steal. Certainly the evidence of the prosecution witnesses would not have supported such a finding. At most their evidence was that defendant appeared to have been drinking, that at one time he staggered, and that at first his talk was slurred. Defendant's testimony, considered alone, might have supported such a finding, although it was quite fantastic. But balancing his acts against his testimony that he did not know what he was doing, eliminates any support for such a finding. His actions in the bar, running his hands over Hanga, his skill in taking the contents of Clapp's pocket without him knowing it, are typical of intentional pickpocketing and are entirely inconsistent with his being so drunk that he did not know what he was doing. Additionally his leaving the tavern immediately upon robbing Clapp, his lack of staggering in his fast attempt to get away, his changing the money from the pocket of his coat which was nearest to Clapp when they both were at the bar to a pocket on the opposite side, his statement to the officer that the latter was trying to frame him and "I didn't do it" are likewise completely irreconcilable with his claim that he did not know what he was doing. Either with or without an instruction containing the second sentence of section 22, it is inconceivable that under the facts of this

case a jury would have found that defendant did not have an intent to steal and would not have convicted defendant.

Actions of a defendant may completely refute his testimony as to his inability to form an intent to do the thing which he did. In *People v. Keeling*, 152 Cal.App.2d 4, 12, 312 P.2d 407, 412, we said, in a homicide case, "Defendant's actions before, during and after the killing completely refute his own statement that he 'blacked out.'" In *People v. Clifton*, 186 Cal. 143, 198 P. 1065 (homicide), the defendant claimed to have been intoxicated to such an extent as to be unable to understand the questions asked him by the police when first arrested. The trial court had refused to give the defendant's instruction to the effect that the jury could disregard the defendant's answers if it found that the defendant was so intoxicated as not to be able to understand the questions. The reviewing court upheld the refusal to so instruct, stating that "In view of the character of the answers given it is difficult to imagine that defendant did not fully understand both questions and answers" (186 Cal. at page 150, 198 P. at page 1068) and that every witness who testified regarding the matter testified that although the defendant was somewhat under the influence of liquor, the defendant apparently sufficiently understood and intelligently answered the questions. In *People v. Coston*, 82 Cal.App.2d 23, 185 P.2d 632 (homicide), the trial court gave an erroneous instruction to the effect that forgetfulness may not be an element of unconsciousness. In holding that there was no prejudice in the error, this court stated (82 Cal.App.2d at page 40, 185 P.2d at page 641): "There must be something more than his [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act. Here the only purported evidence of unconsciousness was the defendant's own statement \* \* \* There was no evidence upon which the jury would have been justified in finding that defendant did not know what he was doing at the time

of the shooting." So, in our case, the only purported evidence of impossibility to form an intent to steal, was defendant's own statement that he did not know what happened. In view of his acts and the testimony of the other witnesses, it is inconceivable that had the jury been properly instructed on intoxication, the jury could have come to any conclusion other than one of guilt.

In the cases cited by defendant such as *People v. Sanchez*, supra, 35 Cal.2d 522, 219 P.2d 9; *People v. Baker*, supra, 42 Cal. 2d 550, 575, 268 P.2d 705; *People v. Coyne*, supra, 92 Cal.App.2d 413, 414, 206 P.2d 1099, and *People v. Romo*, supra, 24 Cal. App.2d 119, 74 P.2d 306, the reviewing court, in holding the failure to give proper instructions on intoxication prejudicial, expressly stated that there was substantial evidence of intoxication. Thus in the *Sanchez* case the court said that "the evidence of intoxication, if believed, would have presented a rational explanation for his [the defendant's] failure to deny the evidence against him." 35 Cal.2d at page 531, 219 P.2d at page 14. In the *Baker* case the court said that there was "ample evidence of voluntary intoxication." 42 Cal.2d at page 575, 268 P.2d at page 720. The *Coyne* case set forth the testimony of eyewitnesses to the shooting concerning the defendant's intoxication. In the *Romo* case, the court stated that the evidence was conflicting and would have supported "either conclusion which might have been reached by the jury upon the question as to whether or not the appellant was so intoxicated at the time as \* \* \* not to have understood what was being done." 24 Cal.App.2d at page 121, 74 P.2d at page 307. As said in *People v. Baker*, 42 Cal.2d 550, 268 P.2d 705, and cases there cited, "'\* \* \* The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error.'" 42 Cal.2d at page 576, 268 P.2d at page 721. The lack of substantial evidence that defendant was intoxicated to the extent of not being able to form an intent to

steal distinguishes our case from those cited by defendant.

The judgment is affirmed.

PETERS, P. J., and ST. CLAIR, J.  
pro tem., concur.



164 Cal.App.2d 200

**Fritz TOEDTER, Otto Bellmann, Herman Behrens, Marie Behrens Heins, Wilhelm Toedter, Marie Toedter, Dora Bosselmann and Marie Boerger, Plaintiffs and Appellants,**

v.

**John H. BRADSHAW, also known as Johnie Bradshaw, also known as Johnie Herman Bradshaw, as Executor and Trustee under the Last Will of John Bellman, deceased, and as an individual, Defendant and Respondent.**

Civ. 9346.

District Court of Appeal, Third District,  
California.

Oct. 15, 1958.

Hearing Denied Dec. 10, 1958.

Action by foreign beneficiaries of trust established by will against trustee to set aside decree of distribution or in alternative to impress trust on property distributed by that decree. The Superior Court, Glenn County, Curtiss E. Wetter, J., refused to set aside decree of distribution and beneficiaries appealed. The District Court of Appeal, Van Dyke, P. J., held that where will of decedent, who died in 1941, provided that residue of estate should go to certain beneficiaries in trust unless they were residents of country engaged in war with United States of America, and that residue should go to trustee after 10 years if conditions remained so that no portion of trust could be distributed, and named beneficiaries were residents of Germany during World War II, Germany could no longer be said to be engaged in war with United States after practical cessation of hostilities on or about May 8,

1945, so that conditions which could divest interest of German beneficiaries and vest those interests in trustee under will ceased to exist within 10-year period.

Reversed with directions.

#### 1. Wills ⚡706

Where it was necessary to construe will solely upon its terms and without aid of evidence, appellate court was not bound by construction placed thereon by trial court, but construed it as matter of law.

#### 2. Evidence ⚡11

Supreme Court would take judicial notice of historical fact that diplomatic relations were resumed between Germany and United States on July 2, 1951.

#### 3. Wills ⚡658

Where will of decedent, who died in 1941, provided that residue of estate should go to certain beneficiaries in trust unless they were residents of country engaged in war with United States of America, and that residue should go to trustee after 10 years if conditions remained so that no portion of trust could be distributed, and named beneficiaries were residents of Germany during World War II, Germany could no longer be said to be "engaged in war" with United States after practical cessation of hostilities on or about May 8, 1945, so that conditions which could divest interest of German beneficiaries and vest those interests in trustee ceased under will to exist within 10-year period, notwithstanding fact that at any time during probate Alien Property Custodian might issue order decreeing property vested in United States if trustee attempted to distribute any part of property to any of beneficiaries.

See publication Words and Phrases, for other judicial constructions and definitions of "Engaged in War".

#### 4. Trusts ⚡231(1, 2)

One who is trustee cannot purchase or deal with subject of trust nor place himself in attitude antagonistic to trust, and it is against public policy to permit persons occupying fiduciary relations to be



placed in such position that influence of selfish motives may be temptation so great as to overpower their duty and lead to betrayal of their trust.

#### 5. Trusts ⇨231(1)

Trustee may not, under any circumstances, be allowed to have any dealings in trust property with himself or acquire any interest therein, and courts will not permit investigation into fairness or unfairness of such transaction or allow trustee to show that dealing was for best interest of beneficiaries.

#### 6. Trusts ⇨179

It is trustee's duty in all things to first consider and always to act for best interests of trust.

#### 7. Trusts ⇨231(1)

Where testator gave residue of estate in trust for certain beneficiaries residing in Germany, trustee was trustee for benefit of beneficiaries at all times during duration of trust, and he violated his duty in giving them no actual notice that he intended to take property through medium of court decree, notwithstanding fact that German beneficiaries could have, but did not, demand special notice.

#### 8. Trusts ⇨162, 231(1)

Where testator gave residue of estate in trust for certain beneficiaries residing in Germany, with provision that if distribution could not be made within 10 years, due to provision that no distribution should be made if beneficiaries resided in country engaged in war with the United States, and trustee determined to take res under residuary provisions of will, but gave only posted notice required by the statutes to be given by executors, he had duty to surrender up his trusteeship upon notice to beneficiaries, according them ample opportunity to seek successor or other representation, and then to present his claims to court of competent jurisdiction in adversary proceeding. West's Ann.Prob.Code, §§ 259, 259.1.

Geis & Byrd and Bruce H. Thomas, Willows, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment refusing to set aside a decree of distribution, or, in the alternative, to impress a trust on property distributed to respondent pursuant to the decree.

John Bellman died testate on August 8, 1941. By his will, executed on April 13, 1939, he left the residue of his estate in trust for certain collateral relatives living in Germany. He nominated respondent John H. Bradshaw to be the executor of his will and he also named him as trustee of the trust therein created. Bradshaw was granted letters testamentary. The estate remained in probate until April 17, 1953. In the meantime, decrees of partial distribution had distributed all but the residue. On April 17, 1953, the residue of the estate was ordered distributed to Bradshaw individually. The court determined that pursuant to certain conditions expressed in the trust provisions the interest of all the beneficiaries had ceased.

After making various specific bequests, Bellman provided in the Fifth Paragraph of his will as follows:

"All of the rest, residue and remainder of my property wherever the same may be situate, I give, devise and bequeath to Johnie Herman Bradshaw, in trust and as trustee, subject to the following terms and conditions:

"It is my will that the said remainder of my estate is to be divided as follows:

"To my nephew, Fritz Toedter, who resides in Wesseloh, Schneverdingen, Hanover, Germany, the sum of Four Thousand Dollars (\$4,000.00);

"To my sister, Mary Behrens, who resides in Fintel, Hanover, Germany, the sum of Four Thousand Dollars (\$4,000.00);

"The residue of my estate shall be divided equally among the following nephews and nieces, to-wit, Otto Bell-

Ernest J. Hill and Orville C. Pratt, IV, San Francisco, for appellants.

man, Herman Behrens, Marie Mimi Behrens Heine, Wilhelm Toedter, Christopher Toedter, and to the living children of my niece, Dora, whose last name I do not now recall, but who is a daughter of my brother, Christopher Bellman and the half-sister of my nephew, Otto Bellman, share and share alike."

By the Ninth Paragraph of his will Bellman declared as follows:

"During the existence of the trusts herein created, I direct my said trustee to pay to each of said beneficiaries either a monthly, quarterly or annual payment from the corpus, interest, accumulations or accretions thereof, which said sum shall be in the discretion of my said trustee, provided further, that in the event a beneficiary resides in any country engaged in a war with the United States of America, or in a country in which diplomatic relations between the United States of America and said country have been suspended or severed, that my said trustee shall retain and hold the portion of the trust to which said beneficiary is entitled so long as said beneficiary remains a resident of the country engaged in a war with the United States of America, or in which diplomatic relations between the United States of America and said country have been suspended or severed. In the event my said trustee retains and holds any portion of any trust herein created by reason of the conditions above referred to, and said condition or conditions remain for a period of ten (10) years after my death, I direct my trustee to deliver any part or portion of said trusts, so held and retained for ten (10) years from and after my death, to the other beneficiaries not affected by said condition or conditions. In the event that no part or portion of said trusts can be distributed by reason of the aforesaid condition or conditions to any of said beneficiaries, then said trusts, or any part

or portion thereof, shall be distributed to Johnie Herman Bradshaw at the termination of ten (10) years from my death."

The decree of distribution was made pursuant to petition of Bradshaw, wherein he made the following allegations: Under the terms of the will of Bellman the residue of the estate was given to petitioner in trust for the purpose of distributing the same to certain beneficiaries therein named and in the manner therein provided. All of the beneficiaries therein named were residents and nationals of the country of Germany. Within a period of less than six months after the death of the above named decedent and before any distribution could be made to any of the said beneficiaries under said trust, the United States of America and the country of Germany became engaged in a war and severed diplomatic relations. The state of war did not finally cease and terminate and diplomatic relations were not resumed between the said countries until more than ten years had elapsed from and after the death of said decedent. By reason of said war and severance of diplomatic relations petitioner had been unable to deliver any part or portion of the residue of said estate to the beneficiaries of said testamentary trust within the ten-year period from and after the death of said decedent. Under the last will and testament of decedent petitioner was entitled to have said residue of said estate distributed to himself free of any trust.

The probate court found in the decree of distribution that by reason of the state of war and the severance of diplomatic relations the trustee had been unable to deliver any portion of the residue of the estate to the beneficiaries of said testamentary trust within the ten-year period from and after the death of Bellman, and concluded that under the terms of the will Bradshaw was entitled to the whole of the residue. The probate court thereupon decreed that the said residue of the estate be so distributed to Bradshaw as sole distributee.

In this action the trial court made the following findings of fact: That at all times during the probate proceedings and up to and including the making of the decree of distribution Bradshaw had known the address of Fritz Toedter in Germany, but that he did not know the address of any of the other beneficiaries; that Bradshaw had not fraudulently or otherwise concealed from the beneficiaries, or any of them, or from the court any facts or matters concerning the estate of Bellman, and that Bradshaw had not made any fraudulent representations to the beneficiaries or to the court; that the beneficiaries had not relied upon Bradshaw to fulfill his obligations as executor and trustee and to deliver to them any part or portion of the trust estate; that the beneficiaries had not been in any wise damaged by the entry of the decree of distribution; that the reason no distribution had been made to Bradshaw as trustee during probate was because doing so would have resulted in an order by the federal alien property custodian vesting the title to all the trust property in the United States; that Bradshaw had not failed to give notice to the beneficiaries of the petition for distribution which he had filed (the evidence shows without conflict that the only notice given was the ten-day statutory notice by posting); that Bradshaw had not intended to prevent the appearance of the beneficiaries when his petition was heard; that Bradshaw had not concealed from the court any matter of notice to the beneficiaries of the hearing of that petition, and that he had not caused the court to act upon his petition without opportunity accorded to the beneficiaries to be heard thereon; that it was untrue that the beneficiaries had been unaware of the petition filed by Bradshaw or of the proceedings taken relative thereto (there is no evidence that they in fact knew of the distribution proceeding); that Bradshaw had not prevented or deterred the beneficiaries from appearing or from being heard at any stage of the proceedings in the matter of the estate; that none of the beneficiaries had been damaged

by any act or omission of Bradshaw; that they had not been lulled into any sense of security by any act or omission of Bradshaw; that the beneficiaries had never filed any request for special notice of estate proceedings; that any loss or detriment which they or any of them may have sustained was the result of their inattention to their interests and not the result of any act or omission of Bradshaw; that the beneficiaries and each of them, for some years before the final distribution decree was made, had actual knowledge of the pendency of the probate proceedings; that during the months of July and September, 1950, Bradshaw had caused the beneficiaries to be notified of the provisions of Sections 259 and 259.1 of the Probate Code, and caused them to be advised that it was necessary and desirable that they be represented by a local California attorney in the final distribution of the estate, and that by reason of the aforesaid matters the beneficiaries were now estopped to assert that they were not present or heard in said matter by reason of any act or omission of Bradshaw or that they, or any of them, had suffered any loss or detriment by reason of any such act or omission; that on or about the 22d day of August, 1951, which date it may be noted, is more than ten years after the death of Bellman, a firm of attorneys in New York had caused an attorney practicing in the County of Glenn to inquire into the status of the estate of said decedent and that the attorney had done so and had rendered an opinion to said New York attorneys in that regard; that the decree of distribution had been made and entered on April 17, 1953, and had become final and was binding and conclusive as to the rights of the parties to this action in and to the residue of the estate distributed by the decree; that at all times during the probate of the estate the alien property custodian for the United States of America declared to Bradshaw's attorneys of record in said estate that, if he attempted to distribute any part of the residue of the estate of Bellman to the beneficiaries or any of them, or to any trustee for them, the



custodian would forthwith issue a vesting order declaring such property vested in the United States. As conclusions of law from the foregoing findings, the court concluded the decree of distribution was final, binding and conclusive of the rights of the parties to this action; that the beneficiaries were entitled to take nothing by this action from Bradshaw and that Bradshaw was entitled to judgment against them for his costs. Judgment to that effect was thereafter entered and this appeal followed.

[1] It is necessary to construe the Bellman will and under this record this court is not bound by the construction placed thereon by the trial court but is to construe it as a matter of law. As stated in *Re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825, 830;

"An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence \* \* \* Under these circumstances, there is no issue of fact, and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law."

By the testator's will the residue of his estate was bequeathed in trust to Bradshaw for the benefit of his relatives residing in Germany. Their interests vested on his death. Under certain conditions set forth in the will the interests of any one or more of them might be divested and pass to the others, or the interests of all might be divested. If that occurred then and only then the trustee could claim and hold the property as his own. The retention provisions imposed by the testator upon the action of the trustee with respect to distribution of the trust res indicate that the testator contemplated only the normal period of probate during which period the trustee could not, of course, distribute something he had not yet received. When the trustee received the trust property he was by the terms of the will under a duty to begin distribution. The time and amount of partial distributions were left to his ab-

solute discretion. Nevertheless, it was his duty to distribute. He had no other duty with respect to the trust res except its safekeeping. But when he received it and was able to distribute, the will commanded that he retain and make no distribution of the interest of any beneficiary residing in the proscribed territory. However, the retention provisions expired ten years after the testator's death, at which time the trustee was to distribute to anyone entitled to take, that is, anyone not affected by the retention provisions. If there were none such, then all interest of any beneficiary whose share had been so retained ceased and the trustee owned the same free from the trust.

[2,3] Turning now to the retention provisions we find there were two. The distributive share of any beneficiary was to be retained if he was residing in a country "engaged in a war with the United States of America." Likewise, there should be retained the share of any beneficiary residing in a country not maintaining diplomatic relations with the United States. While the trial court found that at all times during the ten years after the testator's death all of the German relatives of the testator had been residing in a country engaged in war with the United States and that the same country also, during the same period, was not maintaining diplomatic relations with the United States, these findings cannot stand against historical fact of which this court takes judicial notice. It is a historical fact that diplomatic relations were resumed between Germany and the United States on July 2, 1951, when the first German diplomat was accredited to the United States. This condition for retention therefore ceased within the ten-year period following the testator's death. As to the retention condition concerning residents in a county "engaged in a war" with the United States, we think the reasonable interpretation of that language is that the described period ended with the practical cessation of hostilities. It is historical fact that about May 8, 1945,

or shortly thereafter, the German armies surrendered and Germany was wholly occupied by the allied forces. Germany could no longer be said to be "engaged in a war" with the United States. The very word "engaged" connotes action. Thus Webster's International Dictionary defines the word "engaged" as a state of being involved, "especially, involved in a hostile encounter; as, the engaged ships continued the fight." We hold that within the common and reasonable meaning of the phrase "engaged in a war", Germany, after the surrender of her armies and the occupation of her territory by the allied forces, was no longer engaged in war with the United States. The result of the foregoing is that the conditions which could divest the interest of the German beneficiaries and vest those interests in Bradshaw ceased to exist within the ten-year period after the testator's death. See *Peters v. McKay*, 195 Or. 412, 413, 238 P.2d 225, 246 P.2d 585; *Kaiser v. Hopkins*, 6 Cal.2d 537, 539, 58 P.2d 1278; *Hoover v. Sandifur*, 27 Wash.2d 791, 171 P.2d 1009, 168 A.L.R. 170.

The situation respecting the alien property custodian and his power to vest and his threats to vest the interests of the German nationals, which situation is heavily stressed in respondent's brief, has nothing to do with the question of title. The existence of a power to vest was not mentioned in the will. It may have been good judgment on the part of Bradshaw to keep the estate proceedings open, as he did, for approximately 12 years, but he could only obtain title to the property as to which he was trustee under the conditions specified in the testator's will.

[4-8] When Bradshaw, as executor, filed his petition for distribution and therein for the first time made a claim that he owned individually and was entitled to distribution of the trust res, he was bound to act in respect to the beneficiaries of the trust by those rules which govern the action of trustees. One who is a trustee cannot purchase or deal with the subject of the

trust nor place himself in an attitude antagonistic to the trust. It is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust. This rule is unyielding and a trustee may not, under any circumstances, be allowed to have any dealings in the trust property with himself or acquire any interest therein. Courts will not permit an investigation into the fairness or unfairness of such a transaction or allow the trustee to show that the dealing was for the best interest of the beneficiaries. It is a trustee's duty in all things to first consider and always to act for the best interests of the trust. In *re Estate of Howard*, 133 Cal.App.2d 535, 540-541, 284 P.2d 966. Much more might be said concerning the strict supervision of trustees by courts, but the underlying policy is so well known that extended citation of authorities is unnecessary. The findings of the court that the German nationals did not rely upon the good faith of their trustee are of no avail to respondent. Under the law they had a right to so rely and in the absence of direct evidence that they knew that he had turned against them it must be assumed that they did so rely. There is no such evidence in this record. Unavailing also to respondent are the court's findings as to communications to the German nationals respecting their rights to inherit under the sections of the Probate Code referred to, for their right to inherit was a matter entirely apart from Bradshaw's claims that their inheritances had been divested by the conditions in the will. Neither does it avail respondent that they consulted attorneys concerning the status of their interest and may have been informed, or, as we hold, misinformed by those attorneys as to that status. The plain fact is that respondent was a trustee for their benefit at all times with which we are here concerned, that he gave them no warning that he intended to take their property as his own through the medium of a court decree, and

that he gave them no actual notice of his attack upon them. By such conduct he violated his plain duties as trustee. The posted notice that was given was that of the executor. The decree followed in the space of ten days. It does not aid respondent to argue, as he does and as the court found, that the German nationals could have demanded, but did not demand, special notice. Their failure to do so lessened not at all respondent's duty as trustee. Under the circumstances existing and as soon as respondent determined to take for himself the trust res it was his duty to surrender up his trusteeship upon notice to the beneficiaries according to them ample opportunity to seek a successor or other representation and then to present his claims to a court of competent jurisdiction in an adversary proceeding.

It does not help respondent that the trial court here found that he had not misrepresented anything to the probate court or that that court (since it had the will before it) knew of the pertinent provisions with respect to the trust estate and the title to it. The vice of his conduct is that he succeeded in obtaining a judgment upon which he now relies through a proceeding had in the absence of those whose interest he was attacking and under conditions whereby he knew that they would not be represented, as in fact they were not. It makes no difference that the court found that he acted in good faith. Under such circumstances he must be held to have acted in bad faith. The situation is comparable to that where a trustee deals with the property of his trust. In such situations it is to be said as the court said in *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 365, 78 P. 550, 554:

"\* \* \* The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal. His self-interest prompts him to

make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of trust, nor will the court enter into any examination of the honesty of the transaction."

There appears to be no good reason why the interests of the appellants cannot be sufficiently secured to them by a reversal of the judgment appealed from with directions to the trial court to enter a judgment declaring that respondent took the property distributed to him under the trusts declared in the testator's will and that he is accountable to them as trustee for that property and the proceeds thereof. It is so ordered.

PEEK and SCHOTTKY, JJ., concur.



164 Cal.App.2d 262

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Joseph Louis RUMPH and Arthur Gene**  
**Shamburger, Defendants and**  
**Appellants.**

**Cr. 6154.**

**District Court of Appeal, Second District,**  
**Division 1, California.**

**Oct. 16, 1958.**

**Hearing Denied Dec. 10, 1958.**

Prosecution for robbery. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction and denied motion for new trial, and



defendants appealed. The District Court of Appeal, White, P. J., held that evidence sufficiently established the identity of defendants as the robbers.

Affirmed.

#### 1. Robbery ☞24(3)

In prosecution for robbery, evidence was sufficient to establish identity of defendants as the robbers. West's Ann.Pen. Code, § 211.

#### 2. Criminal Law ☞1159(2)

In exercise of their appellate jurisdiction, courts of appeal are restricted to consideration of questions of law alone, and the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby from its very nature, a question of law, such as where evidence bears upon its face the brand of improbability, or which may be said to be unbelievable, per se, because it involves claim that something has been done that it would not seem possible could be done under circumstances described in evidence.

#### 3. Criminal Law ☞1159(2)

On appeal, district court of appeal is not authorized to retry case or reweigh evidence, but its function is limited to determination of whether there is sufficient evidence in record, contradicted or uncontradicted, to justify conclusion that crime was committed and that accused were perpetrators thereof.

#### 4. Criminal Law ☞260(11)

Questions of weight of evidence and credibility of witnesses being for trial court, it necessarily follows that when circumstances shown reasonably justify finding of guilt, opposing view that such circumstances may be reconciled with innocence will not warrant interference with judgment on appeal.

#### 5. Criminal Law ☞572

In prosecution for robbery, evidence was insufficient to establish defendants' alibi. West's Ann.Pen.Code, § 211.

Crispus A. Wright, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were charged with the crime of robbery (Penal Code, Section 211), in that they did by means of force and fear take \$63 in money from the person of James Long.

Defendants pleaded not guilty, trial by jury was duly waived, and the cause was submitted to the trial court on the transcript of the preliminary examination, each side reserving the right to offer evidence in addition to that contained in the aforesaid transcript. Following a reading of the transcript and presentation of additional testimony, the court adjudged defendants guilty as charged. Motion for a new trial was denied as to each defendant, and they were committed to the Youth Authority of the State of California. From the judgment of conviction and the order denying their motions for a new trial both defendants prosecute this appeal.

Concerning the factual background surrounding this prosecution, the record reflects testimony that on the evening of May 11, 1957, at approximately 10:15 p. m., James Long, proprietor of a service station in the city of Los Angeles, was seated alone in the office of his service station. He had been on duty since 7:30 a. m. that morning but was not "overly tired" or sleepy since it was his usual routine to work these long hours. During this period Long had not used stimulants. Some 15 minutes earlier, at about 10:00 p. m., Long had checked the cash register in the service station office and found that it contained approximately \$63, representing part of his business proceeds for that day.

At approximately 10:15 p. m., on the aforesaid night, defendants Rumph and Shamburger appeared at the door of the

service station. The area both inside and outside the service station office was well lighted. Long walked to the door and was directly facing the defendants, when Rumph jumped to one side and pushed something hard into Long's side, the latter not actually seeing a gun at this time. Defendant Rumph informed Long that it was a holdup and when Long asked him what he said, defendant Shamburger then exhibited a gun and told Long that this was a "stickup."

Long was pushed over to the cash register, was told to open it, and defendant Rumph then removed the money. After the money had been taken, defendants Rumph and Shamburger ran from the service station and fled on foot, their departure being witnessed by Joseph White, a customer, who arrived just before defendants ran out the door. As the defendants ran out the door, White had a direct view of their faces at a distance of approximately 18 feet for a period of about five seconds.

On June 17, 1957, at approximately 1:14 a. m., Sergeant Gaylord L. Campbell of the South Pasadena Police was stationed in his police car on the Orange Grove ridge above the Pasadena Freeway. He observed a car, which in his estimation was exceeding the 55-mile per hour speed limit on the Pasadena Freeway, proceed along the freeway, up the ramp to the Orange Grove Bridge and skid through the stop sign at the top of the ramp. As the vehicle negotiated a right-hand turn after skidding through the stop sign, Sergeant Campbell turned on his red light and gave chase, honking his horn at the same time. The automobile turned right at the first block south of the freeway and finally stopped after Sergeant Campbell had pulled alongside in his police car. Two of the three occupants of the car were defendants Rumph and Shamburger, and when the driver Rumph was questioned about his manner of driving, he stated that "someone was chasing them." Because of the apparently excessive speed of the car, the fact that it skidded through a stop sign and

turned down a residential side street after he gave chase, the lateness of the hour, the apparently unsubstantiated excuse that "someone was chasing" the car, and the fact that defendants were Negroes and the residential street down which they turned was part of an all-Caucasian neighborhood, Sergeant Campbell believed that the occupants of the car might have committed a felony. Because of this belief, he arrested the occupants and subsequently searched the car in which they had been riding, the result of the search being the discovery of a loaded .38 caliber revolver in the glove compartment of the car.

On approximately June 20, 1957, James Long appeared at the Los Angeles Police Department building and there viewed a police lineup of possible suspects consisting of about twenty men, approximately fifteen of whom were Negroes. The defendants Rumph and Shamburger were among those appearing in the lineup, but were separated by five or six men. At this lineup Long was able to positively identify defendants Rumph and Shamburger as the men who robbed him on the night of May 11, 1957.

Some time after the viewing of the lineup and the identification of the defendants by Long, Joseph White also appeared at the Los Angeles Police Department building and there looked over pictures of possible suspects and viewed a police lineup. He was shown a group of pictures and shortly thereafter viewed a police lineup of approximately ten men, consisting of both Negro and Caucasian suspects including defendants Rumph and Shamburger, they being separated by approximately two men in the lineup. At this time White identified, both from the pictures and from the lineup, the defendants Rumph and Shamburger as the men he had seen running from Long's service station on the night of May 11, 1957, and at the time of the robbery.

Both defendants were sworn as witnesses in their own behalf. Defendant Shamburger testified that he was not in Los Angeles at any time during the evening of May 11, 1957. That about 10:30 p. m. on that date (when the robbery oc-

curred), he was at home where he arrived about 10:00 p. m. that night. That when he arrived at his home, his mother, father, brothers, sisters and a friend, Mr. Noulín Hollingsworth were there. Ollie Mae Butler testified that she lives in Pasadena. That she saw defendant Shamburger, on May 11, 1957, the date of the robbery, at the B & C Restaurant about a quarter to 8:00. She further testified that she and Shamburger along with a Mr. Percy Moore, left the B & C Restaurant about 10 minutes after 8:00, and that they walked to Fair Oaks and Colorado where they stood under a canopy while it was raining, and that they walked to Green Street and Shamburger left them at that time; that she came back to her home with Percy Moore; that defendant Shamburger came to her home about a quarter of 9:00 and that Roosevelt Butler "picked Shamburger up" from her house.

Roosevelt Butler testified that he took defendant Shamburger in his automobile from the latter's home between 5:30 and 6:00 p. m. on the evening here in question; that they rode around until about 7:30 p. m. when they let defendant out of the automobile at the home of the witness Ollie Mae Butler. That about 9:45 p. m. he "picked up" defendant Shamburger, drove him to the latter's home, and saw him go through the door into the house. The witness Percy Moore corroborated in general, the testimony of Ollie Mae Butler.

Defendant Shamburger's father testified that the former arrived home on May 11, 1957 at about 10:00 p. m. and did not leave the house at any time during the night.

Testifying in behalf of defendant Rumph, his father stated that the gun found in the car driven by the defendant belonged to his wife and although usually kept locked up in a small box at home was, on the day of defendant Rumph's arrest, missing, the back of the box having been pried off. Defendant Rumph testified that he had broken into his father's locked box and obtained the gun found in the car at the time of his arrest, June 17, 1957, because his life had been threatened on the

16th of June, 1957. Defendant Rumph further stated that one Gordon Holt had threatened to shoot him in connection with some girl, although Rumph had met Holt only two or three times and had not gone with any girl that Holt was interested in. He denied any participation in the robbery of which he was accused.

[1] Appellants' sole contention is that the decision of the court was contrary to law and the evidence in that the latter was legally insufficient to sustain the finding of guilt. Appellants urge that since they were not arrested until more than a month after the alleged robbery, their identification would be rendered difficult. That since the victim had been working from 7:30 a. m. on the date of the crime which occurred around 10:00 p. m., he was tired and, according to the witness White, appeared to be nervous, that "It is quite obvious that the human body cannot take such an assault (the robbery) without the mind being affected so far as the ability to identify is concerned." However, the victim testified that he was not overly tired or sleepy because it was his usual custom to work these long hours.

[2-4] Appellants direct our attention to certain testimony given by the prosecution witnesses indicating some uncertainty as to the type and color of the clothing worn by the robbers, whether they wore hats or caps, or had mustaches or sideburns. All these contentions present factual situations for determination by the duly constituted arbiter of the facts. It has long been the rule, strictly adhered to in this state, that in the exercise of their appellate jurisdiction, the courts of appeal are restricted to the consideration of questions of law alone, and that, therefore, the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law, such as where the evidence bears upon its face the brand of improbability, or which may be said to be unbelievable, *per se*, because it involves a claim that something has been done that it



would not seem possible could be done under the circumstances described in the evidence. In such a situation, the issue becomes one of law. The instant case does not present such an issue. While the claimed weakness in the identification testimony of two of the prosecution's witnesses undoubtedly afforded opportunity for a persuasive argument to the trial judge against the reliability of such testimony, we see in them nothing from which a reviewing court could justly conclude that their entire testimony is, *per se*, unbelievable, and that it was, therefore, the duty of the trial judge not only to disregard it, but to accept appellants' testimony and that of their alibi witnesses, and therefrom conclude that the appellants' guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt. The record reveals that the victim and the witness Joseph White positively identified appellants as the perpetrators of the robbery. Also, as heretofore set forth in the factual narrative of this prosecution, both of the aforesaid witnesses, prior to the trial, positively identified appellants when the witness recognized them in a police "line-up," and Mr. White recognized them in pictures shown him of possible suspects. On appeal, we are not authorized to retry the case or reweigh the evidence. Our function is limited to a determination of whether there is sufficient evidence in the record, contradicted or uncontradicted, to justify the conclusion that a crime was committed and that the accused were the perpetrators thereof. Questions of the weight of evidence, and the credibility of witnesses being for the trial court, it necessarily follows that when the circumstances shown, reasonably justify the finding of guilt, an opposing view that such circumstances may be reconciled with innocence will not warrant interference with the judgment on appeal. As was said in *People v. Smith*, 35 Cal.App.2d 73, 76, 94 P.2d 633, 634: "\* \* \* it is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court."

[5] What we have herein stated is equally applicable to appellants' contention

that the "alibi" testimony of their witnesses was sufficient to "raise a reasonable doubt whether defendant was present when the crime was committed." The trial judge had the witnesses before him. He was afforded an opportunity to observe their demeanor, candor or lack of candor, as well as the fact that they were all relatives or close friends of appellants and their consequent interest in the outcome of the prosecution. It is manifest that he questioned their veracity to the extent that, in the light of other evidence positively identifying appellants as having committed the crime charged against them, the "alibi" evidence did not create in his mind a reasonable doubt as to the guilt of the accused. Considered in the light of the rule announced in *People v. Newland*, 15 Cal.2d 678, 681, 682, 104 P.2d 778, a declaration by this court that the adjudication of guilt by the trial judge in the case now engaging our attention is barren of a sufficient foundation to uphold it, would not be justified.

For the foregoing reasons, the judgment and the order denying defendants' motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.



164 Cal.App.2d 599

**The PEOPLE of the State of California,**  
Plaintiff and Respondent,

v.

**Gloria A. QUESADA, Defendant and**  
Appellant.

Cr. 6108.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 28, 1958.

Prosecution for assault with deadly weapon. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and denied motion for

new trial and accused appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained conviction.

Affirmed.

**1. Assault and Battery** §92

Evidence sustained conviction for assault with deadly weapon

**2. Criminal Law** §938(1)

Motion for new trial on ground of newly discovered evidence is matter within discretion of trial court.

**3. Criminal Law** §939(1)

Where accused, in support of motion for new trial, presented affidavit of additional witness that she had known accused and alleged victim, that she was in saloon at time of incident and was in position to observe actions of accused and alleged victim, that alleged victim came at accused in threatening manner and that accused thrust out her hands to ward off blow allegedly aimed at her, but that witness had not come forward prior to trial because she had not wanted to become involved, trial court did not abuse its discretion in denying new trial.

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Richard R. Cody, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In a nonjury trial defendant was adjudged guilty of assault with a deadly weapon. She appeals from the judgment and the order denying her motion for a new trial.

[1] Appellant contends that the evidence was insufficient to support the judgment; and that the court abused its discretion in not granting a new trial on the ground of newly discovered evidence.

On January 15, 1957, about 1 a. m., Miss Blair and Mr. Solorzano were sitting at the bar in a saloon. About ten minutes thereafter, the defendant and Espe Baca (girl friend of defendant) entered the saloon and approached Miss Blair with whom they were acquainted. Baca asked Blair if her

friend (Solorzano) would buy a drink for Baca and defendant. Solorzano bought drinks for them, and they sat at the bar.

Blair testified that, after the drinks had been served, she stood up in order to show new pedal-pushers to Baca; when she stood up she left her cocktail glass on the bar; at that time defendant was sitting at the bar, and Blair and Baca were standing near defendant; Blair was about three feet from defendant and she (Blair) did not have anything in her hands; while they were standing there, defendant criticized Blair with respect to her clothes, dyed hair, and moral character; then the defendant hit Blair's face; defendant and Baca ran out a cocktail glass; the glass broke and cut Blair's face; defendant and Baca ran out of the place; Blair was taken to a hospital where doctors sewed the face injury; the doctors also sewed a wound which was in the palm of Blair's hand; she did not know the cause of the cut in her hand.

Mr. Solorzano testified that after the drinks had been ordered, and while he was sitting at the bar and while Blair, Baca, and defendant were standing near him, he heard conversation and he noticed that Blair was looking toward the floor and seemed to be laughing; then he saw defendant, with a cocktail glass in her hand, "lash out" at Blair with her right hand and strike Blair on her left temple; defendant made another grab at Blair, but Solorzano (witness) and the bartender pushed the defendant away.

A police officer testified that he had a conversation with defendant, in the presence of her attorney, at the police station two days after the injury occurred; in that conversation the defendant said: she had known Blair a long time; at the time involved here, Blair kept insisting on buying a drink for defendant, and that defendant had refused; Blair turned toward defendant, with a glass in her hand, and defendant believed that she struck Blair at that time; she and Blair had been "teed off at each other" over an old boy friend; a wound, which was on her hand, was received as a result of the fracas; and she had not made a report to the police.

Defendant testified that she had known Blair about six years; when defendant and Baca were about to leave the saloon, Blair called Baca and offered to buy a drink for Baca and defendant; then defendant and Baca went to the bar, and a man bought drinks for them; the man was an older man than Solorzano; she did not recall seeing Solorzano there; Blair asked defendant why defendant did not like her; defendant replied that she did not want to talk about it; Blair said that she was a lady, but she knew defendant was not a lady; then Blair came at defendant with an uplifted hand; defendant, who had a cocktail glass in her hand, put her hands in front of her to push Blair away, and the glass broke on Blair's face; she did not strike Blair.

Baca's testimony corroborated the testimony of defendant.

The bartender testified that, on a prior occasion, Blair told him that she would cut defendant with a can opener; he told defendant that Blair had made that statement; Blair's reputation in the neighborhood for peace and quiet was that she was belligerent and loud.

The evidence was sufficient to support the judgment.

In support of her motion for a new trial, the defendant presented an affidavit of Gloria Garcia, which recited in substance that she had been acquainted with defendant about five years, and she talked with defendant every few months during that time; she had been acquainted with Blair about a year; she (affiant) was in the saloon at the time of the alleged incident and was in a position to observe the actions of defendant and Blair; affiant's attention was attracted to them by the raised and shrill voice of Blair; defendant was sitting at the bar, and Blair was standing; Blair came at defendant in a threatening manner as if she were going to strike defendant; defendant thrust out her hands to ward off the blow aimed at her; defendant was drinking at the time she was attacked by Blair.

Appellant contends, as above stated, that the court abused its discretion in denying

the motion for a new trial. She argues that the newly discovered evidence, as shown by the affidavit, was not merely cumulative; that the affiant was the only witness who had a more or less impartial view of the circumstances; that affiant was not emotionally involved in the events. Appellant argues further that extraordinary diligence was exercised in order to discover new evidence; that counsel for appellant stated, in the trial court, that the new witness came forward after the trial and made the affidavit after much effort on the part of counsel.

[2,3] A motion for a new trial on the ground of newly discovered evidence is a matter within the discretion of the trial court. *People v. Greenwood*, 47 Cal.2d 819, 821, 306 P.2d 427. Under the circumstances here the trial court might properly have regarded the alleged newly discovered evidence as cumulative. Defendant's witness Baca gave testimony which corroborated defendant's testimony. Also, the court might properly have found that the defendant, with reasonable diligence, could have discovered and produced the alleged evidence at the trial. At the hearing of the motion for a new trial, counsel for defendant stated that the reason the additional witness did not come forward prior to the trial was that she did not want to become involved in the trial. The affidavit states that the additional witness was in the saloon at the time involved here and she was in a position to observe the actions of defendant and Blair, and she had known defendant about five years and had talked with her every few months during that time. The court might have inferred therefrom that defendant and the additional witness had had conversations on various occasions after the saloon incident and that defendant had had an opportunity to discuss the incident with the witness and to endeavor to produce her as a witness. The court did not abuse its discretion in denying the motion for a new trial.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



51 Cal.2d 80

**STANSBURY, Incorporated (a Corporation),**  
Petitioner,

v.

**The SUPERIOR COURT OF SAN BERNAR-**  
**DINO COUNTY, Respondent,**

**John W. Golden, Real Party In Interest.**

**L. A. 25070.**

Supreme Court of California,  
In Bank.

Oct. 24, 1958.

Mandamus proceeding to compel superior court to entertain appeal from decision of justice court. The Supreme Court, Gibson, C. J., held that where clerk of justice court demanded \$9 filing fee "to go with papers" and party seeking to appeal from decision of justice court sent check, within 30-day period allowed for appeals, drawn to order of superior court clerk instead of justice court clerk, but upon being notified that \$9 fee should go to justice court clerk to be forwarded and that additional \$1 fee was required by justice court, party sent \$10 check to justice court clerk after 30-day period, there was substantial compliance with statute requiring payment of all fees before appeal will be effectual, and timely payment of \$1 fee was waived by failure to demand it.

Writ of mandate issued.

### 1. Justices of the Peace ⇨155(1)

Giving of notice of appeal from justice court judgment is waiver of and equivalent to notice of rendition of judgment, starts 30-day period allowed for appeals from justice court running and appellant has 30 days thereafter in which to perfect his appeal and pay required fee. West's Ann. Code Civ.Proc. § 981; West's Ann.Gov. Code, §§ 26824, 71667; West's Ann.Bus. & Prof.Code, § 6321.

### 2. Justices of the Peace ⇨158(3)

Where clerk of justice court demanded \$9 filing fee "to go with papers" and party seeking to appeal from decision of justice court sent check drawn to order of superior

court clerk instead of justice court clerk within 30-day period allowed for appeals, but upon being notified that \$9 fee should go to justice court clerk to be forwarded to superior court and that additional \$1 fee was required by justice court, party sent \$10 check to justice court clerk after 30-day period, there was substantial compliance with statute requiring payment of all fees before appeal will be effectual, and timely payment of \$1 fee was waived by failure to demand it. West's Ann.Code Civ.Proc. § 981; West's Ann.Gov.Code, §§ 26824, 71667; West's Ann.Bus. & Prof. Code, § 6321.

### 3. Justices of the Peace ⇨158(1)

Civil appeal from justice court is not subject to dismissal for failure of judge to exact payment of fee payable to justice court. West's Ann.Code Civ.Proc. § 981.

Ball, Hunt & Hart and Donald B. Caf-ray, Long Beach, for petitioner.

Alber E. Weller, County Counsel, and J. B. Lawrence, Deputy County Counsel, San Bernardino, for respondent.

T. L. DeBord, Barstow, for real party in interest.

GIBSON, Chief Justice.

The sole question raised in this proceeding is whether an appeal from a justice court to the superior court was subject to dismissal for failure to pay the required fees in the manner and within the time prescribed by law.

Petitioner was the defendant in a justice court action in which judgment was awarded in favor of the plaintiff, who is the real party in interest in this proceeding. No notice of rendition of judgment was served or filed, but on October 11, 1956, defendant filed a notice of appeal to the superior court. On November 5, defendant received a letter from the clerk of the justice court which, after reciting that the papers in the case were ready to be sent to the county clerk, stated, "I am waiting for the \$9.00 filing fee that has to go with the

papers, if you will send a cashiers check made out to the Clerk of the Superior Court, I will send it with the balance of the papers and not send it thru the trust fund." Pursuant to this request, defendant sent a cashier's check for \$9 payable to the clerk of the superior court. This check was received by the justice court clerk on November 7 and thereafter forwarded to the superior court.

On November 16, defendant received a letter in which the clerk of the justice court stated that she had been informed by the county auditor that the superior court could not accept the filing fee direct from defendant's attorney and that it would have to be sent through the justice court and deposited in a trust fund and then be transferred to the superior court. The letter further stated that the justice court clerk should have charged a transfer fee of \$1 and that if defendant would mail a money order for \$10 the clerk would keep \$1 for the justice court transfer fee and send the balance to the superior court clerk. Defendant immediately complied with these instructions by forwarding a money order in the amount of \$10 payable to the justice court clerk.<sup>1</sup>

On motion of plaintiff the superior court dismissed the appeal, and defendant commenced this proceeding in mandamus to compel the superior court to entertain the appeal.

1. At the time the appeal was taken the superior court was entitled to \$9, consisting of a filing fee of \$8 (Gov.Code, § 26824) and a law library fee of \$1 (Bus. & Prof. Code, § 6321), and the justice court was entitled to a transfer fee of \$1 (Gov. Code, § 71667).
2. Section 981 of the Code of Civil Procedure provides: "No appeal taken from a judgment rendered in a justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the judge of the justice court on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon

[1] Section 981 of the Code of Civil Procedure provides that no such appeal shall be effectual for any purpose unless the appellant, at the time of filing the notice of appeal, pays the fee payable to the judge of the justice court and the fees provided to be paid to the county clerk, and that no notice of appeal shall be filed unless such fees are paid in accordance with the provisions of this section.<sup>2</sup> Under section 974 of the Code of Civil Procedure an appeal in a civil action in a justice court may be taken at any time within 30 days after notice of rendition of judgment.<sup>3</sup> Where, as here, no notice of rendition of judgment is given, it has been held that the giving of notice of appeal is a waiver of an equivalent to notice of rendition of the judgment, that it starts the 30-day period running, and that the appellant has 30 days thereafter in which to perfect his appeal and pay the required fees. *Simmons v. Superior Court*, 30 Cal.App. 252, 254, 157 P. 817; see *Autrand v. Superior Court*, 104 Cal.App.2d 480, 481, 231 P.2d 546.

[2] It is not disputed that the \$9 check was received by the justice court clerk and sent to the superior court clerk within the 30-day period, but it is claimed that the payment was not effective because the check was drawn to the order of the superior court clerk instead of the justice court clerk. Section 981 of the Code of Civil Procedure, which relates specifically

transmitting the papers on appeal, the judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section."

3. Section 974 of the Code of Civil Procedure provides in part: "Any party dissatisfied with the judgment rendered in a civil action in a justice court, may appeal therefrom to the superior court of the county, at any time within 30 days after notice of the rendition of the judgment. The appeal is taken by filing a notice of appeal with the judge of the justice court, and serving a copy on the adverse party. \* \* \*

to appeals from the justice court to the superior court, does not require that such a check be made payable to the justice court, but provides that, upon transmitting the papers on appeal, the judge of the justice court shall transmit to the superior court clerk the sum "deposited for filing the appeal in the superior court." See *supra*, footnote 2. The county auditor, in advising the justice court clerk that the superior court could not accept payment of the fees on appeal direct from defendant's attorney, was apparently relying on section 24353 of the Government Code which provides in part: "Each officer of a county or judicial district authorized to collect money shall pay into the county treasury at the time required by law, but in any event on or before the fifth day of each month, all money collected by him \* \* \* that is payable into the treasury and file with the county auditor \* \* \* a cash statement \* \* \* of all money handled by him \* \* \* during the preceding month. \* \* \*" Although this section sets forth the manner in which the internal accounting of funds should be made by the various officers of a county or judicial district, an officer's failure to comply with those directions should not deprive a party of his right to appeal, particularly where, as here, the party has followed the instructions of the justice court clerk and there has been a substantial compliance with section 981 in respect to the payment of the fees on appeal.

[3] Plaintiff also claims that payment of the fees was not timely because of defendant's failure to pay the \$1 transfer fee to the justice court within the 30-day period. As we have seen, the justice court clerk did not demand this \$1 fee originally, and, as a consequence, the payment was not made until after the 30 days had passed. A civil appeal from a justice court is not subject to dismissal for failure of the judge to exact payment of the fee payable to the justice court. *Gunn v. Superior Court*, 73 Cal.App.2d 564, 566-567, 166 P.2d 906; see *Autrand v. Superior Court*, 104 Cal. App.2d 480, 481, 231 P.2d 546. In the *Gunn* case it was held that a reasonable

construction of section 981 is that a judge of the justice court is not compelled to transmit to the superior court the record on appeal until all requisite fees are paid to him, but that if he transmits the record, together with all the fees payable to the clerk of the superior court on such appeal, that court acquires jurisdiction even though the judge may have failed to exact the fees payable to his court. 73 Cal.App.2d at page 567, 166 P.2d at page 907. In the present case, timely payment of the \$1 transfer fee was waived by failure to demand it.

Let a peremptory writ of mandate issue directing the superior court to entertain the appeal.

SHENK, CARTER, TRAYNOR,  
SCHAUER, SPENCE, and McCOMB, JJ.,  
concur.



51 Cal.2d 142

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Luther POINDEXTER, Defendant and  
Appellant.

Cr. 6268.

Supreme Court of California,  
In Bank.

Oct. 24, 1958.

Rehearing Denied Nov. 19, 1958.

Prosecution for homicide and for furnishing narcotics to minor. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment of conviction of furnishing narcotics to minor and second degree murder and defendant appealed. The Supreme Court, Spence, J., held that evidence was sufficient to sustain conviction of second degree murder from furnishing of narcotics, and under circumstances, failure of court to give



cautionary instruction with respect to oral admission did not constitute prejudicial error.

Affirmed.

Opinion, 322 P.2d 607, vacated.

#### 1. Criminal Law Ⓒ1159(2)

Test on appeal is whether or not there is substantial evidence to support conclusion of trier of fact, and it is not whether guilt is established beyond a reasonable doubt.

#### 2. Polsons Ⓒ9

Evidence sustained finding that defendant was guilty of furnishing narcotics to a minor. West's Ann.Health & Safety Code, § 11714.

#### 3. Indictment and Information Ⓒ101

Where indictment charged defendant with furnishing narcotics to a minor but indictment did not include the name of the minor, since there was no uncertainty in matter as presented to jury as it clearly appeared throughout trial that counts specifically charging violation referred to one of the minors, omission did not render count defective. West's Ann.Health & Safety Code, § 11714.

#### 4. Homicide Ⓒ254

Evidence sustained conviction of second degree murder resulting from death of minor who had been furnished narcotics by defendant. West's Ann.Health & Safety Code, §§ 11009, 11714, 11721; West's Ann.Pen.Code, § 189.

#### 5. Homicide Ⓒ18(1)

Death resulting from commission of a felony such as selling or administering of narcotics to a minor constitutes murder of the second degree. West's Ann.Health & Safety Code, §§ 11009, 11714, 11721; West's Ann.Pen.Code, § 189.

#### 6. Criminal Law Ⓒ507(1)

Where defendant<sup>\*</sup> furnished narcotics to two minors, one of whom died from narcotic poisoning and the other of whom one testified against defendant who was charged with furnishing narcotics to minor and with second degree murder, surviving

minor was not an accomplice of defendant as to underlying charge of furnishing and administering narcotics to minor and he could not be held to be an accomplice within statute requiring corroboration of an accomplice's testimony. West's Ann.Pen.Code, § 1111.

#### 7. Criminal Law Ⓒ507(1)

To be an "accomplice" within statute relating to accomplice testimony, one must stand in the same relation to the crime as a person charged therewith and must approach it from the same direction. West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

#### 8. Homicide Ⓒ308(3)

In prosecution for second degree murder resulting from poisoning of deceased minor through narcotics furnished by defendant, there was no error in court instruction on crime of murder which necessarily referred to the two degrees of murder where the prosecuting attorney and trial court expressly negated possibility that evidence could sustain conviction of murder in the first degree. West's Ann.Pen.Code, § 189.

#### 9. Criminal Law Ⓒ824(5)

In prosecution for furnishing of narcotics to minor and for second degree murder, where state witness called to rebut defendant's testimony on cross-examination related oral admission made to witness by defendant, there was no prejudicial error by trial court in failing to give of its motion an instruction that evidence of an oral admission by defendant should be viewed with caution. West's Ann.Health & Safety Code, § 11714; West's Ann.Code Civ.Proc. § 2061, subd. 4.

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Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny and Victor Griffith, Deputy Attys. Gen., Thomas C. Lynch, Dist. Atty., and

Walter H. Giubbini, Asst. Dist. Atty., San Francisco, for respondent.

SPENCE, Justice.

Defendant was charged with the murder of Douglas Callies and with the furnishing of narcotics to a minor in violation of section 11714 of the Health and Safety Code. He admitted three prior felony convictions. The jury returned verdicts of guilty and found the murder to be second degree. Defendant has appealed, contending: (1) that the evidence is insufficient to sustain the convictions; (2) that he was convicted on the uncorroborated testimony of an accomplice; (3) that the trial court committed prejudicial error in instructing on the elements of murder, and in failing to give a cautionary instruction relative to the evidence of an oral admission by defendant. We have concluded that defendant's contentions cannot be sustained, and that the judgment should be affirmed.

The alleged offenses occurred in San Francisco. Stanley Hoffman and the deceased, Douglas Callies, had been friends for several years. Both were minors, twenty years old. On the evening of September 27, 1956, Hoffman had planned to take two girls to the theatre. About 5:30 p. m., as Hoffman was leaving his home to pick up the girls, he received a telephone call from Callies. The latter, upon learning of Hoffman's plans, asked if he could go along and Hoffman agreed. Thereupon Hoffman drove to Callies' home, and the two then proceeded to the Fillmore Street area because Callies, who was in the Merchant Marine and had just returned from a cruise, wanted to buy some heroin. Both young men had used heroin in the past, and on several occasions they had used it together.

According to Hoffman, they first saw defendant on Fillmore Street near Golden Gate Avenue. Hoffman stopped his car and defendant got in the back seat. Hoffman had known defendant for several months, had previously purchased heroin from defendant, and had taken the heroin

shots in defendant's hotel room on those occasions. Hoffman introduced Callies to defendant, told defendant that Callies wanted to buy some heroin, and defendant stated that he thought he could get some. Callies then gave defendant \$50 and defendant left the car. In a few minutes defendant returned, gave Callies \$15 in change, said "Everything is all right," and directed Hoffman to drive to a service station.

Hoffman proceeded to a nearby station and drove up to the pumps. Callies stayed with the car and arranged to get some gas, while defendant, carrying the heroin and the "outfit," accompanied Hoffman to the men's room. There they went behind the dividing partition, where defendant prepared the drug by cooking it in a spoon, helped Hoffman put a tourniquet around the latter's arm and held it in place while Hoffman took only a small injection as he was driving the car. Thereupon Hoffman went outside to telephone the girls that he would be late, and then waited in the car. Meanwhile Callies joined defendant in the men's room. In a few minutes, Callies and defendant returned to the car. Callies got into the front seat and sat with his chin on his chest. He acted "like he was almost unconscious," "mumbling a little bit," not "saying too much" but "groaning and moaning." Defendant got into the back seat, and Hoffman drove to defendant's hotel, where defendant remained.

Hoffman then drove to the Ingleside district to pick up the two girls. The girls wanted to sit in the front seat, so Callies, who was in a dazed condition but "able to stand on his feet" though "sort of fumbling around," was moved to the back seat. Hoffman drove to the neighborhood theatre and parked the car. It was about 7:30 p. m. Hoffman asked Callies if he wanted to go to the movie and Callies mumbled "no." Hoffman left Callies in the back seat of the car, rolled down the window, and locked all the doors. He took Callies' wallet and gave it to one of the girls to put in her purse, as he was afraid someone

might try to "roll" Callies, thinking that he was drunk.

After staying for the full double feature program, Hoffman and the two girls returned to the car. As they approached the car, Hoffman saw Callies "leaning over toward the window" and thought that he was asleep. Hoffman slapped Callies twice but he did not move. Hoffman then felt Callies' face; it was cold. Hoffman became "scared," and finding that Callies had no pulse, he told the girls that Callies was dead. Hoffman was going to telephone the police, but the girls objected as they wanted to avoid any publicity. One of the girls began to cry, and Hoffman took her home. Thereupon Hoffman and the other girl drove to a churchyard, where Hoffman took Callies' body out of the car and placed it on the ground. Then after taking his companion home, Hoffman returned to his own home, without contacting the police. Hoffman was arrested about 11 a. m. the next day, September 28.

A number of experts testified that Callies died from narcotics poisoning. Heroin is a derivative of morphine, and an amount of morphine sufficient to cause death was found in Callies' body. There was also found an amount of alcohol equivalent to three-and-a-half bottles of beer or shots of whiskey, which was ingested a relatively short time before death. The amount of alcohol, however, was not significant enough to contribute to death. No needle marks were found on the body by the autopsy surgeon, but he indicated that this was not uncommon, for it is very easy to inject material so that the site of the injection would be invisible. The autopsy surgeon estimated that at the time he examined the body, which was at 11 a. m. on September 28, the deceased had been dead over four to six hours but less than two or three days.

Defendant was the sole defense witness. He testified that he had known Hoffman for about three months and had seen him several times. He denied ever selling narcotics to Hoffman or using narcotics with

Hoffman, except for the single occasion on September 27 here in question. He stated that Hoffman once asked him to sell narcotics which Hoffman's friend was to bring back from overseas, but that he had refused. He further stated that on one occasion Hoffman had borrowed his "outfit" to use with some other persons at a service station; and that on another occasion Hoffman had come to his hotel to ask for the use of his room to take an injection, but that he had refused because Hoffman had previously had trouble with his landlord.

With respect to the events of September 27, 1956, defendant testified that he had met Hoffman and Callies on the street and that they asked him if they could use his room and "outfit" to take some narcotics. He stated that he refused to let them use his room but agreed to let them use his "outfit" in return for some of their heroin. Defendant then went to his room, got his "outfit," and the three proceeded to the service station. There they went to the men's room in the sequence as related by Hoffman: first, defendant and Hoffman, but that Hoffman prepared the narcotic solution while he, defendant, readied the hypodermic needle, and that he then stood guard at the door while Hoffman went behind the partition and presumably took "a fix"; that Hoffman then emerged from the room and sent Callies in to "take a fix," while defendant continued to guard the door; and finally, after Callies finished, defendant went in for his own "fix." Defendant denied that he had mixed the narcotic solution or assisted Hoffman and Callies in taking their shots. He further denied having received \$35 from Callies as payment for the heroin, but claimed that Callies furnished the heroin, presumably having brought it in from overseas.

As a rebuttal witness, the prosecution produced a policewoman who had accompanied Hoffman to defendant's room on the evening of October 1, 1956, before defendant's arrest. She stated that she was introduced to defendant as a friend of Hoffman, and that in her presence defendant told Hoffman that he had sold "a \$35 pa-



per" to Callies on the fatal night. On surrebuttal, defendant again took the witness-stand, admitted the related visit of October 1 in his room but claimed that the only mention of narcotics there was Hoffman's request of defendant to "get us some stuff" and that he, defendant, refused. Defendant denied that there was any conversation relative to "a \$35 paper."

[1,2] Defendant first contends that the evidence was insufficient to sustain the convictions. The "test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt." *People v. Daugherty*, 40 Cal.2d 876, 885, 256 P.2d 911, 916; see also *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Applying this test first to the charge of furnishing narcotics to a minor (Health & Saf.Code, § 11714), the record clearly sustains the conviction. While there was conflicting testimony as to who supplied the heroin, the jury apparently chose to accredit Hoffman's version, and its determination will not be disturbed.

[3] Defendant makes a further objection to this conviction because the indictment did not include the name of the minor victim. But such omission did not render this count in the indictment defective. *People v. Leiva*, 134 Cal.App.2d 100, 102, 285 P.2d 46. There was no uncertainty on this matter as presented to the jury. True, there were two minors—Hoffman and Callies—involved in the criminal transaction with defendant, but it clearly appeared throughout the trial that the count specifically charging a violation of the narcotics law (Health & Saf.Code, § 11714) related to the minor Hoffman. Prosecuting counsel expressly so stated in his opening argument, and twice repeated the statement in his closing argument. Hoffman had testified that he was twenty years of age at the time involved, and as corroborating proof, his was the only birth certificate introduced on the minority issue. Defendant at no time during the trial demurred or offered any objection to the

sufficiency of this charge in the indictment. Such condition of the record leaves no uncertainty as to the premise of defendant's conviction on this count, and would permit defendant to establish former jeopardy in the event of a subsequent accusation. In such circumstances, defendant's substantial rights were in nowise affected. *People v. Leiva*, supra, 134 Cal.App.2d at page 103, 285 P.2d at page 48.

[4,5] Nor can defendant prevail in his challenge of the sufficiency of the evidence to support his conviction of murder in the second degree. The furnishing, selling, or administering of narcotics to a minor is a felony. Health & Saf.Code, § 11714. Here there was uncontroverted testimony that Callies died from narcotics poisoning, and that taking a shot of heroin was an act dangerous to human life. Death resulting from the commission of a felony such as furnishing, selling or administering of narcotics to a minor constitutes murder of the second degree. Pen.Code, § 189; *People v. Powell*, 34 Cal.2d 196, 205, 208 P.2d 974. Defendant unavailingly argues that the evidence "at best" supports only a verdict of manslaughter, citing *People v. Hopkins*, 101 Cal.App.2d 704, 226 P.2d 74. In that case, as here, the decedent died from narcotics poisoning. But there a manslaughter conviction was deemed proper because the evidence showed defendant to have assisted the decedent "in the commission of an unlawful act *not amounting to a felony*." (Emphasis added, 101 Cal.App.2d at page 706, 226 P.2d at page 76; Health & Saf.Code, §§ 11721, 11009.)

[6,7] Defendant next contends that his convictions should be reversed because Hoffman was an accomplice within the meaning of section 1111 of the Penal Code, and the trial court failed to instruct on the necessity of corroboration of his testimony. But that section defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial." Here defendant was charged with two offenses, to-wit: The murder of one minor and the furnishing of

narcotics to the other minor. The murder charge was prosecuted upon the theory that the death of the deceased minor resulted directly from defendant's feloniously selling, furnishing and administering narcotics to said deceased minor. Thus neither person to whom defendant furnished narcotics was an accomplice of defendant as to the underlying offenses of selling, furnishing and administering the narcotics to said persons. *People v. Lamb*, 134 Cal.App.2d 582, 285 P.2d 941. To be an "accomplice" within the meaning of the cited section, one "must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction." *People v. Baskins*, 72 Cal.App.2d 728, 731, 165 P.2d 510, 511. Furthermore, both Hoffman and the deceased were minors to whom defendant feloniously sold, furnished and administered the narcotics. In the prosecution for such offenses, the minors are regarded as victims rather than as accomplices, and the testimony of the minors therefore does not require corroboration. *People v. DePaula*, 43 Cal.2d 643, 647, 276 P.2d 600; *People v. Freytas*, 157 Cal.App. 2d 706, 713-714, 321 P.2d 782; see also *People v. Deibert*, 117 Cal.App.2d 410, 427, 256 P.2d 355; *People v. Stanley*, 78 Cal. App.2d 358, 361, 177 P.2d 968. Since neither minor was an accomplice of defendant in the commission of the underlying offenses on which both counts were based, we are of the opinion that Hoffman should not be held in this prosecution to be an accomplice of defendant as to either count.

[8] Defendant next contends that the trial court improperly instructed on the crime of murder. In its instructions the court necessarily referred to the two degrees of murder, since the crime of murder of the second degree may only be defined by relating it to murder of the first degree. Section 189 of the Penal Code provides "and all other kinds of murders are of the second degree." Pen.Code, § 189. But both the prosecuting attorney in final argument and the trial court in the instructions expressly negated the possibility that the

evidence could sustain a conviction of murder of the first degree, and expressly stated that a verdict of murder, if found, could only "be second degree." Defendant's claim that the evidence "at best" would support only a verdict of manslaughter, relying on *People v. Hopkins*, supra, 101 Cal.App.2d 704, 226 P.2d 74, has been discussed above and the situation here distinguished because of the felony involved. Health and Saf.Code, § 11714. The court plainly limited its instructions on the murder charge to accord with the facts presented at the trial, so that they could in no wise prejudice defendant's rights.

[9] Defendant finally contends that the trial court committed prejudicial error by failing to give of its own motion an instruction that evidence of an oral admission by defendant should be viewed with caution. Code Civ.Proc. § 2061, subd. 4; *People v. Bemis*, 33 Cal.2d 395, 202 P.2d 82. The oral admission in question relates to the testimony of a policewoman called to rebut defendant's testimony on cross-examination. Defendant had admitted on cross-examination that Hoffman and a woman companion had visited him in his hotel room on the evening preceding his arrest, but he denied that during such visit he had told Hoffman that he had sold "a \$35 paper" of narcotics to Callies on the fatal night. In rebuttal, the policewoman testified that she was the woman who had accompanied Hoffman to defendant's room on the mentioned occasion, and that in her presence defendant told Hoffman that he had secured "a \$35 paper" for Callies on the night he died. It is therefore clear that defendant's alleged oral admission was introduced by the prosecution for purposes of impeachment rather than as part of its case-in-chief. Such evidence appears relatively inconsequential in comparison with the remaining proof of defendant's guilt. In short, if the cautionary instruction had been given, it appears improbable that the jury would have discounted the testimony to such an extent that they would have returned a different verdict. Under the circumstances, it may be assumed that the

instruction should have been given, though not requested by defendant, but we find no prejudicial error resulting from the failure to so instruct. *People v. Letourneau*, 34 Cal.2d 478, 492, 211 P.2d 865; *People v. Koenig*, 29 Cal.2d 87, 94, 173 P.2d 1; *People v. Lowell*, 77 Cal.App.2d 341, 349, 175 P.2d 846; *People v. Macias*, 77 Cal.App.2d 71, 80, 174 P.2d 895.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



51 Cal.2d 84

**Bruce MACFARLANE, Appellant,**

**v.**

**DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Russell S. Munro,**  
**Director, Defendants and Respondents.**

**L. A. 25097.**

Supreme Court of California.

In Bank.

Oct. 24, 1958.

Petition by liquor licensee for review of proceeding on an alternative writ of mandate for review of order revoking on-sale liquor license held by petitioner and another licensee. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment denying relief sought and petitioner-licensee appealed. The Supreme Court, Schauer, J., held that mere fact that a hearing officer in his findings stated that licensee was convicted of a felony, whereas, in fact, his conviction due to sentence received, was to be considered conviction of a misdemeanor, did not mean that decision of the Department of Alcoholic Beverage Control revoking the license was arbitrary or unlawful, in view of fact that record indicated that the Department's de-

cision was based upon the acts committed by licensee which constituted a violation of statute, and upon the fact that he had been convicted of the violation, rather than upon any view or determination of the crime as a felony.

Judgment affirmed.

Opinion, 326 P.2d 165, vacated.

## **I. Criminal Law** ⚡27

After entry of a judgment imposing punishment on a defendant of imprisonment in the county jail, crime of which defendant was convicted was to be deemed a misdemeanor for all purposes, and he was not thereafter to be subject to the statutory disabilities or deprivations which accompany or ensue from a felony conviction, notwithstanding fact that crime from which he was convicted, in the discretion of the judge, could have resulted in a punishment of imprisonment in the state prison with the result that the crime would then be deemed a felony. *West's Ann.Pen.Code*, §§ 17, 337a, 2600, 2604.

## **2. Intoxicating Liquors** ⚡108(9)

Mere fact that a hearing officer, in his findings on a hearing in regard to revocation of a liquor license, stated that licensee was convicted of a felony, whereas in fact his conviction due to sentence received was to be considered conviction of a misdemeanor, did not mean that decision of the Department of Alcoholic Beverage Control revoking the license was arbitrary or unlawful, in view of fact that record indicated that the Department's decision was based upon the acts committed by licensee which constituted a violation of statute, and upon the fact that he had been convicted of violation, rather than upon any view of determination of the crime as a felony. *West's Ann.Const. art. 20, § 22*.

## **3. Evidence** ⚡65

Knowledge of the law is presumed.

## **4. Intoxicating Liquors** ⚡108(10)

In view of provision of the Constitution expressly authorizing revocation of an intoxicating liquor license in the discretion



of the Department of Alcoholic Beverage Control under specified circumstances, the Supreme Court is not free to substitute its own discretion as to action taken by the Department even if it were inclined to do so, but the Supreme Court can act only in the event of an abuse of discretion. West's Ann.Const. art. 20, § 22.

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John J. Bradley, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

The superior court, pursuant to an alternative writ of mandate issued upon the petition of Bruce Macfarlane (sometimes hereinafter called petitioner), reviewed proceedings theretofore had before respondent Department of Alcoholic Beverage Control (hereinafter termed the department) and rendered judgment upholding the findings and conclusions of the department as well as its order revoking an on-sale liquor license held by petitioner and one Faye M. Wine. (See Cal.Const. art. XX, § 22; Alcoholic Beverage Control Act, Bus. & Prof. Code, div. 9, ch. 7.) Petitioner has appealed, and as ground for reversal contends that the department and the hearing officer misconstrued the legal effect of a conviction suffered by petitioner of violation of subdivision 3 of section 337a of the Penal Code ("receiving, holding, or forwarding" wagers on horse races), and that such alleged misconstruction establishes that the decision of the department (which was affirmed by its appeals board) was not based upon the discretion which the law declares shall be exercised in the revocation of liquor licenses, but instead was arbitrary and unlawful. We have concluded that no showing has been made that the decision revoking the license was affected by any misconception as to the law, or that an abuse of discretion occurred. Accordingly, the judgment should be affirmed.

Section 22 of Article XX of the California Constitution declares, so far as here material, that "The department shall have the power, in its discretion, to \* \* \* revoke any specific alcoholic beverage license if it shall determine for good cause that the \* \* \* continuance of such license would be contrary to public welfare or morals, or that a person \* \* \* holding a license has violated any law prohibiting conduct involving moral turpitude." (See also Bus. & Prof. Code, § 24200, subd. (a).)

It appears that a decision revoking liquor license, such as is here under attack, is "final, subject to review for excess of jurisdiction, errors of law, abuse of discretion and insufficiency of the evidence, and that where there is error the matter ordinarily should be remanded to the board for further proceedings." (*Covert v. State Board of Equalization* (1946), 29 Cal.2d 125, 132 [6, 7], 173 P.2d 545.)

The written accusation filed with the department stated as follows the "facts constituting ground for suspension or revocation of license": "On September 26, 1955, Bruce Macfarlane \* \* \* was in the Superior Court \* \* \* convicted of violation of section 337(a) subsection 3 thereof of the Penal Code of California as charged in an information on file therein accusing him with \* \* \* on April 13, 1955, on his above-designated premises, where he and the other respondent co-licensee [Wine] were then the holders of \* \* \* on-sale general license, \* \* \* taking, holding, and forwarding bets upon horse races, and sentence being suspended, respondent licensee was placed upon probation for the term of one (1) year and ordered to pay a fine in the sum of \$250.00."

Bruce's Cafe, located in Lennox, California, constitutes the premises referred to in the accusation. Following a hearing on the accusation, the hearing officer made the following proposed decision, which was thereafter adopted by the department and affirmed by the appeals board:

"Findings of Fact: \* \* \* That it is true that on 9/26/55 respondent \* \* \*

Macfarlane was in the Superior Court \* \* after jury trial, convicted of violation of Section 337(a) subsection 3 of the California Penal Code, *a felony* [italics added], as charged in an information filed with said court \* \* \*; that following conviction of said offense, the said court \* \* on 10/31/55, did sentence the said Bruce Macfarlane to the County Jail \* \* \* for a term of six months, sentence was then suspended, and said Bruce Macfarlane placed on probation for a period of one year and ordered to pay a fine in the amount of \$250.00.

"That said Bruce Macfarlane was arrested on the above-licensed premises on 4/13/55, that said arrest was on the above charge and the events immediately preceding said arrest constituted the cause for said conviction; that said events were as follows:

"(a) On 4/12/55 a Deputy of the Los Angeles County Sheriff's office did attempt on the above-licensed premises to place a bet on a horse race with said Bruce Macfarlane; that on said occasion said Bruce Macfarlane did refuse to take said bet stating in effect that it was too late that day for him to get said bet in, that Bruce Macfarlane did then refer said Deputy to a patron in said premises whom Bruce Macfarlane stated would and who did in said premises take the said bet.

"(b) That on 4/13/55 said Deputy did again return to said premises and thereon did place with said Bruce Macfarlane a \$2.00 bet on a horse running that day at Golden Gate Fields; that said Bruce Macfarlane did accept said bet and that said action did result in his arrest on said premises and the filing of the above information and the above conviction.

"That the taking of unlawful bets on horse races in premises licensed for the sale of alcoholic beverages and the taking of such bets by persons licensed to sell alcoholic beverages are both contrary to public welfare and morals.

"That continuance of the above license would be contrary to public welfare and morals.

"\* \* \* [Petitioner has been] Licensed since 1945 with no prior record of disciplinary action."

Under the heading "Determination of Issues Presented" the subject decision declares, so far as here material: "2. That respondent Bruce Macfarlane did violate and respondent Faye M. Wine did permit a violation of California Penal Code Section 337(a) (3) on the above licensed premises; that said violation and act of permitting said violation constitute a grounds [sic] for the suspension or revocation of the license under Article XX Section 22 of the Constitution. \* \* \* 3. That by reason of the conviction of \* \* \* Macfarlane for violation of Section 337(a) (3) of the California Penal Code continuance of the license would be contrary to public welfare and morals within the meaning of Article XX Section 22 of the Constitution \* \* \*." As above stated, the penalty imposed by the department was revocation of the liquor license.

Petitioner contends that the "finding" which recites that he was convicted of "violation of Section 337(a) subsection 3 \* \*, a felony, as charged in an information," is contrary to undisputed evidence which establishes that the conviction was of a misdemeanor rather than of a felony, and that as a result of the department's "misconception of the legal effect of the judgment of conviction" it "could not make a decision of what is just and proper" and "could not exercise a discretion in accordance with law, that was guided by fixed legal principles \* \* \* in regard to the existence of 'good cause' to suspend or revoke" the subject license.

[1] Section 337a of the Penal Code, for violation of which petitioner was convicted, specifies that the punishment shall be "imprisonment in the county jail or state prison \* \* \*." Section 17<sup>1</sup> of the same

code provides that "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." Thus, after entry of the judgment imposing punishment on petitioner by imprisonment in the county jail, the crime of which he was convicted is to be deemed a misdemeanor for all purposes and he is not thereafter to be subjected to the statutory disabilities or deprivations which accompany or ensue from a felony conviction. (See also Pen. Code, §§ 2600, 2604; *Pearson v. County of Los Angeles* (1957), 49 Cal.2d 523, 543-544 [18], 319 P.2d 624, *People v. Hamilton* (1948), 33 Cal.2d 45, 50 [1, 2], 198 P.2d 873.) It follows that at the time of the hearing and the decision on the liquor license accusation here involved, to designate or treat as a "felony" the crime of which petitioner had been convicted would be erroneous.

[2] From the record herein it does not, however, appear that petitioner was regarded or treated as standing convicted of a felony after the county jail sentence had been imposed. The "finding" that "it is true that \* \* \* [petitioner] was \* \* convicted of violation of Section 337(a) subsection 3 of the California Penal Code, a felony, as charged in an information" etc., by its express language has reference to the crime *as charged in the information* and to petitioner's conviction of that charge. Obviously the defendant was convicted of the crime "as charged" and it was not until the trial court, in the exercise of its discretion, had imposed a county jail sentence that the crime was to "be deemed a misdemeanor."

The record clearly indicates that the department's decision was based upon the acts committed by petitioner which constituted a violation of section 337a(3), and upon

the fact that he had been convicted of the violation, rather than upon any view or determination that the crime was a felony on the one hand, or a misdemeanor on the other. Thus, as already quoted hereinabove, the department "found" that "the taking of unlawful bets on horse races in [licensed] premises \* \* \* and \* \* \* by [licensed] persons \* \* \* are both contrary to public welfare and morals. That continuance of the above license would be contrary to public welfare and morals." And the "determination of issues" was that petitioner violated section 337a(3) on the licensed premises, that under the constitutional provisions such *violation* constitutes ground for suspension or revocation of license, and that by reason of the *conviction* of petitioner for such violation "continuance of the license would be contrary to public welfare and morals within the meaning of Article XX Section 22 of the Constitution." Moreover, the only reference made by either the hearing officer or the department to the conviction as being a "felony" appears in the recital in the "findings" to which petitioner objects, and the language used in that recital appears to have simply been copied from the minutes of the superior court which state the fact of the conviction of petitioner "of the crime of Violation of Section 337a, Subdivision 3, Penal Code of California, a felony, as charged in the information," and further set forth the sentence and the probation period.

[3] The proof of petitioner's conviction in the superior court was made by introducing into evidence the records of that court, including the quoted court minutes. Both the minutes of the superior court and the decision of the department set forth the sentence (imprisonment in county jail) which as a matter of law establishes the crime as a misdemeanor rather than a felony. Knowledge of the law is presumed. (*People v. Munroe* (1893), 100 Cal. 664, 670, 35 P. 326, 24 L.R.A. 33, 38 Am.St.Rep. 323; *Allen v. Allen* (1892), 95 Cal. 184, 199, 30 P. 213, 16 L.R.A. 646; see also *Central Pacific Ry. Co. v. Droge* (1915), 171



Cal. 32, 42, 151 P. 663; *People v. Kehoe* (1898), 123 Cal. 224, 228, 55 P. 911, 69 Am. St.Rep. 52; *In re Estate of Carroll* (1956), 138 Cal.App.2d 363, 365, 291 P.2d 976, 20 Am.Jur. 208, § 211; 18 Cal.Jur.2d 503.) Hence, it does not appear that the department was under a misapprehension as to the facts or the law, or that any such misapprehension entered into the determination that the continued holding of a liquor license by petitioner would be contrary to public welfare and morals or contributed to the decision that the license should be revoked rather than merely suspended. In this connection, petitioner properly concedes that "it, no doubt, is in the power of respondent Department to determine that the conduct of appellant in forwarding a \$2 bet \* \* \* was of such nature as to make his holding of an on-sale liquor license contrary to public welfare or morals \* \* \* [and] such conduct may be a basis for a conclusion that 'good cause' existed for the Department to exercise its discretion in regard to whether" the license should be suspended or revoked.

It may be further noted that during the hearing in the department the only person who used the word "felony" was petitioner's then counsel. Twice while cross-examining the deputy sheriff who arrested petitioner such counsel apparently followed the language of the above quoted court minutes in referring to violation of section 337a as a felony.<sup>2</sup> This, of course, was not an incorrect reference by counsel and neither does it show that the department was under any misapprehension as to the nature of the crime charged or as to its character after sentence was pronounced.

[4] Petitioner also urges that revocation, rather than mere suspension, of license is too harsh. On the record this might appear to some of us to be a just crit-

icism. But no such determination is within our proper function. The conduct for which the license was revoked constituted a crime under the laws of this State, and was thus at least technically contrary to public welfare or morals. The Constitution (art. XX, § 22) expressly authorizes license revocation in the discretion of the department under such circumstances, and this court is not free to substitute its own discretion as to the matter, even if it were inclined so to do.

In summary, we hold that no abuse of discretion is shown. The judgment denying the writ is therefore affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



51 Cal.2d 92

William E. VANCE, Petitioner,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY et al., Respondents.

L. A. 25125.

Supreme Court of California,  
In Bank.

Oct. 24, 1958.

Rehearing Denied Nov. 19, 1958.

Prosecution under indictment charging defendant with crime against children. On petition for writ of mandate to require respondents to permit petitioner to hear certain electronic transcriptions in possession of district attorney, the Supreme Court, McComb, J., held that petitioner was entitled to hear recordings of his

"Q. As a matter of fact, it is a felony in this state, too, not only by one who takes a wager, but also by one who makes a wager, isn't that also your understanding?"

2. The questioning was as follows:

"Q. [By petitioner's counsel] And the arrest that you were attempting to perfect or consummate was what we call a violation of Section 337(a) of the Penal Code, a felony in this state? A. sir.

conversation with police officers and of conversation between police officers and purported victim which were played to him during his questioning by police, to refresh his recollection so that his attorney could adequately prepare his defense.

Writ of mandate issued.

#### Criminal Law ¶627½

In prosecution under indictment charging defendant with crime against children, defendant was entitled to hear recordings of his conversation with police officers and of conversation between police officers and purported victim which were played to him during his questioning by police, to refresh his recollection so that his attorney could adequately prepare his defense. West's Ann.Pen.Code, § 288.

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John F. O'Laughlin, San Diego, for petitioner.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., James Don Keller, Dist. Atty., and James J. Biggins, Jr., Deputy Dist. Atty., San Diego, for respondents.

McCOMB, Justice.

Petitioner seeks a writ of mandate to require respondents to order the District Attorney of San Diego County to permit him to inspect and hear certain electronic transcriptions in the possession of the district attorney.

Petitioner was charged by an indictment with violation of section 288 of the Penal Code (crimes against children: lewd or lascivious acts) and was arraigned in the Superior Court of San Diego County on May 16, 1958. He entered a plea of not guilty, and the matter was set for trial on June 20, 1958.

Petitioner was arrested May 12, 1958, and questioned extensively by police officers. During the questioning portions of a tape-recorded conversation between the purported victim, Judith Ann Kropf, and law enforcement officers were played to

him; and petitioner alleges that he has reason to believe his conversation with the law enforcement officers was also recorded.

On May 28, 1958, after receiving a copy of the grand jury transcript, petitioner filed a motion, accompanied by affidavits, requesting the superior court to order the district attorney to produce transcriptions of the conversations which the law enforcement officers had with petitioner, as well as with Judith Ann Kropf.

The trial judge, after reading the affidavits presented by petitioner and the People, denied the motion, and the case is now set for trial.

Petitioner alleges that he does not remember what statements he made to the police officers and that his attorney has told him that in order to prepare his defense properly, it will be necessary for the attorney to know what was said in the conversation between petitioner and the police officers and in the conversation between the purported victim and the officers.

This is the sole question presented: *Can petitioner require the prosecution to permit him to hear recordings of (a) his conversation with the police officers, which conversation he claims he does not now remember, and (b) a conversation between the purported victim and the police officers?*

*Yes.* In a criminal case an accused is entitled to hear recordings of his conversations with police officers and recordings played to him at the time he was examined by them where he has forgotten what he said at the time he was examined and alleges that the recordings are necessary to refresh his recollection. (Powell v. Superior Court, 48 Cal.2d 704, 706 et seq., 312 P.2d 698; People v. Riser, 47 Cal.2d 566, 587, 305 P.2d 1.)

The foregoing rule is applicable to the present case. The record discloses that at the time petitioner was examined by police officers a recording of his conversation with the officers was made; that a recording of a conversation between the

purported victim and the police officers was played to petitioner during his examination by the officers; that he does not remember what he said at the time of such examination; and that the recordings of the conversations are necessary to refresh his recollection so that his attorney can adequately prepare his defense.

Let a peremptory writ of mandate issue directing the respondents to permit petitioner to hear recordings of (a) his conversation with the police officers and (b) the conversation between the police officers and the purported victim which were played to petitioner during his questioning by them.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



51 Cal.2d 33

Merril J. BROWN et al., Appellants,

v.

TERRA BELLA IRRIGATION DISTRICT,  
Respondent.

L. A. 24529.

Supreme Court of California,  
In Bank.

Oct. 24, 1958.

Rehearing Denied Nov. 19, 1958.

Action to quiet title to oil, gas and mineral rights in land. The Superior Court, Tulare County, W. G. Machetanz, J., rendered judgment for the defendant and the plaintiffs appealed. The Supreme Court, Shenk, J., held that where deed contained a reservation of all oil and gas and minerals underlying land for a period of 25 years from date of delivery of deed and as long thereafter as oil or other gas or petroleum products or minerals should be produced in paying quantities and deed further provided for transfer of grantor's

real property together with the reversion and reversions, remainder and remainders thereof, an interest in reversion was existent in grantor upon execution of deed and grantor's reversionary rights were effectively conveyed, and subsequent attempt by grantor to convey same interest to others by quitclaim deed was ineffective.

Judgment affirmed.

Opinion, 321 P.2d 835, vacated.

### 1. Deeds ⇨138

Generally, an exception concerns property which is excepted from the grant and does not pass to the grantee, whereas a reservation is a right newly created in favor of the grantor out of property which does pass to the grantee.

### 2. Perpetuities ⇨1

The rule against perpetuities voids an attempted conveyance as of the time of the execution of the deed.

### 3. Mines and Minerals ⇨55(7)

Where deed contained a reservation of all oil and gas and minerals underlying land for a period of 25 years from date of delivery of deed and as long thereafter as oil or gas or petroleum products or minerals should be produced in paying quantities, and deed further provided for transfer of grantor's real property together with the reversion and reversions, remainder and remainders thereof, an interest in reversion was existent in grantor upon execution of deed and grantor's reversionary rights were effectively conveyed, and subsequent attempt by grantor to convey same interest to others by quitclaim deed was ineffective. West's Ann.Civ.Code, § 1111.

Mack, Bianco, King & Eyherabide and Dominic Biancho, Bakersfield, for appellants.

Pillsbury, Madison & Sutro, Turner H. McBaine, James L. Wanvig, Severson, Davis & Larson and Randell Larson, San Francisco, as amici curiæ on behalf of appellants.



Maddox, Abercrombie, Kloster & Jacobus and Erling H. Kloster, Visalia, for respondent.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment in favor of the defendant, the Terra Bella Irrigation District, in cross actions for declaratory relief and to quiet title to oil, gas and mineral rights in 240 acres of land near the town of Terra Bella in Tulare County. The case was presented both to the trial court and on appeal on an agreed statement of facts.

The plaintiffs' and the defendant's claims are based on transfers from Edward F. Halbert, a common grantor who held title to the property involved. On December 16, 1925, he entered into a contract with the district in which he agreed to sell the land to the district for \$25,000 payable in installments. On the same date a deed to the district was placed in escrow and, after full payment under the contract, was recorded on January 16, 1932, and delivered to the district on the 3rd day of February 1932. The deed, in substantial compliance with the terms of the contract, contained a "reservation" of "all oil and gas and all minerals in or underlying said real property" together with the right in the grantor of free ingress to and egress from the property for the purpose of exploring for, drilling for, developing and producing oil, gas and minerals. The deed provides that the "reservation aforesaid as to oil, gas and minerals shall continue for the period of twenty-five years from the date of the actual delivery of this deed to the [Terra Bella Irrigation District], and as long thereafter as oil or gas or petroleum products or minerals shall be produced from said real property in paying quantities" subject to certain limitations with reference to interference with the district's development of water resources. The deed finally provides as follows: "Subject to the reservations and conditions aforesaid, [Edward F. Halbert] hereby grants, bargains, sells and conveys all of said real property aforesaid, to the [district], together with

the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

The plaintiffs derive their title through a quitclaim deed executed and delivered to them by the common grantor on October 25, 1955. This deed describes the property as all the oil or gas "in and under, or that may be produced from" the real property involved, and was "made subject to all of the terms, conditions, covenants and agreements" contained in the prior deed from Halbert to the defendant district which was recorded on January 16, 1932. The complaint herein was filed on January 6, 1956. No oil, gas or minerals were produced during the term of the lease and up to and including the commencement of this action.

The foregoing appears as stipulated facts, and the court so found and concluded that the plaintiffs have no right, title or interest in and to oil, gas or mineral rights, and that the district is the owner and entitled to the possession of all of the real property. Judgment was accordingly entered quieting the district's title as against the plaintiffs. Neither the findings of fact nor the conclusions of law disclose the theory upon which the judgment was based.

The plaintiffs contend that the issues presented on this appeal are whether the deed in question provides for a valid reservation of the oil, gas and mineral rights, and whether there was created a future contingent estate which violated the rule against perpetuities. They contend that the so-called "reservation" in the deed is, in legal effect, an exception rather than a reservation; that title to the oil, gas and minerals thus remained in the grantor; that as to the oil, gas and minerals it was intended that the grantees receive only a remainder over to vest at the expiration of twenty-five years and the cessation of production in paying quantities; that because the cessation of production was an uncertain, dubious event, the remainder

over was a future contingent estate falling within the rule against perpetuities in that its vesting was subject to a condition precedent which conceivably might not take place within lives in being plus twenty-one years; that the remainder over was therefore ineffective and void; that the interest in the remainder over reverted to the grantor, and that the grantor was thus left free to later convey his existing possessory interest and his reversionary interest in and to the oil, gas and minerals to the plaintiffs.

[1] The plaintiffs' theory suggests two issues, both of which must be determined in their favor, if, under their theory, they are to prevail. First, it is contended that we are here in reality dealing with an exception, as distinguished from a reservation. If so, then any residue ineffectively transferred would revert to the grantor rather than be vested in the grantee. As a general rule an exception concerns property which is excepted from the grant and does not pass to the grantee, whereas a reservation is a right newly created in favor of the grantor out of property which does pass to the grantee. "The word 'reserved' in a strict technical sense is not synonymous with 'exception.' The former term is applied to a clause in a deed which creates some right or privilege for the benefit of the grantor in the land described as granted, and withholds it from the operation of the grant, so that the title to the thing passes to the grantee, and the right of privilege concerning it is the only thing retained by the grantor. The latter term applies to something which constitutes a part of the thing described as granted and which would pass but for the excepting clause, the office of which is to exclude it from the thing described, and the title to the thing excepted remains in the grantor." *Van Slyke v. Arrowhead Reservoir & Power Co.*, 155 Cal. 675, 679, 102 P. 816, 818. The defendant district contends that the limitation in the present case is, in legal terminology and effect, a reservation.

The plaintiffs next contend that the rule against perpetuities operates to void the remainder over and that such interest, failing to be effectively transferred, reverts to the grantor. The defendant district contends that the rule against perpetuities requires only a vesting of interest, regardless of when possession is acquired; that both the grantee and the interest conveyed are ascertainable and not subject to any contingencies, and that the grantee's ownership was thus vested.

[2, 3] We find it unnecessary to resolve either of the foregoing contentions and for that reason express no views thereon. If the plaintiffs were to prevail in their contentions, we would be required for other reasons to affirm the judgment. It is obvious that if the plaintiffs' contentions are correct the grantor was, as the plaintiffs claim, possessed of a reversionary interest in the oil, gas and mineral rights to take effect in possession upon the expiration of his determinable estate after twenty-five years and the cessation of profitable production. The rule against perpetuities, where it is applicable, voids an attempted conveyance as of the time of the execution of the deed. *Sheean v. Michel*, 6 Cal.2d 324, 328, 57 P.2d 127. In the present case an interest in the reversion was existent in the grantor upon the execution of the deed. Such an interest is one which is alienable by the grantor. Civ.Code, § 1111. It was in fact transferred to the district by the same deed which, the plaintiffs claim, failed to provide a valid remainder over and thus brought the reversion into being. As hereinbefore shown the deed provides for the transfer of the grantor's real property, "together with the \* \* \* reversion and reversions, remainder and remainders \* \* \* thereof." It clearly appears from a consideration of the agreement and the deed that the grantor intended to convey all of his reversionary rights to the district and that an effective conveyance thereof was made. When, in 1955, the grantor attempted to convey these same interests to the plaintiffs, he was no

longer possessed thereof and the quitclaim deed was ineffective for that purpose.

If, on the other hand, the plaintiffs are in error as to the application of the rule against perpetuities then the conveyance to the district of the interest here in dispute was effective. In any event the interest in dispute was conveyed to the district by operation of one or the other clause of the deed of 1925.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



50 Cal.2d 844

**CALIFORNIA GASOLINE RETAILERS (a Nonprofit Corporation) and Phillip M. Hudson, Plaintiffs and Respondents,**

**v.**

**REGAL PETROLEUM CORPORATION OF FRESNO, Inc. (a Corporation), et al., Defendants and Appellants.**

**S. F. 19635.**

**Supreme Court of California.  
In Bank.**

**Oct. 14, 1958.**

Nonprofit corporation, which consisted of members distributing gasoline and related products of major oil companies, brought suit against independent gasoline service station operators to enjoin them from allegedly giving away their products in violation of the Unfair Trade Practice Act, from using allegedly fraudulent and misleading advertising, and from conducting alleged lottery in violation of the Penal Code. The Superior Court, Fresno County, George M. DeWolf, J., entered judgment in favor of the independent gasoline service station operators on causes of action charging unfair trade practices and fraudulent advertising, but in favor of the

corporation on the cause of action charging the independent gasoline service station operators with conducting a lottery, and they appealed. The Supreme Court, Carter, J., held that where independent gasoline service station operators, who engaged in give-away programs as an advertising scheme and to bring new patronage to their service stations, gave prize tickets away free to anyone who asked for them and to many, who did not ask for them, and tickets were given to persons away from the stations, and receipt of tickets was not dependent on purchase of merchandise or service, and prize winning tickets were honored regardless of a purchase of merchandise, there was no "lottery," since no "consideration" was paid by ticket holders.

Portions of judgment appealed from reversed.

Opinion, 322 P.2d 945, vacated.

#### **1. Constitutional Law ☞32**

Section of the Constitution providing that the Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in the state of lottery or gift enterprise tickets in any scheme in the nature of a lottery, though showing a legislative intention that lotteries are to be prohibited in the state, is not "self-enforcing" or "self-executing". West's Ann.Const. art. 4, § 26.

#### **2. Trade-Marks and Trade-Names and Unfair Competition ☞88**

Nonprofit corporation consisting of members selling gasoline and other related products was not a proper party plaintiff to bring action for injunctive relief against certain service station operators who were charged with giving away their products in violation of the Unfair Trade Practice Act, with using fraudulent and misleading advertising, and with conducting a lottery, where there was no allegation that corporation was authorized by members to bring the suit, and corporation was not, itself, engaged in selling gasoline and other related products and therefore was not "similarly



situated" with its members. West's Ann. Bus. & Prof.Code, §§ 17000-17101; West's Ann.Pen.Code, §§ 319-322; West's Ann. Code Civ.Proc. § 382; West's Ann.Const. art. 4, § 26.

### 3. Parties ⇨50

Where nonprofit corporation, which consisted of members distributing gasoline and other related products, and which brought suit against independent service station operators to enjoin them from giving away their products in alleged violation of the Unfair Trade Practice Act, from using alleged fraudulent and misleading advertising, and from conducting alleged lottery, was not a proper party plaintiff, amendment of complaint to include corporation's president, who was a member of the corporation and therefore similarly situated with the other members, had effect of curing original defective pleading. West's Ann.Bus. & Prof.Code, §§ 17000-17101; West's Ann.Pen.Code, §§ 319-322; West's Ann.Code Civ.Proc. §§ 382, 473; West's Ann.Const. art. 4, § 26.

### 4. Parties ⇨51(4)

Where nonprofit corporation, which consisted of members distributing gasoline and other related products, and which brought suit against independent service station operators to enjoin them from giving away their products in alleged violation of the Unfair Trade Practice Act, from using alleged fraudulent and misleading advertising, and from conducting alleged lottery, was not a proper party plaintiff, and amendment of complaint to include as a party plaintiff corporation's president, who was a member of the corporation and therefore similarly situated with other members, stated no new cause of action and no new facts, and it did not appear that independent service station operators were prejudiced by amendment, court did not abuse its discretion in permitting amendment and inclusion of president as a party plaintiff, so that pleadings would conform to the proof. West's Ann.Bus. & Prof.Code, §§ 17000-17101; West's Ann. Pen.Code, §§ 319-322; West's Ann.Code

Civ.Proc. §§ 382, 473; West's Ann.Const. art. 4, § 26.

### 5. Lotteries ⇨3

Three elements must be present to constitute a "lottery," namely, a prize, distribution by chance, and consideration. West's Ann.Pen.Code, §§ 319-322; West's Ann. Const. art. 4, § 26.

See publication Words and Phrases, for other judicial constructions and definitions of "Lottery".

### 6. Lotteries ⇨3

In order to constitute "consideration" necessary for a lottery, there must be a valuable consideration paid, or promised to be paid, by the ticket holder. West's Ann.Pen.Code, §§ 319-322; West's Ann. Const. art. 4, § 26; West's Ann.Civ.Code, § 1605.

See publication Words and Phrases, for other judicial constructions and definitions of "Consideration".

### 7. Lotteries ⇨3

Where independent gasoline service station operators, who engaged in give-away programs as an advertising scheme and to bring new patronage to their service stations, gave prize tickets away free to anyone who asked for them and to many who did not ask for them, and tickets were given to persons away from the stations, and receipt of tickets was not dependent on purchase of merchandise or service, and prize-winning tickets were honored regardless of a purchase of merchandise, there was no "lottery", since no "consideration" was paid by ticket holders. West's Ann. Pen.Code, §§ 319-322; West's Ann.Const. art. 4, § 26.

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A. E. Stebbings, C. Neil Ash, James D. Garibaldi, Los Angeles, Frank C. Lerrigo, Eckhart A. Thompson, Fresno, Martin J. Weil, Brewster L. Arms, Los Angeles, Robert R. Rosson and A. Hugo Pearson, Hanford, for appellants.

Eugene S. Clifford, Caspar W. Weinberger, Heller, Ehrman, White & McAuliffe, San Francisco, Philip C. Wilkins, Sacramento, Spencer E. Van Dyke, Smith,

Van Dyke & Hildreth, Los Angeles, David F. Crossen, Clayton, Mo., and Thomas B. Curtis, St. Louis, Mo., as amici curiae on behalf of appellants.

Rowell, Lamberson & Thomas, Milo E. Rowell, Richard Z. Lamberson and Breckinridge Thomas, Fresno, for respondents.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., as amici curiae on behalf of respondents.

CARTER, Justice.

The original plaintiff in this action for injunctive relief was California Gasoline Retailers, a nonprofit California corporation consisting of members distributing the products of the major oil companies, Standard Oil, Shell Oil, Union Oil and others. The defendants, too numerous to name individually, are members of three groups of independent service station operators. For convenience, they have been, and will be, referred to as the Regal Group, the Norwalk Group and the Beacon Group.

Plaintiff, some 60 of whose members were in the Fresno area where this case arose, brought suit against the defendants charging them with giving away their products in violation of the Unfair Trade Practices Act (Bus. & Prof.Code, §§ 17000-17101); with fraudulent and misleading advertising; and with conducting a lottery in violation of sections 320, 321 and 322 of the Penal Code. The trial court found in favor of defendants on the causes of action charging unfair trade practices and fraudulent advertising, but in favor of the plaintiff on the cause of action charging them with conducting a lottery. After the evidence had been concluded and both parties had rested, the plaintiff made a motion for leave to file an amendment to the complaint and to add one Philip M. Hudson as a party plaintiff. Hudson was president of plaintiff corporation and one of its members. Plaintiff's motion was denied with the court reserving the right to alter

its ruling if it could be done without prejudice to the defendants. On the day the decision was rendered, the court granted plaintiff's motion to amend.

All defendants appeal, contending that (1) the plaintiff corporation was not a proper party plaintiff; (2) the court abused its discretion in permitting the amendment and joinder of Hudson as a plaintiff; (3) their advertising and merchandising program did not constitute a lottery as defined by section 319 of the Penal Code; (4) equity will not enjoin the commission of a crime unless the activities constitute a public nuisance, or direct pecuniary loss has been sustained by the plaintiff.

[1] It is also contended that article IV, section 26, of the California Constitution evidences a strong public policy against lotteries in this state. That section, so far as is here pertinent, provides: "The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery." While the section just quoted shows a legislative intention that lotteries are to be prohibited in this state, it is obvious from the language thereof that it is not a "self-enforcing" or self-executing" provision such as is found in article I, section 14, of the Constitution (*Rose v. State of California*, 19 Cal.2d 713, 720, 721, 123 P.2d 505). The language shows that it was intended that the Legislature should have no power to authorize lotteries by legislation and that it was to enact legislation prohibiting lotteries. It is also apparent from a reading of the provisions that a lottery is not defined. Pursuant to the mandate of the just-quoted section, the Legislature has enacted legislation defining and prohibiting lotteries and these provisions are hereinafter discussed. *Plaintiff Corporation as Proper Party Plaintiff*;<sup>1</sup> *Joinder of Hudson as Party Plaintiff*:

1. This point was presented to the trial court by special demurrer and motion to dismiss.

Plaintiff corporation is composed of members who sell gasoline and other related products. Some 60 odd members reside in Fresno County and there are others elsewhere in the state. Plaintiff argues that it is a proper plaintiff by virtue of section 382 of the Code of Civil Procedure which provides that “\* \* \* when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the Court, one or more may sue or defend for the benefit of all.” Defendants contend that there was no authorization to the plaintiff corporation to bring the suit; that plaintiff corporation is not, itself, engaged in selling gasoline; that there are more defendants than plaintiffs and that it would not be impracticable to bring them before the court. It is true, as stated by defendants, that the complaint does not allege that plaintiff was authorized to bring the suit on behalf of its members. It is alleged that plaintiff’s members have suffered loss of customers and loss of sales of gasoline and other products and related commodities and “have been injured in their property and businesses \* \* \*”; that plaintiff will also suffer injury and loss by “reason of the inability of said members to pay dues and assessments and to participate as members of Plaintiff Corporation.”

[2] In *Haggerty v. County of Kings*, 117 Cal.App.2d 470, 477, 256 P.2d 393, 398, the court noted: “In the present case it is alleged in the complaint that plaintiff is the secretary of the California State Federation of Labor and has been *authorized* to bring this action in a representative capacity; that the Federation and its members are engaged in peaceful picketing; that the defendants have threatened to institute and are instituting prosecution of such pickets and members under the provisions of the two ordinances involved and that the members of the Federation constitute a class similarly situated with respect to the matters alleged. These allegations must be accepted as true where, as here, the demurrer to the complaint was sus-

tained without leave to amend.” (Emphasis added.) It would appear that the court in the *Haggerty* case considered an allegation as to authorization to bring the suit necessary as well as an allegation to the effect that the members represented constituted a class similarly situated. There are no such allegations in the complaint under consideration. It appears that the interest of plaintiff corporation and its members may fall within the rule of *Parker v. Bowron*, 40 Cal.2d 344, 352, 353, 254 P.2d 6, 10: “The statutory provision [Code Civ.Proc. § 382] is based upon the doctrine of virtual representation and is an exception to the general rule of compulsory joinder of all interested parties. *Weaver v. Pasadena Tournament of Roses Ass’n*, 32 Cal.2d 833, 837, 198 P.2d 514. It is a codification of ‘the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy.’ *Fallon v. Superior Court*, 33 Cal.App.2d 48, 50, 90 P.2d 858. ‘[R]egardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined “community of interest” in the questions of law and fact involved as affecting the parties to be represented.’ *Weaver v. Pasadena Tournament of Roses Ass’n*, supra [32 Cal.2d 833, 198 P.2d 517]; *Jellen v. O’Brien*, 89 Cal.App. 505, 509, 264 P. 1115.

“No facts have been alleged to bring *Parker* within this well established rule regarding class suits. He does not claim to be a member of the interested class, and there is nothing to indicate that he is ‘similarly situated’ with those whom he pretends to represent. There can be no ‘common or general interest’ in the subject matter of the controversy, *Weaver v. Pasadena Tournament of Roses*, supra, 32 Cal.2d at page 842, 198 P.2d at page 518, between *Parker*, who is not employed by the city, and city employees. *Parker* cannot give himself standing to sue by purporting to represent a class of which he is not a



member." In other words if the rule of *Parker v. Bowron*, supra, 40 Cal.2d 344, 352, 353, 254 P.2d 6, is strictly applied, there is no community of interest between plaintiff and its members and they are not "similarly situated" since plaintiff is complaining of the inability of its members to pay dues and assessments, and the members are alleged to have been injured by defendants through loss of business. It would thus appear that plaintiff corporation is not a proper party plaintiff.

[3, 4] The amendment to the complaint and the inclusion of Hudson as a party plaintiff have the effect of curing the original defective pleading. Hudson is a member of plaintiff corporation and therefore "similarly situated" with the other members. Section 473, Code of Civil Procedure, provides that "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party. \* \* \*" In *Feigin v. Kutchor*, 105 Cal.App.2d 744, 747, 748, 234 P.2d 264, it was held that a court may, in its discretion, permit amendment of pleadings after the evidence is all in, pending argument of counsel, and even after submission of the cause. The statutory provision relating to amendments to the pleadings in the furtherance of justice has received a very liberal construction in the courts of this state (*Klopstock v. Superior Court*, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318). The amendment to the complaint stated no new cause of action against the defendants, nor did it state any new facts. It does not appear that defendants were prejudiced thereby and the court did not abuse its discretion in permitting the amendment and inclusion of Hudson as plaintiff so that the pleadings would conform to the proof. *Foster v. Keating*, 120 Cal.App.2d 435, 446, 261 P.2d 529.

#### *Advertising and Merchandising Program as Lottery:*

Section 319 of the Penal Code Provides: "A lottery is any scheme for the disposal

or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

[5] It is agreed by all parties that three elements must be present to constitute a lottery: (1) a prize; (2) distributed by chance; and (3) consideration. All parties are also agreed that the first two elements are present under the facts here presented. It is the third element of consideration upon which the parties differ.

Inasmuch as all three groups of defendants operated in slightly different ways, the facts concerning their operations will be set forth separately.

#### *The Regal Group:*

The Regal Group operates three service stations in Fresno which conduct what is known as a give-away program as part of a merchandising and advertising scheme. Tickets were distributed to the Regal stations for redistribution to the public. They were given to persons before any purchase of gasoline or other service, or whether any sale was made; they were distributed with the stubs attached from house to house; they were distributed at drive-in theaters and at baseball games. Those who received the tickets away from the stations were required to go to one of the stations to deposit the ticket stub. Rules for the drawing were posted in each Regal station and provided that any person over the age of 18 years would receive, free of charge, an officially numbered ticket; that the winner did not have to be present at the time of the drawing; and that the winning numbers would be posted for a seven-day period at the Regal stations after the periodic drawings. The prizes to be won consisted of an automobile, cash and other personal property.

*The Norwalk Group:*

This, too, was a merchandising and advertising program and these defendants advertised in the newspaper, over the radio and by billboards that each month, commencing with May, 1955, the Norwalk stations would give away three Buick automobiles, and several household appliances. When this program was initiated, the distributors, to defray the expenses of the campaign, increased the price of gasoline to the retailers by one cent per gallon which increase was passed on to the consumers. Those Norwalk dealers who did not choose to participate in the program did not receive their gasoline at the increased rate. The Norwalk tickets were given away to anyone who asked for them regardless of whether any product or service offered for sale was purchased; tickets were also distributed from house to house, and some 5,000 of them were placed under windshield wipers of cars parked at the Fresno County Fair Grounds. One of the Norwalk dealers testified that he gave more tickets for larger purchases and that he passed along the one-cent increase in his cost of gasoline to the purchasers thereof. Another Norwalk dealer testified that he gave tickets to those driving into his station both before and after purchases. The ticket stubs were required to be deposited in a receptacle in a Norwalk station. There is evidence in the record that when Norwalk tickets were distributed away from the stations, the stubs were first removed so that the recipient did not have to go into the station to be eligible for one of the prizes. A drawing was held once a month and the winning list was posted for seven days at all Norwalk stations participating in the program. If no claimant appeared to call for his prize during the seven-day period, the prize was then awarded to the winning number next in line. Written rules were posted at each participating station and provided (Rule 1) that "Any person who is 18 years of age or over will be given free, on request, an official numbered ticket for any drawing. Giving of such ticket is unconditional and does not

depend on the purchase of or payment for any merchandise or service."

*The Beacon Group:*

This was a similar advertising and merchandising operation entered into by the Beacon and Caminol Company in conjunction with United Stations, Inc., an association of gasoline stations formed by the operators for the purpose of operating give-away programs. Caminol did not raise the price of gasoline to the dealers, but the dealers, raised the price to the consumer by one cent per gallon and then remitted the extra one cent per gallon to Caminol to pay for the expenses and advertising of the give-away program. Tickets were distributed away from the station, to those who made no purchases at the station, and to those who did. The tickets given to persons away from the stations had the stubs attached causing the recipients to go to the station to deposit them. The rules provided that any person 18 years of age, or over, would be given free, on request, an official numbered ticket for any drawing; that the giving of the ticket was unconditional and did not depend on the purchase of any merchandise or services; that the winner did not have to be present at the drawing and that all winning numbers would be posted at the participating stations for a seven-day period. Drawings were held twice a month and prizes were distributed to those holding the winning tickets.

In *People v. Cardas*, 137 Cal.App.Supp. 788, 790, 791, 28 P.2d 99, 100, it was held that "An analysis of the section [Pen.Code, § 319] and an examination of the authorities construing it and other similar statutory provisions disclose that there are three elements necessary to constitute a lottery. These elements are: (1) The disposition of property, (2) upon a contingency determined by chance, (3) *to a person who has paid a valuable consideration for the chance of winning the prize, that is to say, one who has hazarded something of value upon the chance.* *People v. Hecht*, 119 Cal.App. Supp. 778, 3 P.2d 399; 17 R.C.L. 1222; 38 C.J. 289." (Emphasis added.) In the Car-

das case the defendant was a motion picture theater operator. He advertised by means of programs, newspapers, placards and on the theater screen that on a certain date two fully paid round trip tickets to Santa Catalina Island would be given free to the holders of the lucky tickets which were to be drawn on a certain evening. The court stated the facts as follows: "The tickets were placed in the hands of the public by the distribution in the vicinity of the theater of five thousand theater programs, each containing one of the tickets, and by handing two thousand tickets to passing motorists. Also, an employee of the theater was stationed between the street and the entrance to the theater, who gave prize tickets to all who asked them, and offered them to any person who approached within proximity of her. No charge was made for any of these prize tickets, nor was it necessary that an admission ticket to the theater be purchased." The winner was announced both inside and outside the theater; stubs were deposited in a receptacle outside the theater. The court noted that stubs were deposited there by persons who purchased admission tickets, by those who were admitted to the theater free of charge, and by others who did not attend the show.

In the Cardas case, as in the one under consideration, "Counsel for the people argue that patronage from the ticket holders as a whole constituted consideration for the distribution of the prizes, even though the individual holders of tickets had not parted with consideration for the individual ticket held by them. This argument apparently proceeds upon the theory that the element of consideration is established by showing that the defendant received something of value in return for the distribution of the prizes. The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of the prize tickets. The question is: Did the holders of prize tickets pay a valuable consideration for the chance? Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance

of getting the prize. They did not hazard anything of value. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office, but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free."

In *People v. Carpenter*, 141 Cal.App.2d 884, 887, 888, 889, 890, 297 P.2d 498, 500 (hearing denied), a bank night drawing was also involved. As an advertising technique to encourage theater patronage, the operators of Lakewood theater solicited registrations from house to house and gave registration blanks to people attending the theater who were asked if they would like to register for the bank night. Registration blanks were kept at the snack bar and sometimes at the box office and were given to anyone who asked for them. A ticket containing each number was put into a drum kept by the theater as the name to which it was assigned was placed in the registration book. Once a name was registered that person was eligible to win at any bank night held thereafter. Bank nights were held once a week and a ticket was drawn from the drum and given to the manager who compared it with the registration book. The winning name was then announced over loudspeakers within and outside the theater and the person winning was given two minutes to reach the stage and identify himself. Admission tickets were not necessary for persons wishing to enter the theater to see and hear the bank night drawing, or to go into the theater to claim the prize.

In the *Carpenter* case the court held that the element of chance was lacking inasmuch as under the facts of that case *Carpenter*, who arranged to have himself chosen as the one to draw the ticket, had palmed a ticket which he purported to draw from the drum on the stage. This was done according to a prearranged plan with two others. The court stated the "initial question" to be "Was the bank night drawing a lottery?" And after holding that the element of chance was missing due



to the fraud of Carpenter, continued: "We come now to the third element in a lottery, viz.: consideration for the chance of winning the prize. The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of prize tickets. The question is: Did the holders of prize tickets pay a valuable consideration for the chance? Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize. They did not hazard anything of value. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free.

"The court in the Cardas case, *supra*, relied on *Cross v. People*, 18 Colo. 321, 32 P. 821, 822 [36 Am.St.Rep. 292]. In discussing the element of consideration in a lottery, the Colorado Supreme Court stated: 'By the admitted facts it is shown that the plaintiffs in error gave business cards, which entitled the holders to a chance on a piano, to be distributed as the holders of such chances might elect. These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiffs in error or not, to those who registered their names at their shoe store, and to those who, from a distance, sent the return postage. While it is admitted that Charles Linton purchased goods to the amount of one dollar at their store, and received one of these cards, it is admitted that such purchase, or any purchase of goods, was not a condition upon which the card was delivered. The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to

draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking and the transaction did not constitute a violation of the statute.'" In holding that the element of consideration was also lacking the court had this to say: "Certainly those who registered upon request of a solicitor without attending the theater did not pay for the chance of getting the prize; neither did those who later registered without purchasing an admission ticket. Those who purchased admission tickets and then registered while they were at the theater as patrons, cannot be said to have paid a consideration for the privilege of registering, as they could have done so without buying an admission ticket. Once a person's name was registered, it might be drawn at any bank night thereafter, and it was not necessary that he purchase an admission ticket either to listen to or see the bank night drawing or to claim the award if his name was called.

"It therefore follows, under the principles of the Cardas case, *supra*, that no consideration was paid for the chance of winning the bank night prize in the instant case."

In the case at bar all three groups of defendants engaged in the so-called give-away programs as an advertising scheme and to bring new patronage to their service station. In all groups, prize tickets were given away free to anyone who asked for them, and to many who did not ask for them; in all groups the tickets were given to persons away from the stations; in all groups the receipt of the ticket or tickets was not dependent upon a purchase of merchandise or service and in all groups the prize winning tickets were honored regardless of a purchase of merchandise. The Norwalk and Beacon Groups raised the price of gasoline one cent per gallon to the consumer in order to finance the advertising program. However, in both of these groups tickets were given away free

without respect to the purchase of any gasoline or other related products.

The People, as amicus curiae, make the following point: It is contended that there are two types of advertising schemes—"closed participation" and "flexible participation." A closed participation scheme is where those participating in the scheme have paid a consideration for a chance to win the prize; the flexible participation type is where some have paid a consideration and some have not. As in the case at bar, there were some customers of the gasoline stations who received prize tickets after purchase of the products offered for sale, and others who received the tickets at their homes, or at other places, and paid for no merchandise. In this latter connection, the argument is made that in all of the groups the major part of the tickets went to those who made purchases. It is pointed out that in *People v. Gonzales*, 62 Cal.App.2d 274, 278, 279, 285, 286, 144 P.2d 605, 607, the theater manager testified that one cash night prize ticket was given to each patron who purchased a ticket when he purchased the ticket and another was given to him as he left the theater. No tickets were distributed to persons who had not purchased admission tickets. The court noted that "There was no general or indiscriminate distribution of the drawing tickets to persons irrespective of whether they paid admission." The court, after discussing the *Cardas* case, *supra*, 137 Cal.App.Supp. 788, 28 P.2d 99, stated: "The decision in the *Cardas* case was a proper determination upon the facts therein that the drawing therein was not a lottery. That decision, however, is not determinative or at all persuasive that the drawing herein, involving facts vastly different from those therein, was not a lottery. The presence of certain facts in that case, as to free distribution, and as to announcements and participation outside the theater, was the basis for the decision therein that the drawing was not a lottery, but in this case those or similar facts are not present and an opposite state of facts

exists." From the court's statement that "There was no *general* or *indiscriminate* distribution of the drawing tickets to persons irrespective of whether they paid admission" (emphasis added) the People argue that because a lesser number of tickets in the case at bar were given to persons away from the station and to those who made no purchases that this was more like a closed participation scheme, and hence a lottery, than it was the flexible participation scheme which was found not to constitute a lottery in the *Cardas* case.

Since it clearly appears from the record that any person could have received a ticket, or tickets, free for the asking, or even without a request and without any necessity of making any kind of purchase it would seem that the relative numbers of tickets distributed with purchases or without purchases should not be determinative of the issue involved which is whether the holder, or holders, of the tickets paid, or promised to pay a valuable consideration for the chance of winning a prize. As the court stated in the *Carpenter* case, *supra*, 141 Cal.App.2d 884, 888, 297 P.2d 498, 500: "It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free." Also, in the *Carpenter* case, 141 Cal.App.2d at page 889, 297 P.2d at page 501, the court, quoting from *Cross v. People*, 18 Colo. 321, 32 P. 821, stated that " '\* \* \* The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking and the transaction did not constitute a violation of the statute.' "

Plaintiffs and amicus curiae both argue that *People v. Gonzales*, 62 Cal.App.2d 274, 144 P.2d 605, laid down the rule that a closed participation program and thus a lottery exists where the distribution of tickets to persons other than customers is

not "substantial" or is "negligible" in comparison with those distributed to customers. This rule, it is contended, has "emasculated" the holding of *People v. Cardas*, 137 Cal. App.Supp. 788, 28 P.2d 99. In view of the holding in *People v. Carpenter*, 141 Cal. App.2d 884, 889, 890, 297 P.2d 498, 501 that "Certainly those who registered upon request of a solicitor without attending the theater did not pay for the chance of getting the prize; neither did those who later registered without purchasing an admission ticket. Those who purchased admission tickets and then registered while they were at the theater as patrons, cannot be said to have paid a consideration for the privilege of registering, as they could have done so without buying an admission ticket," it would appear that this argument is without merit. If any person could receive a ticket or tickets without paying anything therefor, it would appear that the question of consideration should not rest on the percentage of those receiving tickets with purchases as opposed to those receiving tickets without such purchases.

Reliance is also placed on *Holmes v. Saunders*, 114 Cal.App.2d 389, 390, 391, 250 P.2d 269, 270 where tickets for a drawing where an automobile was the prize were distributed to all those who paid \$1 for a six months' subscription to the "Associated Bulletin." It was there said: "The consideration to make such a transaction a lottery need not be paid exclusively for the chance to win the prize. It is sufficient that the consideration, as here, be paid for something else and the chance to win the prize. *People v. Gonzales*, 62 Cal.App.2d 274, 144 P.2d 605; *People v. Miller*, 271 N.Y. 44, 2 N.E.2d 38; and see the many cases collected in the notes in 48 A.L.R. 1115; 57 A.L.R. 424; 103 A.L.R. 866; 109 A.L.R. 709; 113 A.L.R. 1121. It is said in 34 Am.Jur. 650 'that no sooner is the term "lottery" defined by a court, than ingenuity evolves some scheme within the mischief discussed, although not quite within the letter of the definition given; but an examination of the many cases on the subject

will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery laws \* \* \*. The court will inquire, not into the name, but into the game, however skilfully disguised, in order to ascertain if it is prohibited \* \* \*."

Several cases from other states are cited by the People in an endeavor to show that the promotional scheme here involved did constitute a lottery. One somewhat factually similar is *Featherstone v. Independent Service Station Ass'n*, Tex.Civ. App., 10 S.W.2d 124, 125, 126, 127, where a prize ticket was distributed for each \$1 spent by a customer of a service station. Apparently the plan was changed and some tickets were distributed to persons who did not make purchases of merchandise or service. The Texas court noted that a lottery was not defined by the laws of Texas and adopted the definition set forth in *State v. Lipkin*, 169 N.C. 265, 84 S.E. 340, 342, L.R.A.1915F, 1018: "A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token, which entitles him to receive a larger or smaller value or nothing, as some formula of chance may determine." The court said [10 S.W.2d 127]: "While dealers, under the new plan, distributed tickets to non-customers as well as to customers, it seems that the scheme was to distribute tickets, in the main to customers, as the evidence discloses that only a few, negligible in number, were given to persons other than customers. That the giving of tickets, and the drawings and distribution of prizes, were inducements to patronage and unquestionably lured customers, is shown from the very satisfactory business results that followed. *Patronage thus induced was the consideration that passed from the ticket holder for the chance received,*



in that the price paid, whatever it was, the amount being immaterial, constituted the aggregate price for the merchandise or service and the ticket that represented a chance to win the prize; in other words, for one undivided price both were purchased, the merchandise, or service, and ticket, the ticket being as much bought as though priced separately." (Emphasis added.) In other words, the court held that the *benefit flowing to the sponsor* of the scheme was the consideration which made the scheme a lottery. The Cardas case, *supra*, held that "The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of the prize tickets" and section 319 very clearly so states: That it is the distribution of property by chance "among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it."

The People also cite Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, 293, 294, 74 S.Ct. 593, 595, 98 L.Ed. 699, where radio give-away programs were involved. The statute there involved (18 U.S.C. § 1304) provided: "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined \* \* \*." Examples of the give-away programs were listed as "Stop the Music," "What's My Name" and "Sing It Again." The court, speaking through Mr. Chief Justice Warren, stated that the Federal Communications Commission "contends that consideration in the

form of money or a thing of value is not essential, and that a commercial benefit to the promoter satisfies the consideration requirement \* \* \*" and that the section involved did not define the type of consideration necessary. The court held: "We find no decisions precisely in point on the facts of the cases before us. The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement. Some courts—with vigorous protest from others—have held that the requirement is satisfied by a 'raffle' scheme giving free chances to persons who go to a store to register in order to participate in the drawing of a prize, and similarly by a 'bank night' scheme giving free chances to persons who gather in front of a motion picture theatre in order to participate in a drawing held for the primary benefit of the paid patrons of the theatre. But such cases differ substantially from the cases before us. To be eligible for a prize on the 'give-away' programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening." (Emphasis added.) The People rely on the italicized portion of the above-quoted statement as a holding that when a participant is required to go to the sponsor's place of business to deposit his prize ticket stub the necessary consideration is established. The Supreme Court also noted that "We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime." In view of our statute (Pen.Code, § 319) defining a lottery and which provides that the consideration necessary is a "valuable one" paid, or promised to be paid by the one receiving the ticket, the fact that a ticket holder must go to the place of business of the sponsor of the scheme to deposit the

ticket stub cannot be considered the necessary consideration.

[6] We are also urged by the People to consider section 1605 of the Civil Code in defining the consideration necessary under the lottery statutes. That section provides that "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." It would again appear that, in view of the plain provisions of section 319 of the Penal Code, in order to constitute consideration within the definition of a lottery there must be a valuable consideration paid, or promised to be paid *by the ticket holder*. *People v. Carpenter*, 141 Cal.App.2d 884, 297 P.2d 498. We held in *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, 156, 187 P.2d 769, 780, 175 A.L.R. 382, that "Penal statutes will not be given application beyond their plain intent. Such acts include only those offenses coming clearly within the import of the language." The "realistic approach" to the consideration necessary to constitute a promotion scheme a lottery which is urged upon us by the People in asking us to accept the definition of consideration as found in section 1605 of the Civil Code would seem to be an argument which should be directed to the Legislature rather than to this court.

[7] It is our conclusion that defendants' advertising and promotional scheme did not fall within the definition of a lottery as set forth in section 319 of the Penal Code because of the lack of consideration.

The portions of the judgment appealed from are reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARL F. W. BORGWARD G. M. B. H. (a Corporation), Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF LOS ANGELES, Respondent.

A. W. Woolverton et al., Real Parties  
in Interest.  
L. A. 25060.

Supreme Court of California,  
In Bank.  
Oct. 24, 1958.

Rehearing Denied Nov. 19, 1958.

Proceeding on petition for a writ of mandate to compel a Superior Court to enter an order quashing service of summons in a civil action brought by plaintiffs, against petitioner, a foreign corporation. The Supreme Court, Traynor, J., held that where foreign corporation actively undertook promotion and protection of its market in California by sending its agent to negotiate contracts in the state, and reaped the benefit of the local market, and had access to state courts to enforce any rights growing out of its transactions in the state, and plaintiffs' alleged cause of action against foreign corporation grew directly out of their relationship with foreign corporation's agent and its dealings with its local importer, the quality and nature of its activity in relation to the fair and orderly administration of the laws of state fully justified subjecting foreign corporation to jurisdiction of the state courts under statute providing for service on foreign corporations doing business in the state.

Alternative writ discharged and peremptory writ denied.

McComb, J., dissented.

Opinion, 325 P.2d 137, vacated.

#### 1. Corporations $\S$ 642(1)

"Doing business" within meaning of section of Code of Civil Procedure dealing with service of process on foreign corporations is synonymous with the power of the

state to subject foreign corporations to local process, and such term does not mean transacting intrastate business as defined in the Corporations Code, nor does such section of the Corporations Code effect a change in the jurisdiction provided over foreign corporations by the Code of Civil Procedure. West's Ann.Code Civ.Proc. §§ 411, subd. 2, 416.3; West's Ann.Corp.Code, §§ 6203, 6300, 6500-6504.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

## 2. Corporations 668(5)

Where an agent of a foreign corporation came to California, and performed important services for the foreign corporation in the state, namely, the establishment and maintenance of a satisfactory importing, distributing, and sales organization, regardless of how closely these activities might have been supervised from Germany, they nevertheless were activities of the foreign corporation through its agent in the state and were sufficient to constitute such agent the foreign corporation's general manager in the state for purposes of service of process if the foreign corporation were doing business in the state. West's Ann. Code Civ.Proc. § 411, subd. 2.

## 3. Corporations 642(4/2)

Where foreign corporation actively undertook promotion and protection of its market in California by sending its agent to negotiate contract in the state, and reaped the benefit of the local market, and had access to state courts to enforce any rights growing out of its transactions here, and plaintiffs' alleged cause of action against foreign corporation grew directly out of their relationship with foreign corporation's agent and its dealings with its local importer, the quality and nature of its activity in relation to the fair and orderly administration of the laws fully justified subjecting foreign corporation to jurisdiction of the state courts under statute providing for service on foreign corporations doing business in the state. West's Ann.Code Civ. Proc. § 411, subd. 2.

Overton, Lyman & Prince, Eugene Overton and Ernest E. Johnson, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

MacBeth & Ford and Moira Ford, Los Angeles, for real parties in interest.

TRAYNOR, Justice.

Petitioner, Carl F. W. Borgward G. M. B. H., a German corporation, seeks a writ of mandate to compel the Superior Court of Los Angeles County to enter its order quashing service of summons in an action brought by plaintiffs, the real parties in interest in this proceeding. See Code Civ. Proc. § 416.3. Earle C. Anthony, Inc., and Doe One to Doe Ten were joined as defendants in plaintiffs' action. Borgward was served by making personal service on Lutz Knemeyer in California as its alleged "general manager in this State." Corp.Code § 6500. It appeared specially and moved to quash the service of summons. Its motion was denied.

At the time they filed their action, plaintiffs were distributors and dealers selling Borgward automobiles and parts pursuant to a contract with Anthony, the exclusive importer of Borgward's products for the western United States. Anthony had announced its intention not to renew plaintiffs' contract at the end of its term on December 31, 1957. Plaintiffs alleged that Anthony had agreed that the contract would be renewed unless plaintiffs gave Anthony good cause for refusing to do so, but that the contract failed to express this agreement. They also alleged an oral contract with Borgward whereby plaintiffs agreed to enter into a franchise agreement with Anthony for distributing Borgward products and Borgward agreed that plaintiffs' franchise to market such products in the territory already developed in Southern California would not be terminated so long as plaintiffs performed their duties diligently and efficiently, and that Anthony's contract with Borgward was subject to this oral agreement.



Plaintiffs also alleged that Anthony and Doe One to Doe Ten entered a conspiracy to interfere with their oral contract with Borgward for the purpose of appropriating plaintiffs' business for themselves.

Plaintiffs prayed for reformation of their contract with Anthony and a declaration of their rights thereunder; for a declaration of the existence and terms of their oral agreement with Borgward; for injunctive relief against Anthony and Borgward to secure plaintiffs' rights under their contracts; and for compensatory and exemplary damages against Anthony and Doe One to Doe Ten.

[1] Borgward contends that it was not and is not doing business in this state within the meaning of Code of Civil Procedure, section 411, subdivision 2, and is therefore not subject to service of process pursuant to Corporations Code section 6500.

In *Henry R. Jahn & Son v. Superior Court*, 49 Cal.2d 855, 858-859, 323 P.2d 437, 439, we stated: "The statute authorizes service of process on foreign corporations that are 'doing business in this State.' That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, [161 A.L.R. 1057]. Whatever limitation it imposes is equivalent to that of the due process clause. "'[D]oing business" within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process.' *Eclipse Fuel Engineering Co. v. Superior Court*, 148 Cal.App.2d 736, 738, 307 P.2d 739, 741 \* \* \*."

It is contended at the outset that we should re-examine the rule of the *Jahn* case in the light of Corporations Code sections 6203 and 6300. Code of Civil Procedure section 411(2) provides for service of process on foreign corporations "doing

business in this State; in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code." Those sections and sections 6203 and 6300 are all in part 11 of the Corporations Code. Section 6300 provides that "this part does not apply to corporations engaged solely in interstate or foreign commerce," and section 6203 provides that "'Transact intrastate business' means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce." Accordingly, it is contended that no provision has been made for service on corporations engaged solely in interstate or foreign commerce and that "doing business in this State" within the meaning of section 411 must mean transacting intrastate business as defined in section 6203.

There is no merit in this contention. Section 6203 defines, not the words "doing business in this State," but the words "transact intrastate business." Since the Legislature was dealing specifically with the definition of terms, had it meant the two phrases to be equivalent, it would have said so. Moreover, by excluding acts done by a foreign corporation in this state in interstate or foreign commerce from its definition of the words "transact intrastate business," it clearly recognized that a corporation may do business in this state without transacting intrastate business.

Nor does section 6300 afford any basis for departing from the well established meaning of "doing business in this State," which was followed and applied in the *Jahn* case. It is true that if the service provisions of part 11 of the Corporations Code stood alone, section 6300 would prevent their application to corporations engaged solely in interstate or foreign commerce. Those provisions are applicable to such corporations, however, not *ex proprio vigore*, but because they are incorporated by reference in section 411(2) of the Code of Civil Procedure. To hold that section 6300 governs section 411(2) would require amending it to read "This part and section 411(2) of the Code of Civil

Procedure do not apply to corporations engaged solely in interstate or foreign commerce."

In addition to the service provisions, part 11 of the Corporations Code contains detailed regulatory and penal provisions governing foreign corporations engaged in the transaction of intrastate business, and the legislative history of section 6300 makes clear that it was these latter provisions, not section 411(2), that are governed by it. Section 6300 was based on former Civil Code section 407, which provided that "The requirements of this chapter [now part 11 of the Corporations Code] as to foreign corporations shall not apply to corporations engaged solely in interstate or foreign commerce." (Italics added.) Section 407 thus referred only to the acts required to qualify to conduct intrastate business and made clear that foreign corporations engaged solely in interstate or foreign commerce were not required so to qualify. It is no way indicated, however, that such corporations doing business in this state were not subject to service of process here. Given this court's recognition in 1942 that a foreign corporation engaged solely in interstate commerce may be amenable to suit here (*West Publishing Co. v. Superior Court*, 20 Cal.2d 720, 729-731, 128 P.2d 777), and the legislative declaration when the Corporations Code was enacted in 1947 that the "provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments" (Corp.Code § 2), the recasting of the wording of section 407 of the Civil Code in section 6300 of the Corporations Code cannot be interpreted as intended to effect a radical change in the jurisdiction provided over foreign corporations by section 411(2) of the Code of Civil Procedure.

Borgward contends, however, that even under the tests enunciated in the Jahn case and the cases there cited, it is not doing business in this state. Although it appears that several million dollars worth of its products are sold in this state annually,

Borgward contends that such business is solely that of its independent importer Anthony, who purchases and takes title to its products in Germany. (See, *Irvine Co. v. McColgan*, 26 Cal.2d 160, 165-166, 157 P.2d 847, 167 A.L.R. 934.) Plaintiffs do not seek to found jurisdiction on the fact alone, however, that Borgward's products are sold in this state through Anthony, but on that fact coupled with the acts done in this state by Borgward's agent Knemeyer in negotiating and arranging for the distribution of Borgward products by independent contractors, and they point out that their alleged cause of action is directly related to Knemeyer's activities here.

Knemeyer visited California for periods of several days on three occasions in 1956 and 1957. In February 1956, with the approval of Borgward, he executed a contract in the form of a letter from Thomson to Borgward in Los Angeles appointing Walter J. Thomson Co., Ltd., as exclusive importer. It described Knemeyer's activities as follows:

"1. The territory which you originally granted to us as sole importers had been broadened by Mr. Knemeyer to include all of the trading area territory lying west of the Mississippi River.

"2. Mr. Knemeyer has removed Bob Knapp as distributor for California and has approved the appointment of Bob Knapp as exclusive dealer for the City of Pasadena. \* \* \*

"3. Mr. Knemeyer has approved the appointment of Messrs. Ed. Van Horn and Gordon Reid (who are forming a new corporation) as distributors for Northern California, Oregon, Washington, Idaho and the northern part of Nevada. \* \* \*

"4. Mr. Knemeyer has approved appointment of Mr. Whitney Lyon as distributor for all of the remaining territory not specifically mentioned in paragraph 3 above. \* \* \*"

Approximately a year later, after a dispute had arisen between Thomson and some

of its distributors including plaintiffs, Knemeyer returned to California and with Borgward's approval, terminated Thomson as importer, and appointed Anthony. At that time Knemeyer met with plaintiffs and other distributors and according to plaintiffs made the oral agreement that is the subject of their action against Borgward.

After Anthony informed plaintiffs that their contract would not be renewed, plaintiffs wrote Borgward and received a cable in reply stating that the matter was being referred to Knemeyer, then enroute to the United States and Canada, who would get in touch with plaintiffs in California. Process was served on Knemeyer shortly after he arrived in California on this trip.

[2] Disregarding the numerous affidavits setting forth extrajudicial statements of Knemeyer to California distributors and dealers that he had full authority to act for Borgward with respect to the importation, distribution, and sales of its products in California (see *Hilyar v. Union Ice Co.*, 45 Cal.2d 30, 42, 286 P.2d 21; Code Civ.Proc. § 1870 (5)), we conclude from the foregoing evidence that Knemeyer performed important services for Borgward in California, namely, the establishment and maintenance of a satisfactory importing, distributing, and sales organization. Regardless of how closely these activities may have been supervised from Germany, they nevertheless were activities of Borgward through its agent here, and were sufficient to constitute Knemeyer Borgward's "general manager in this State" (Corp.Code § 6500) for purposes of service of process if Borgward was doing business here. *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709, 713, 192 P. 526; *Eclipse Fuel Engineering Co. v. Superior Court*, 148 Cal.App.2d 736, 745-746, 307 P.2d 739; *Milbank v. Standard Motor Const. Co.*, 132 Cal.App. 67, 71, 22 P.2d 271.

[3] It thus appears that Borgward is not merely a manufacturer who sells its

products in Germany knowing they will reach this state. It has actively undertaken to promote and protect its market in California by sending its agent to negotiate contracts here. It reaps the benefit of the local market and has access to our courts to enforce any rights growing out of its transactions here. Plaintiffs' alleged cause of action grew directly out of their relationship with Borgward's agent here and Borgward's dealings with its local importer Anthony. Plaintiffs are not seeking needlessly to inject Borgward into a controversy concerning only them and Anthony. If plaintiffs are able to prove the existence of their contract with Borgward and its breach, they may nevertheless fail to prove that it is binding on Anthony or to establish any cause of action against Anthony. Obviously, however, it is preferable, if possible, to settle the entire controversy in one action, here or in Germany. Even if it is assumed that plaintiffs could secure jurisdiction over Anthony in a German court, since all of the relevant events occurred in California the burden on plaintiffs and Anthony of prosecuting and defending in Germany would far outweigh the burden on Borgward of defending here.

No point would be served by reiterating here the review of the recent authorities sustaining jurisdiction over foreign corporations set forth in the *Jahn* case. For the reasons stated above, however, and in the light of those authorities, we conclude that "the quality and nature of [its] activity in relation to the fair and orderly administration of the laws" fully justifies subjecting Borgward to the jurisdiction of our courts. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L.Ed. 95.

The alternative writ is discharged and the peremptory writ denied.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.



McCOMB, Justice.

I dissent. I would grant the writ for the reasons expressed by Mr. Justice Vallée in the opinion prepared by him for the District Court of Appeal in *Borgward v. Superior Court*, Cal.App., 325 P.2d 137.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.



51 Cal.2d 59

**GENERAL DYNAMICS CORPORATION, a**  
Corporation, Plaintiff and Respondent,

v.

**COUNTY OF LOS ANGELES et al.,**  
Defendants and Appellants,

**United States of America, Intervener and**  
Respondent.

**AEROJET-GENERAL CORPORATION, a**  
Corporation, Plaintiff and Respondent,

v.

**COUNTY OF LOS ANGELES et al.,**  
Defendants and Appellants,

**United States of America, Intervener and**  
Respondent.

L. A. 24818, 24819.

Supreme Court of California,  
In Bank.

Oct. 24, 1958.

Rehearing Denied Nov. 19, 1958.

Contractors, which were performing various research and production contracts relating to national defense, brought actions against county and cities to recover back county and city ad valorem personal property taxes paid, and the United States intervened. The Superior Court, Los Angeles County, Vernon W. Hunt, J., pro tem., entered judgments in favor of the contractors and the United States, and the county and the cities appealed. The Supreme Court, Traynor, J., held that contractors were not the owners of property in possession of contractors under cost-plus-fixed-fee contracts or fixed-price contracts

for purposes of ad valorem personal property taxation.

Judgments affirmed.

#### 1. Taxation ☞5

A private contractor's right to use government property may be made the subject of a nondiscriminatory tax measured by the value of property used, even though economic burden of the tax falls on the United States, and, a fortiori, a state may stop short of imposing such a tax and impose a tax on a privately held possessory interest in tax exempt property measured by the value of that interest. West's Ann.Const. art. 13, § 1; West's Ann.Rev. & Tax.Code, §§ 104, 107.

#### 2. Taxation ☞88

The Legislature has not provided for taxation of limited interests in tangible personal property and has not defined personality as including a right to its possession as it has realty, and such omission reflects not merely a lack of detail, but a consistent pattern of taxing tangible personality as an entity or not at all. West's Ann.Const. art. 13, §§ 1, 14; West's Ann.Rev. & Tax.Code, §§ 104, 107, 201.

#### 3. Taxation ☞88, 350

Though taxable property may be assessed to a mere possessor, and such a possessor is required to file a statement of his possession, the property is assessed at its full cash value and is listed on assessment roll as personality and not as a possessory interest therein, and no provision is made for declaring or assessing a possessory interest in tax-exempt personality. West's Ann.Rev. & Tax.Code, §§ 401, 405, 442, 602.

#### 4. Taxation ☞83, 84

Under statute providing that when a person is assessed as agent, trustee, bailee, guardian, executor, or administrator, his representative designation shall be added to his name, and assessment shall be entered separately from his individual assessment, assessee is liable for taxes assessed against

him only in his representative capacity. West's Ann.Rev. & Tax.Code, § 612.

#### 5. Taxation ⇨79

Right to obtain economic benefit from use or possession of property may be a relevant consideration in determining who is actually its owner for tax purposes in doubtful cases, but the existence of such right is not controlling.

#### 6. Constitutional Law ⇨68(4)

##### Licenses ⇨7(2)

To be valid, a use or possession tax must apply to all tax-exempt property so as not to discriminate against private use or possession of property owned by the United States, and it is for the Legislature, not the court, to determine whether such a nondiscriminatory tax on possessory interests in tax-exempt personalty should be adopted and to determine the measure of such a tax.

#### 7. Taxation ⇨174

A title clause, which provides that the government has title, standing alone, is not conclusive of ownership of property for tax purposes, when it appears that taxpayer retains the essential indicia of ownership, or that government title is for security only.

#### 8. Taxation ⇨79

Where cost-plus-fixed-fee contracts between the United States and contractors, which were performing various research and production contracts relating to national defense, provided that title to personalty acquired by contractors passed to the United States in case of property purchased by contractors for performance of contracts, on delivery to contractors at their plants or at plants of supplier on f. o. b. purchases if Naval Inspectors at plants of contractors shall have given their approval, or, in case of property not so purchased, on allocation thereof to the contracts by commencement by contractors of processing or use thereof or otherwise, contractors were not the owners of the property for purposes of ad valorem personal property taxation. West's Ann.Const. art. 13, §§

1, 14; West's Ann.Rev. & Tax.Code, §§ 104, 107, 201, 401, 405, 442, 602.

#### 9. Taxation ⇨79

Where fixed-price contracts between the United States and contractor engaged in research and production relating to national defense provided that, on payment of any progress payment to contractor, legal and equitable title to all materials, assemblies, subassemblies, parts, inventories, work in process, nondurable tools, completed work and other property acquired, produced or allocated by contractor for performance of contracts shall vest absolutely in the United States forthwith upon acquisition, production, or allocation by contractor of such property for such performance, contractor was not the owner of any of the property for purposes of ad valorem personal property taxation, though contractor had right to dispose of or receive title to property no longer useful or necessary in performance of the contracts, and risk of loss was to be borne by contractor. West's Ann.Const. art. 13, §§ 1, 14; West's Ann.Rev. & Tax.Code, §§ 104, 107, 201, 401, 405, 442, 602.

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Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, and Alfred Charles DeFlon, Deputy County Counsel, Los Angeles, for appellants.

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Charles K. Rice, Asst. Atty. Gen., Joseph F. Goetten, A. F. Prescott and H. Eugene Heine, Jr., U. S. Attorneys, Dept. of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., and Edward R. McHale, Asst. U. S. Atty., Los Angeles, for intervener and respondent.

TRAYNOR, Justice.

Plaintiffs, General Dynamics Corporation and Aerojet-General Corporation, brought

these actions to recover county and city ad valorem personal property taxes for the fiscal year 1953-1954. They assert that they had no taxable interest in the property. The United States intervened and alleged that the property assessed belonged to it and that it was obligated by contract to reimburse plaintiffs for the taxes paid. The trial court entered judgments for plaintiffs and intervener, and defendants appeal.

On the first Monday in March, 1953, plaintiffs were performing various research and production contracts relating to national defense. Some were prime contracts with the armed services, and others were subcontracts. Some were fixed-price contracts, and others were cost-plus-a-fixed-fee contracts. Aerojet operated its own plant, and General Dynamics operated a plant owned by the United States Navy. The tax on General Dynamics' possessory interest in this real property is not in issue here.

Under the terms of the contracts, title to all of the personal property involved was in the United States on tax day. It comprised tools and equipment used in producing goods or carrying out research for the armed forces, materials being fabricated into products to be delivered to the armed forces, and property held on a stand-by basis for use in the event of increased defense research or production.

Defendants contend that plaintiffs had taxable possessory interests in this government-owned personal property. They now concede, however, that the method of evaluation adopted by the assessor was erroneous and therefore seek a reversal of the judgment with appropriate directions for correctly evaluating and taxing plaintiffs' interests.

[1] It is now settled that a private contractor's right to use government property may be made the subject of a nondiscriminatory tax measured by the value of the property used even though the economic burden of the tax falls on the United States. (*City of Detroit v. Murray Corporation of*

*America*, 355 U.S. 489, 78 S.Ct. 458, 2 L.Ed. 2d 441; *United States v. City of Detroit*, 335 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424; *United States v. Township of Muskegon*, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436.) A fortiori, a state may stop short of imposing such a tax and impose a tax on a privately held possessory interest in tax exempt property measured by the value of that interest. *Kaiser Co. v. Reid*, 30 Cal.2d 610, 184 P.2d 879. The first question in these cases is whether the state has done so.

Defendants contend that there is no logical distinction between possessory interests in real and personal property. They point out that possessory interests in real property are taxable (*De Luz Homes, Inc., v. County of San Diego*, 45 Cal.2d 546, 290 P.2d 544; *Kaiser Co. v. Reid*, 30 Cal.2d 610, 184 P.2d 879; *Rev. and Tax.Code*, § 104) and invoke section 1 of Article XIII of the California Constitution and Revenue and Taxation Code, section 201 as establishing the same rule with respect to personal property.

Section 1 of Article XIII provides that "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership \* \*." Section 201 provides that "All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code." With respect to personal property, however, these general provisions are controlled by other constitutional and statutory provisions dealing expressly with the taxation of personal property and interests therein.

Section 14 of Article XIII provides in part that "The Legislature shall have the power to provide for the assessment, levy



and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, not exempt from taxation under the provisions of this Constitution, in such manner, and at such rates, as may be provided by law, and in pursuance of the exercise of such power the Legislature, two-thirds of all of the members elected to each of the two houses voting in favor thereof, may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property."

[2] Under these provisions the Legislature may provide for the taxation of "all forms of tangible personal property" and "any legal or equitable interest therein." We have concluded, however, that the Legislature has not provided for the taxation of limited interests in tangible personal property. It has not defined personal property as including a right to its possession as it has real property (see, Rev. and Tax.Code, §§ 104, 107), and this omission reflects not merely a lack of detail, but a consistent pattern of taxing tangible personal property as an entity or not at all.

[3, 4] Although taxable property may be assessed to a mere possessor (Rev. and Tax. Code, § 405; S. & G. Gump Co. v. San Francisco, 18 Cal.2d 129, 131, 114 P.2d 346, 135 A.L.R. 595) and such a possessor is required to file a statement of his possession (Rev. and Tax.Code, § 442), the

property is assessed at "its full cash value" (Rev. and Tax.Code, § 401) and is listed on the assessment roll as personal property and not as a possessory interest therein.\* No provision is made for declaring or assessing a possessory interest in tax exempt personal property. Moreover, section 612 provides that when "a person is assessor as agent, trustee, *bailee*, guardian, executor, or administrator, his representative designation shall be added to his name, and the assessment entered separately from his individual assessment." (Italics added.) The assessee is liable for taxes assessed against him under this section only in his representative capacity. County of Los Angeles v. Morrison, 15 Cal.2d 368, 371-373, 101 P.2d 470, 129 A.L.R. 443. Accordingly, if the property held in such capacity is tax exempt, any assessment of it would necessarily be self-defeating for the tax could not be enforced against the property or its possessor personally, at least in cases such as these, where the *bailee's* interest in the property could not be transferred.

It is true that from an economic viewpoint a *bailee's* right to use tax exempt personal property may be as valuable as the right to use tax exempt real property. In construing ad valorem tax legislation, however, we cannot overlook the historical distinction between real and personal property that is reflected not only in the statutory provisions but in common understanding of what sort of interest in property is necessary to qualify as property itself within the meaning of tax statutes. The distinction was recognized in Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, and it was held in both Douglas Aircraft Co. v. Byram, 57 Cal.App.2d 311, 134 P.2d 15, and C. C. Moore & Co., Engineers v. Quinn, 149

\* Revenue and Taxation Code, section 602 provides that the "local roll shall show:

"(a) The name and address, if known, of the assessee.

"(b) Land, by legal description.

"(c) A description of possessory interest sufficient to identify them. [Section 107 confines such interests to interests in real property.]

"(d) Personal property. \* \* \*

"(e) The cash value of real estate, except improvements.

"(f) The cash value of improvements on the real estate.

\* \* \* \* \*

"(h) The cash value of possessory interests.

"(i) The cash value of personal property, other than intangibles. \* \* \*

Cal.App.2d 666, 308 P.2d 781, that possessory interests in tangible personal property were not taxable property. *Timm Aircraft Corp. v. Byram*, 34 Cal.2d 632, 213 P.2d 715, is not to the contrary for in that case the court concluded that the taxpayer was in fact the owner of the funds involved. The *Timm* case is consistent with the theory that it is the property rather than interests therein that is the subject of the tax, for the tax was sustained on the ground that the property was owned by the taxpayer, not the United States.

[5] The right to obtain an economic benefit from the use or possession of property may be a relevant consideration in determining who is actually its owner for tax purposes in doubtful cases (*Timm Aircraft Corp. v. Byram*, 34 Cal.2d 632, 638, 213 P.2d 715; *Kaiser Co. v. Reid*, 30 Cal.2d 610, 621, 184 P.2d 879), but the existence of such right is not controlling. No one would contend that a warehouseman was the owner of government property stored with him, or that a repair shop proprietor was the owner of government automobiles brought to him for repairs, even though their possessory interests in such government property were profitable to them. In accord with such common understanding, the assessor himself in the present cases did not assess to plaintiffs government property supplied to them by the government to enable them to perform their contracts.

Defendants now contend, however, that it is immaterial who has title so long as the essential economics of the transaction remain the same. What difference they ask, should it make that in one case the government may supply tools and material already owned by it, whereas in another it requires the contractor to acquire tools and material that immediately become government property, and in still another title remains in the contractor until the goods are delivered and the tools disposed of, if in all three cases the contractor receives essentially the same compensation for performing essentially the same services? Although there may be no difference of prac-

tical significance if the contract is carried out as planned, there may be a vital difference in the event of breach or termination. See, *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 471, 31 S.Ct. 49, 54 L.Ed. 1107; *In re Read-York*, 7 Cir., 152 F.2d 313, 316. In one case the government as owner has the right to do with the property as it pleases subject only to such limitations as the contract imposes; in the other it is the taxpayer who has such right subject only to such limitations. However irrelevant such considerations might be to the application of a tax on the use or possession of property, they are not irrelevant to the application of an *ad valorem* tax on the property itself.

[6] Although in any given case the impact of a use tax and a property tax might appear identical, they are not the same thing, and we cannot sustain a property tax here on the ground that the Legislature could constitutionally provide for the levy of a tax of equal amount under a different scheme. To be valid a use or possession tax would have to apply to all tax exempt property so as not to discriminate against the private use or possession of property owned by the United States, and it is for the Legislature, not the court, to determine whether such a nondiscriminatory tax on possessory interests in tax exempt personal property should be adopted and to determine the measure of such a tax.

[7] The question remains whether plaintiffs retained such an interest in any or all of the property so that they were in fact the owners for tax purposes despite the clauses in the various contracts vesting title in the United States. A title clause standing alone is not conclusive of ownership for tax purposes when it appears that the taxpayer retains the essential indicia of ownership (*American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 80 N.W.2d 363, 367, affirmed 356 U.S. 21, 78 S.Ct. 559, 2 L.Ed.2d 578; *C. C. Moore & Co. v. Quinn*, 149 Cal.App.2d 666, 670, 308 P.2d 781) or that the government title is for security only. *Timm Aircraft Corp. v. Byram*, 34 Cal.2d 632, 638, 213 P.2d 715,



and cases cited. Accordingly, it is necessary to examine the terms of the contracts to determine whether plaintiffs retained rights in the property inconsistent with its ownership by the United States for tax purposes.

[8] The title clause of a typical cost-plus-fixed-fee contract provides that title to personal property acquired by the contractor passed to the government "(1) in the case of such property which is purchased by the contractor for the performance of this contract, upon delivery to the contractor at the contractor's plant or at the plant of the supplier on f. o. b. purchases if the Naval Inspector at the contractor's plant shall have given his approval or (2) in the case of property not so purchased, upon the allocation thereof to the contract by the commencement by the contractor of processing or use thereof or otherwise. Such passage and vesting of title shall not impair any right which the Government might otherwise have under this contract, including but not limited to the right to reject any supplies hereunder, and shall not relieve the contractor of any of its obligations under this contract." After title passed, such property was treated in essentially the same manner as government property supplied to the contractor directly by the government for use in carrying out the contract. It was to be used "by the contractor for the performance of this contract or of other contracts with" the government, and with certain limitations the risk of loss was borne by the government. The contractor retained no beneficial interest other than the right of use in carrying out its contract. Scrap or other property no longer needed was sold under close government supervision and the proceeds applied to the reduction of payments owing to the contractor from the government. If the contract was completed or terminated in whole or in part, property not already delivered to the government was either disposed of as the government directed for the government's sole benefit or made available for further use in performing other contracts. The

government could and did remove its property at any time it saw fit, and even if such removal constituted a violation of the contractor's right to use the property, it does not appear that the contractor could prevent it or pursue other than purely contract remedies for the breach. Throughout plaintiffs' operations under the contracts the government exercised control fully consistent with its ownership of the property involved, and the trial court found on the basis of substantial evidence that its use was "under the close, direct and watchful immediate supervision and control of the representatives of the United States." Accordingly, in the case of property supplied by the government and property to which it took title under the cost-plus-fixed-fee contracts, plaintiffs neither secured nor retained the essential indicia of ownership and were therefore not the owners of such property for tax purposes.

The foregoing discussion with respect to government supplied property under cost-plus-fixed-fee contracts also applies to government property supplied under separate agreements for use by the plaintiffs generally in performing their contracts and to government property supplied for performing fixed-price contracts.

[9] Contractor-acquired property under fixed-price contracts, however, is treated in some respects differently, and requires separate discussion. Only plaintiff Aerojet had fixed-price contracts. A typical title clause provided:

"(1) Upon the payment of any progress payment to the Contractor under this contract, legal and equitable title to all materials, assemblies, subassemblies, parts, inventories, work in process, non-durable tools, completed work and other property acquired, produced or allocated by the Contractor for the performance of this contract shall vest absolutely in the Government forthwith upon acquisition, production or allocation by the Contractor of such property for such performance. Such passage and vesting of title shall not relieve the Contractor or the Government of



any of their respective rights or obligations under this contract, nor shall it affect the responsibility of the Contractor in the event of loss or destruction of or damage to property.

"(2) Property, title to which is or hereafter may become vested in the Government under the provisions of this Section may be (i) incorporated in supplies to be furnished hereunder, (ii) disposed of by the Contractor as obsolete, worn out, or damaged, (iii) altered from time to time, (iv) expended in the production of such supplies. To the extent any such property is not incorporated in supplies delivered hereunder, or disposed of as obsolete, worn out or damaged, or expended in the production of such supplies title to such property shall pass to and vest in the Contractor when such property is no longer necessary or useful for the performance of this contract, subject, in the case of termination, to the provisions of the Sections hereof entitled, 'Termination for Convenience of the Government' and 'Default'."

Under the termination and default clauses the government could retain title and assume possession or otherwise direct the disposition of the property.

Under normal operations the distinction between the treatment of contractor-acquired property under fixed-price contracts and fixed-fee contracts was that in the former case the contractor had the right to dispose of or receive title to property no longer useful or necessary in the performance of the contract whereas in the latter case the government retained such rights; in the former the risk of loss was borne by the contractor, and in the latter, by the government. These distinctions, however, are not inconsistent with the government's ownership of the property for tax purposes during the crucial period when title was vested in it. Placing the risk of loss on the contractor benefits the government, not the contractor, and is not by itself inconsistent with government ownership. (*United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452,

466-467, 31 S.Ct. 49, 54 L.Ed. 1107.) While the property was still useful or necessary for the performance of the contract it could only be used in performance of the contract unless the government otherwise directed, and in practice the government exercised the same supervision and control over the disposal of scrap material under fixed-price contracts as it did under fixed-fee contracts.

In some respects the problem is the converse of that presented in *Timm Aircraft Corp. v. Byram*, 34 Cal.2d 632, 213 P.2d 715. In that case title to advance payments made to the contractor by the government was held to be in the contractor for tax purposes despite the government's right to reclaim those funds not necessary for the contract's performance and the balance of the funds in the event of the contract's termination. Conversely, in the present case, the parties have provided for the passage of title to materials before the delivery of the finished products, and there is a provision revesting title to unnecessary materials in the contractor. Just as in the *Timm* case, where the contractor received substantial interests in the advance payments before they were fully earned, so in this case the government received substantial interests in the property on making a progress payment, interests it would not have received in the absence of the title clause. It did not have solely a lien or security interest that could be defeated by the discharge of the obligation secured or whose enforcement might entail a sale terminating its interest in the property. To serve its best interests, the government could terminate the contracts in whole or in part and take possession of its property, and it could do likewise in the event of the contractor's default, whether or not such default constituted a breach of contract. In any such event, it was not dependent on the performance of the contractor's obligations to it to protect its rights, for the property was already its.

In *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 80 N.W.2d 363,

366-367, invoked by defendants, the court interpreted a fixed-price contract similar to the ones involved here and stated that "the Company's right to acquire [for itself] or dispose of the property [title to which had passed to the government] is subject to no restriction, the only requirement being that a price for such acquisition be agreed upon with the Contracting Officer and the amount involved be paid or credited to the Government as the Officer may direct." It concluded that "the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation." The decision in the American Motors case, however, appears to have overlooked the fact that the contractor's right to acquire or dispose of the property other than scrap could only be exercised at the option of the government. Until such option was exercised in favor of the contractor, it, like Aerojet, had no right to acquire or dispose of government property. Moreover, as pointed out above, the mere fact that the risk of loss was borne by the contractor is not inconsistent with government ownership.

We conclude that plaintiffs were not the owners of any of the property here involved for the purposes of ad valorem personal property taxation under present California statutes.

The judgments are affirmed.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ. concur.

McCOMB, Justice (concurring).

I concur in the affirmance of the judgments for the reasons expressed by Mr. Justice TRAYNOR in the majority opinion and also for the reason that the property here involved upon which defendants

had attempted to levy and collect taxes was not the property of plaintiffs.

Article XIII of the state Constitution authorizes the taxation of "property." The term "property" in the broadest meaning is ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. (Black, Law Dictionary (4th ed. 1951), p. 1382.)

In Douglas Aircraft Co. v. Byram, 57 Cal.App.2d 311, 317, 134 P.2d 15, 18, Mr. Justice Bishop says, "A common characteristic of a property right is that it may be disposed of, transferred to another."

In Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 524, 279 P. 128, 129, the definition of property is given as "the exclusive right of possession, enjoying, and disposing of a thing; it is 'the right and interest which a man has in lands and chattels, to the exclusion of others;'" and the term is sufficiently comprehensive to include every species of estate, real or personal."

In view of the foregoing definitions, the property involved in the instant cases was not property of plaintiffs since it did not have the attributes as defined above.

Plaintiffs could not use any part of the property without the consent of the government. Neither did plaintiffs have the ownership, that is, the unrestricted right to possess it, to use it, or to exclude every one else from interfering with it. Plaintiffs did not have the power to dispose of it, to transfer it, to pledge or to hypothecate it. The property, so far as plaintiffs were concerned, had no exchangeable value and did not go to make up part of plaintiffs' estate. Therefore, since the property in question was not the property of plaintiffs, it was not properly taxable by defendants.

SCHAUER, J., concurs.

51 Cal.2d 127

**CITY AND COUNTY OF SAN FRANCISCO,**  
a municipal corporation, Plaintiff and  
Appellant,

v.

**HO SING and Ho Lum Shee, Defendants**  
and Respondents.

S. F. 19977.

Supreme Court of California,

In Bank.

Oct. 24, 1958.

Action by city and county against defendants to recover indemnity for the amount plaintiffs were compelled to pay pedestrian for injuries received when he fell over defective skylight in a sidewalk in front of the premises owned by the defendant. Judgment sustaining demurrers in the Superior Court, City and County of San Francisco, John B. Molinari, J., and the plaintiffs appealed. The Supreme Court, Carter, J., held that where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay damages to a member of the public injured thereby the city has a right to recover the amount so paid from the property owner by way of indemnity.

Reversed.

Schauer and McComb, JJ., dissented.

Opinion, 323 P.2d 1054, vacated.

### 1. Municipal Corporations ⇨808(1)

An abutting landowner may be held liable for dangerous condition of public sidewalk which has been altered or constructed for his benefit and which serves a use independent and apart from the ordinary use for which the sidewalks are designed.

### 2. Municipal Corporations ⇨814

Where persons are injured by condition of portions of a public sidewalk which have been altered for the benefit of the abutting landowner, city and the landowner are joint or concurrent tort-feasors, and

each is directly liable for his own wrong and each may be held liable for the entire damage suffered.

### 3. Indemnity ⇨13(1)

Where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay damages to a member of the public injured thereby, the city has a right to recover the amount so paid from the property owner by way of indemnity. West's Ann.Civ.Code, § 22.2; West's Ann. Const. art. 4, § 31; West's Ann.Code Civ. Proc. §§ 709, 875 and subd. (f); West's Ann.Gov.Code, §§ 53050, 53051.

Dion R. Holm, City Atty., and George E. Baglin, Deputy City Atty., San Francisco, for appellant.

Bronson, Bronson & McKinnon and Frank E. Farrella, San Francisco, for respondents.

### CARTER, Justice.

This is an appeal by the City and County of San Francisco, a municipal corporation, from a judgment after defendants', Ho Sing and Ho Lum Shee, demurrer to its complaint had been sustained without leave to amend.

Mr. and Mrs. Ho purchased a building in San Francisco. Their predecessors in title had installed a sidewalk skylight in front of the building. This skylight was over a basement which was maintained by defendants Ho. During the course of defendants' possession of the building, the sidewalk skylight developed a crack two inches wide and 18 inches long. On August 24, 1952, one Mrs. Wagner tripped because of said crack and fell, breaking her hip. Mr. and Mrs. Wagner sued both the City and County of San Francisco and Mr. and Mrs. Ho for damages resulting therefrom (Wagner v. City & County of San Francisco, No. 423562) and recovered a final judgment against plaintiff city and defendants Ho in a total amount of \$15,000 plus



interest and costs. Plaintiff city paid Mrs. Wagner the sum of \$5,000 plus \$102.03 costs. Defendants paid Mrs. Wagner the sum of \$10,000.

Plaintiff, in bringing this action, seeks to compel defendants to indemnify it in the sum of \$5,258.87 (\$5,000 plus costs and interest at 7%). As heretofore noted, the trial court sustained defendants' demurrer to plaintiff's complaint without leave to amend.

The only question involved is one of first impression in this state and may be stated as follows: Where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay compensation in damages to a member of the public injured thereby may the city recover the amount so paid from the property owner by way of indemnity?

This question was specifically left open in *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 430, 260 P.2d 55, 62, where we said: "We are not presented with the problem whether the city might have a right over against the Duques in the event it pays the judgment and the jury returns a verdict against the property owners on a new trial, and nothing we say here should be taken as indicating our views on that matter." Both sides argue, however, that from certain statements made in the *Peters* case, there is, or is not, a right over against the property owner in the case at bar.

In the *Peters* case the plaintiff brought suit against both the city and the Duques, as property owners, for damages sustained by her from a fall occasioned by a ramp or slope extending from a building maintained by the Duques and which extended across the sidewalk and caused a depression therein. The jury found for the plaintiff against the city but against the plaintiff with respect to the Duques' liability. On appeal, we affirmed the judgment against the city and reversed that portion which exonerated defendant Duque from liability.

[1,2] We held that: (1) "The rule is that an abutting landowner may be held liable for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed"; (2) "The duty to maintain portions of a sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by or at the request of his predecessors in title"; (3) "The city is under a duty to keep sidewalks in safe condition, it is directly liable to pedestrians for failing to correct a dangerous condition of which it had notice, and it is not relieved of its responsibility in this regard merely because the condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom"; and (4) "*With regard to persons who are injured by such a condition, the city and the landowner are joint or concurrent tort-feasors; each is directly liable for his own wrong and each may be held liable for the entire damage suffered.*" Emphasis added; *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 423, 427, 429, 260 P.2d 55, 61, and cases there cited.

From the emphasized portion (4) set forth above, defendants argue that since the abutting property owner and the city are joint, or concurrent, tortfeasors, the long established rule in this state against contribution between joint tortfeasors applies. The city, on the other hand, argues that this is not a question of *contribution* but of *indemnity*. We said in the *Peters* case that "Even if such a right to contribution or indemnity were recognized, however, it would not mean, as asserted by the city, that its liability to pedestrians is merely dependent or derivative from that of the landowner and not joint or direct. As noted above, the rule against contribution between joint tort-feasors admits of some exceptions, and a *right of indemnification*

may arise as a result of contract or equitable considerations and is not restricted to situations involving a wholly vicarious liability, such as where a master has paid a judgment for damages resulting from the voluntary act of his servant." 41 Cal.2d 419, 430, 431, 260 P.2d 55, 61. The city contends that when an abutting landowner makes an unusual use of the public streets for his own private benefit it is with the permission, either express or implied, of the municipality; that such permission carries with it an implied condition that the landowner will exercise due care for the safety of the public and that it will hold the city harmless for any damages occasioned by the lack of due care. In other words, indemnity, as distinguished from contribution, exists because of some special relationship existing between the two tortfeasors and the entire loss is shifted to the one bound to indemnify. Prosser on Torts, 2d Ed., § 46, p. 249. In *Runyon v. City of Los Angeles*, 40 Cal.App. 383, 389, 180 P. 837, 840, it was held: "The abutting owner, whose title extends to the center of the street, may excavate a vault or cellar under the sidewalk. Such owner, with permission of the city authorities, express or implied—implied or inferred where, after a reasonable time, no objection has been made by the proper officials—may insert in the sidewalk, for the purpose of admitting light and air to the vault or cellar, an iron grating, or other similar device, if safely and properly constructed, and such contrivance in the sidewalk is not a nuisance *per se*. *Rider v. Clark* [132 Cal. 382, 64 P. 564] *supra*; *Morrison v. McAvoy*, 7 Cal.Unrep. 37, 70 P. 626; *Hirsch v. James S. Remick Co.*, 38 Cal.App. 764, 177 P. 876; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am.Rep. 422."

*The City's Argument:*

It is the position of the city that in the absence of conflict with the constitutional or statutory law of this state, the common law prevails (Civ.Code, § 22.2; *Cole v. Rush*, 45 Cal.2d 345, 355, 289 P.2d 450, 54 A.L.R.2d 1137) and that the common law is consistent throughout the United States

that indemnity is allowed in such a situation as we have here.

The city cites many cases from out-of-state courts in which indemnity has been allowed. The theories relied on by such courts have differed as has been heretofore noted by us in the *Peters* case. We said there: "The opinions in those cases, however, recognize that the city has an independent duty to correct dangerous conditions of which it has notice, regardless of who created them, and the term 'secondary' is not used therein to indicate that the city is merely liable vicariously for the negligence of the landowner. Instead, it appears that the term is used as a means of indicating that, in the jurisdiction where the case arose, a city has a right to be indemnified by a landowner in the event it is compelled to pay damages resulting from a dangerous condition he created or maintained and for which he would be liable to pedestrians. In this regard it may be noted that a number of jurisdictions which adhere to the view that the city and the landowner are joint or concurrent tortfeasors make an exception to the general rule against contribution between joint wrongdoers and hold that a municipality has a right to be indemnified by the property owner in such a situation. *City of Chicago v. Robbins*, 2 Black. 418, 422-423, 425, 67 U.S. 418, 422-423, 425, 17 L.Ed. 298, 302-303; *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316, 16 S.Ct. 564, 568, 40 L.Ed. 712; *Salt Lake City v. Schubach*, 108 Utah 266, 159 P.2d 149, 157-158, 160 A.L.R. 809, 821-822; *City of Tuscaloosa v. Fair*, 232 Ala. 129, 167 So. 276, 279; *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill.App. 148, 98 N.E.2d 783, 785; 19 McQuillin, *Municipal Corporations* [1950], § 54.19, pp. 91-94; Prosser on Torts [1941], p. 1116; 1 Freeman on Judgments [5th ed.], § 477, p. 980." 41 Cal.2d 419, 430, 260 P.2d 55, 62.

In *Washington Gas. Co. v. District of Columbia*, 161 U.S. 316, 325, 327, 328, 16 S.Ct. 564, 40 L.Ed. 712, the district had given the gas company permission, for

which it was paid a dollar, to open the sidewalk to install a gas box which contained a cock in the service pipe. The box had an iron cover which when locked in place was flush with the surface of the sidewalk. After the installation of the box, the district caused the sidewalk to be widened so that the box was approximately in the center thereof. The gas box was left open by the company and a pedestrian fell as a result thereof and was injured. She brought suit against the district and recovered a judgment for such damages. The district thereafter brought an action for indemnity against the gas company to recover the damages it had been forced to pay. The Supreme Court of the United States, in affirming a judgment for the plaintiff district against the gas company, held:

"It would be unreasonable to infer that congress, when it authorized the use of the streets or sidewalks for the purposes of the gas company's business, contemplated that the city of Washington, or its successor, the District of Columbia, should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the gas company. We conclude, therefore, that the duty was imposed upon the gas company to supervise and keep the gas box in repair. This duty not only does not conflict with the charter of the company, but on the contrary is sanctioned by its tenor, and is imposed as an inevitable accessory of the powers which the charter confers \* \* \*.

"2. *Had the District a cause of action against the gas company, resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the gas company to supervise and repair?*

"An affirmative answer to this proposition is rendered necessary by both principle and authority. This court Cal.Rep. 329-330 P.2d-65

said in *City of Chicago v. Robbins*, 2 Black, 418, 422 [17 L.Ed. 298]: 'It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer.' And the same doctrine is reiterated, in almost the identical language in *Robbins v. Chicago*, 4 Wall. 657, 670, [18 L.Ed. 427].

"The principle thus announced qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers. In the leading case of *Inhabitants of Lowell v. Boston & Lowell Railroad*, 23 Pick., Mass., 24, 32, the doctrine was thus stated: 'Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, "*In pari delicto, potior est conditio defendentis.*" If the parties, are not equally criminal, the principal delinquent may be held responsible to his codefinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers.'" 161 U.S. at pages 325, 327, 328, 16 S.Ct. at page 567.

In the "Statement of the Case" (161 U.S. at pages 318, 319, 16 S.Ct. at page 565) it



was noted that it was the district's duty to inspect, at the first of each month, the various gas boxes in the sidewalks.

Cases from other jurisdictions also draw a distinction between "active" and "passive" negligence in holding that the municipality is entitled to indemnity from the landowner using the public ways for his own personal benefit and thereby causing injury to a member of the public entitled to use the sidewalk or street in the customary way. *City of Spokane v. Crane Co.*, 98 Wash. 49, 167 P. 63, 64; *Salt Lake City v. Schubach*, 108 Utah 266, 159 P.2d 149, 155, 160 A.L.R. 809.

The following quotations demonstrate the city's position that in a situation such as we have in the case at bar, courts of other jurisdictions generally agree that the municipality has, or should have, a right of action over against the landowner whose negligent use of the public ways has caused it to become liable in damages to a member of the general public. In 19 McQuillin, *Municipal Corporations*, Third Edition, section 54.19, pages 91-94, it is said: "Indeed, 'the right of a municipality to recover over against the party primarily liable for the negligence has been established so long that it is not now questioned,' the leading authority in support of this rule being a decision of the United States Supreme Court, which has been approved or followed in numerous cases." In 4 Dillon, *Municipal Corporations*, Fifth Edition, section 1728, page 3032, it is said: "If a *municipal corporation be held liable* for damages sustained in consequence of the unsafe condition of the sidewalks or streets, *it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe*, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance \* \* \*." And in Prosser on Torts, Second Edition, page 250, it is noted that "Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where a municipal corporation, held liable for

failure to keep its streets in safe condition, seeks recovery from the person who created the condition or a property owner who permitted it."

In *Monsch v. Pellissier*, 187 Cal. 790, 792, 793, 794, 204 P. 224, 225, where plaintiff was injured because of the defective condition of a light-well in the sidewalk in front of defendant's property, the court said:

"Inasmuch, therefore, as the light-wells, as such, were, as we have seen, constructed for the benefit of defendant and her property and for a use independent, of and apart from, the ordinary and accustomed use of the sidewalk, the law casts upon her the duty, to be discharged with reasonable care, of keeping it in proper and safe condition. \* \* \*

"\* \* \* In other words, under the facts of this case, *the duty was, in the first instance*, independent of notice to or by the city, cast upon the defendant to repair the gratings." (Emphasis added.) See, also, *Sexton v. Brooks*, 39 Cal.2d 153, 157, 245 P.2d 496; *Granucci v. Claasen*, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435.

The city also contends that the municipality's right of action over against the landowner in such a situation should be allowed in the interests of equity and justice; that it is inequitable to hold the taxpayers liable for the negligent maintenance of a structure in the public sidewalk which injures only to the landowner's private benefit.

The city also argues that to hold the city liable in damages for such landowner's negligence constitutes a gift of public funds in violation of article IV, section 31, of the Constitution of California which provides, in part, that "The Legislature shall have no power to give or to lend \* \* \* the credit of \* \* \* any \* \* \* city and county \* \* \* in aid of or to any person \* \* \* or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual \* \* \*."

As a final argument the city contends that in the enactment of section 875 of the Code of Civil Procedure which became effective on January 1, 1958, the Legislature expressly recognized that there is a distinction in California between the right to indemnity and the right to contribution. Section 875, which provides for contribution between joint tortfeasors, sets forth in subdivision (f) that "This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

#### *The Defendants' Argument:*

Defendants contend that the Peters case laid down the rule that the city and the landowner are each liable for their separate wrongful acts; that they are joint and concurrent tortfeasors; that there is no right to contribution among joint tortfeasors in California.<sup>1</sup>

Defendants rely on *Smith v. Fall River J. U. High School Dist.*, 1 Cal.2d 331, 334, 335, 34 P.2d 994, 996. In the *Smith* case, plaintiff was injured as the result of a collision between a school bus owned and operated by one Fitzwater in which she was a passenger and an automobile driven by one Pratt. Fitzwater had an agreement with the school district whereby it paid him so much per month to transport pupils, living within the district, by bus to school. Plaintiff sued the school district, Fitzwater, the driver of the bus, and Pratt, on account of their concurring negligence as the cause of her injuries. She recovered judgment against all three defendants. All three defendants appealed, but only the district and Fitzwater gave a bond on appeal to stay execution. The Independence Indemnity Company was the surety on the bond. The judgment was affirmed and the Independence Indemnity Company paid plaintiff the full amount of the judgment. The satisfaction of judgment executed by the plaintiff

was not filed until Pratt moved the court to compel its entry. The motion was granted by the trial court and the indemnity company appealed. At the time of the hearing of the motion, it appeared that prior to the accident Independence Indemnity Company had contracted in writing with the school district to insure it and Fitzwater against any such loss occasioned by the use of the school bus. The indemnity company contended that it was entitled to be subrogated to the rights of the plaintiff against all three defendants because of the stay bond given by it. The court held that if the "appellant's sole liability to the parties herein was that incurred under said stay bond, its position is undoubtedly correct." It was held that "As appellant cannot recover from either the district or Fitzwater by reason of its indemnity bond, can it recover against the respondent [Pratt] whose negligence concurred with that of Fitzwater in causing plaintiff's injuries? *It is well settled in this state that there is no right of contribution between joint tortfeasors whose concurrent negligence has made them jointly liable in damages.* *Adams v. White Bus Line*, 184 Cal. 710, 195 P. 389. Therefore, had either of the two defendants, the school district or Fitzwater, paid said judgment, no claim for contribution against the respondent could have been made by the defendant making said payment. Neither could the appellant, after paying the judgment as the indemnitor of the two defendants, the school district and Fitzwater, compel contribution or recover anything from the respondent, a joint tort-feasor with the other two defendants. This was the point involved and definitely settled in the case of *Adams v. White Bus Lines*, supra." (Emphasis added.) The court went on to hold that had the indemnity company had only the stay or appeal bond and had there been no indemnity insurance the holding in *La Fleur v. M. A. Burns Lumber Co.*, 188 Cal. 321, 205 P. 102, would have applied. In the *La Fleur*

1. As heretofore noted, this rule was changed by the Legislature in 1957 by the addition of section 875 of the Code of Civil

Procedure, effective January 1, 1958. The present action arose in 1952.

case the surety upon the appeal or stay bond paid the judgment and was held entitled under section 709 of the Code of Civil Procedure to be subrogated to all the rights of the plaintiff in the action in which its principal had been defendant.

Defendants rely on *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 138, 139, 121 P. 379, in support of their position that the California courts do not draw a distinction between "passive" and "active" negligence. In the *Dow* case plaintiff was the employee of the Sunset Telephone and Telegraph Company. The facts showed that the telephone company had originally strung its wire too close to wires of the Oakland Gas, Light and Heat Company. The wires of the Oakland light company were improperly insulated and the contact between the installations of the two companies produced a dangerous supercharge of electricity. An employee of the Oakland company reported the danger to his superior but it took no steps either to correct the trouble or to warn the telephone company. Plaintiff was assured by his superior in the telephone company that the wire was not supercharged with electricity and while making an investigation of some trouble with the telephone wire was seriously injured as a result of an electric shock received from one of the telephone wires. He brought an action against both companies and recovered a judgment which was affirmed on appeal (*Dow v. Sunset Tel. and Tel. Co.*, 157 Cal. 182, 106 P. 587). Plaintiff collected the entire judgment from the Oakland Gas, Light and Heat Company and thereafter it sought contribution from the telephone company. The court held [162 Cal. 136, 121 P. 380]: "Both companies were liable, but appellant insists that it was only passively guilty of a tort, and that, therefore, it comes within an exception to the general rule above stated. With this view we cannot agree. It was the separate duty of each to take thorough precautions. Any accident due to neglect of such duty made the corporations jointly liable." The court in the *Dow* case cites *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 573, 87 P. 24, and *Fowden v. Pacific Coast Steamship Co.*,

149 Cal. 151, 157, 68 P. 178, in support of its statement that there is no contribution between joint tortfeasors. In all three of these cases contribution was sought by one joint tortfeasor against the other. It is conceded that the rule in California has always been that there can be no enforced contribution between joint tortfeasors. In the case at bar, however, the city seeks indemnity from defendants because of the special licensor- licensee relationship existing between them with respect to the use of the public ways.

Defendants contend that the Public Liability Act of 1923 (Govt.Code, §§ 53050, 53051) "evidenced a strong public policy in favor of placing financial responsibility on a City for failure to keep its public ways in safe condition"; that if the city is entitled to indemnity from the property owner it will exonerate the city from all responsibility for its own neglect. We held in the *Peters* case, 41 Cal.2d 419, 429, 260 P.2d 55, that the city was directly liable to pedestrians for failing to correct a dangerous condition of which it had notice and "it is not relieved of its responsibility in this regard merely because the condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom." We also held that "Even if such a right to contribution or indemnity were recognized, however, it would not mean, as asserted by the city, that its liability to pedestrians is merely dependent or derivative from that of the landowner and not joint or direct." 41 Cal.2d 430, 431, 260 P.2d 61.

[3] We conclude that where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay compensation in damages to a member of the public injured thereby the city has a right to recover the amount so paid from the property owner by way of indemnity. In so holding, we do not depart from our holding in the *Peters* case quoted just above. We affirm our statement there that in holding that the city has a right over against the property owner we do not mean that the city's liability to



the injured member of the public is merely dependent or derivative and not joint or direct.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

It is my view that inasmuch as the city was held liable to the injured pedestrian, Mrs. Wagner, because of its own failure to perform obligations owed directly to her, no recovery over should be permitted in the city's favor as against the abutting property owner. This conclusion is emphasized by the further fact that Mrs. Wagner would not have sustained her injury if the city had not neglected to perform the duty it owed to her. As hereinafter shown the majority ruling creates a new right and enforces it retroactively.

By adoption of the Public Liability Act in 1923 (now Gov.Code, § 53051) the Legislature imposed upon municipalities liability to persons injured from the dangerous or defective condition of streets and sidewalks "if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition \* \* ." (Gov.Code, § 53051; see also, Fackrell v. City of San Diego (1945), 26 Cal.2d 196, 203, 208[9], 157 P.2d 625, 158 A.L.R. 773; Ackers v. City of Los Angeles (1940), 40 Cal.App.2d 50, 53, 104 P.2d 399; Jones v. City of South San Francisco (1950), 96 Cal. App.2d 427, 430-433, 216 P.2d 25.) The Streets and Highways Code provides in section 5610 that "The owners of lots \* \* \* fronting on any portion of a public street \* \* \* when that street \* \* \* is improved \* \* \*, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons \* \* \*." The same code in section 5611 directs that "When any portion of the sidewalk is out of repair \* \* \* and in condition to endanger persons \* \* \* in the use of such sidewalk, the superintendent

of streets shall notify the owner or person in possession of the property fronting on that portion of such sidewalk so out of repair, to repair the sidewalk," and (section 5615) "If the repair is not commenced and prosecuted to completion with due diligence, as required by the notice, the superintendent of streets shall forthwith repair the sidewalk." (See, also, Sexton v. Brooks (1952), 39 Cal.2d 153, 157-158, 245 P.2d 496; Laurenzi v. Vranizan (1945), 25 Cal.2d 806, 809-812, 155 P.2d 633; Schaefer v. Lenahan (1944), 63 Cal.App.2d 324, 326-327, 146 P.2d 929; Barton v. Capitol Market (1943), 57 Cal.App.2d 516, 517-518 [1], 134 P.2d 847.) It follows that by the judgment entered in favor of the pedestrian, Mrs. Wagner, and against the city it became established as a matter of law that the city had knowledge or notice of the dangerous and defective sidewalk condition and permitted such condition to continue to exist beyond a reasonable time and until she was injured thereby. (See Arellano v. City of Burbank (1939), 13 Cal.2d 248, 254 [1], 89 P.2d 113.)

This court has specifically declared that "The duty of the landowner is to use due care not to create or maintain a dangerous condition for the benefit of his property, while that of the city is to use due care to discover and remove defective conditions. [Citations.] Thus, the liability of each type of defendant is based upon his individual wrongful act or omission, and it is possible to have a valid verdict exonerating one and holding the other. [Citations.] \* \* \*" (Peters v. City & County of San Francisco (1953), 41 Cal.2d 419, 428-429 [14], 260 P.2d 55.)

In the Peters case the city argued that the judgment against it should be reversed because there was no judgment against the landowner, but we there stated that "We do not agree. The city is under a duty to keep sidewalks in safe condition, it is directly liable to pedestrians for failing to correct a dangerous condition of which it had notice, and it is not relieved of its responsibility in this regard merely because the condition was created or maintained by a property owner who might also be liable to pedes-

trians for injuries resulting therefrom. [Citations.] With regard to persons who are injured by such a condition, the city and the landowner are joint or concurrent tortfeasors; each is directly liable for his own wrong and each may be held liable for the entire damage suffered. [Citations.]” ( *Peters v. City & County of San Francisco* (1953), supra, 41 Cal.2d 419, 429 [14, 15, 16], 260 P.2d 55; see also, *Douglass v. City of Los Angeles* (1935), 5 Cal.2d 123, 128 [2], 53 P.2d 353; *Bosqui v. City of San Bernardino* (1935), 2 Cal.2d 747, 764 [9], 43 P.2d 547; *Marsh v. City of Sacramento* (1954), 127 Cal.App.2d 721, 723-725 [1], 274 P.2d 434; *Wilkes v. City etc. of San Francisco* (1941), 44 Cal.App.2d 393, 397 [5], 112 P.2d 759; *Mulder v. City of Los Angeles* (1930), 110 Cal.App. 663, 668, 294 P. 485.) Thus, it is not for any act or neglect of the property owner that the city is liable; it is liable, if at all, not on any such theory as that of *respondeat superior*, but, rather, solely for the breach of its own duty. And, perhaps more important, it must be recognized that the *acts of both original defendants* (the property owners and the city) were necessary to produce the injury to the pedestrian, Mrs. Wagner. If *either the property owner or the city* had discharged the duty respectively imposed on them the accident would not have happened.

Under these circumstances it appears to me that to require the landowner not merely to answer for his own negligence but also to indemnify the city for its independent tort will tend to defeat the Legislature's purpose in making the city liable for its own negligence in failing to vigilantly inspect and diligently maintain, or require owners of abutting property to maintain, sidewalks in a safe condition. If such a right is created and enforced by this court, a most natural result will be encouragement of laxity on the part of the city in carrying out its obligation of inspection, discovery of patent defects, and proper maintenance of sidewalks for the safety of the public. The proposal of the city that it should be indemnified by the property owner for what it terms its own “passive” negligence in permitting a danger-

ous condition to continue should be promptly and positively rejected.

This matter obviously presents no such case as *San Francisco Unified School Dist. v. California Bldg., etc., Co.* (1958), 162 Cal. App.2d 434, 328 P.2d 785, wherein the court expressly recognized the rule that there is no right of contribution among joint tortfeasors but properly held that in the circumstances of that case the rule was inapplicable because of the contractual relations of the parties. “The contract \* \* \* provided that the [defendant] \* \* \* ‘*is held responsible for payment of any and all damages resulting from its operations.*’ [Italics added.] Even if this did not amount to an express contract to indemnify the school district for damages caused to it by a breach of the contract by the [defendant] \* \* \*, such a warranty or agreement to indemnify would necessarily be implied. Whether the school district [plaintiff] should be precluded from recovery by reason of its conduct, that is, whether the conduct of the district helped to bring about the damage, is at least a question of fact and should have been left to the jury. Under such circumstances it was error to grant a nonsuit.” (At page 449 of 162 Cal.App.2d, at page 794 of 328 P.2d.)

The case before us not only does not show any agreement by the property owners to indemnify the city for the breach of its duty but makes clear, as a matter of law, the fact that “the conduct of the [city] helped to bring about the damage.” The case at bar, therefore, is fundamentally indistinguishable from, and should be governed by, *Dow v. Sunset Tel. & Tel. Co.* (1912), 162 Cal. 136, 138-140, 121 P. 379, and cases there cited. (See also 23 So. Cal. L. Rev. 413.) In this case, as in *Dow*, the independent negligence of both tortfeasors was necessary to cause the pedestrian's injury. From the fact that the judgment in the basic personal injury action was entered in favor of the plaintiff therein and has become final as against both the city and the property owners, it follows as a matter of law (implicit in the determination adverse to the respective defendants in such basic action) that the

subject injury would not have occurred if either (a) the property owner had not created the condition or (b) the city had not permitted the condition to continue after it had notice and was bound to correct it. Thus the right of the city to claim indemnification for the consequences ensuing from its own tort is a new right of recovery, not heretofore known to the law of this state, and it is enforced retroactively by the same decision which creates it. Such rulings should not find favor with the court.

I would affirm the judgment denying recovery to the city.

McCOMB, J., concurs.



51 Cal.2d 24

**SECURITY-FIRST NATIONAL BANK OF  
LOS ANGELES (a National Banking As-  
sociation), Plaintiff and Respondent,**

**v.**

**William P. ROGERS, as Attorney General  
of the United States, etc., Appellant,  
Margaret Mann et al., Defendants and  
Respondents.**

**L. A. 24527.**

**Supreme Court of California,  
In Bank.**

**Oct. 24, 1958.**

Suit brought by trustee of an inter vivos trust for declaratory and other relief relating to construction of trust instrument, administration of trust, and distribution of income and corpus. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment which was, in part, favorable to German beneficiaries, and the Attorney General of the United States, as successor to the Alien Property Custodian, appealed. The Supreme Court, Gibson, C. J., held that inter vivos trust requirement that interest of any beneficiary be paid to him "personally, solely and individually" would

not be satisfied by payment to Attorney General under vesting order; and held that since vesting orders had prevented payments to German beneficiaries in manner required by trust, gift over provisions of trust had become operative and rights of German beneficiaries had terminated. The Court held, however, that since the American beneficiaries who were, under its decision, entitled to entire beneficial interest in trust had not appealed, the lower court judgment, providing that income and corpus impounded or becoming distributable on or after date of issuance of General License releasing property previously blocked under Executive Order should be paid to all of beneficiaries, including German beneficiaries, according to trust instrument, was final as to them.

Affirmed.

Opinion, 324 P.2d 908, vacated.

#### **1. War and National Defense ☞12**

Inter vivos trust requirement that interest of any beneficiary be paid to him "personally, solely and individually" would not be satisfied by payment to Attorney General under vesting order; and where vesting orders prevented payment to German beneficiaries in manner required by trust, gift over provisions of trust became operative, and rights of German beneficiaries were terminated. Executive Order No. 8389; 12 U.S.C.A. following section 95a; Trading with the Enemy Act, § 1 et seq., 50 U.S.C.A. Appendix, § 1 et seq.

#### **2. War and National Defense ☞12**

Attorney General could not acquire, as result of vesting orders, greater rights or interests than those held by aliens, and when their rights were terminated, nothing remained which Attorney General could obtain. Executive Order No. 8389; 12 U.S.C.A. following section 95a; Trading with the Enemy Act, § 1 et seq., 50 U.S.C.A. Appendix, § 1 et seq.

#### **3. War and National Defense ☞12**

It would be against public policy to sanction circumvention of intent of Con-



gress by deferring payment to enemy aliens until such payment once again became legal; but it would not be against public policy to avoid confiscation by providing that, if gift to alien failed, gift over was made to alternate legatee who was not barred from taking by virtue of Trading with the Enemy Act. Trading with the Enemy Act, § 1 et seq., 50 U.S.C.A. Appendix, § 1 et seq.

#### 4. Trusts ⇨140(1)

When interest of beneficiary of trust is devoid of any possibility of present or future enjoyment, it lacks all substantiality, and cannot be recognized.

#### 5. Appeal and Error ⇨1173(2)

Where American beneficiaries who were, under Supreme Court decision, entitled to entire beneficial interest in trust had not appealed, judgment, providing that income and corpus becoming distributable on or after date of issuance of General License releasing property previously blocked under Executive Order should be paid to all of beneficiaries, including German beneficiaries, according to trust instrument, was final as to them.

#### 6. Appeal and Error ⇨150(3)

##### War and National Defense ⇨12

By implication, Joint Resolution, terminating state of war between United States and Germany and providing that German property which had been vested, or which, before January 1, 1947, was subject to vesting, would retain its prior status in that respect, terminated power of Attorney General to vest property which was not subject to vesting prior to that date; and, subject to certain exceptions, Joint Resolution and General License, releasing property previously blocked, brought to an end public policy preventing former enemies from holding assets in United States, and, therefore, after date of General License, public had no interest in withholding property from German beneficiaries which would entitle Attorney General to appeal in public interest from judgment that inter vivos trust income and corpus becoming distributable on or after date

of General License were payable to beneficiaries, including German beneficiaries, according to trust instrument. Joint Resolution Oct. 19, 1951, 50 U.S.C.A. Appendix, preceding section 1.

Dallas S. Townsend, Asst. U. S. Atty. Gen., Director, Office of Alien Property, Laughlin E. Waters, U. S. Atty., Arline Martin, Asst. U. S. Atty., Los Angeles, Mary Eschweiler, Atty., Office of Alien Property, San Francisco, Cal., George B. Searls, Irwin A. Seibel, Washington, D. C., Paul J. Spielberg, Falls Church, Va., Marbeth A. Miller, Attys., Dept. of Justice, Washington, D. C., for appellant.

Brady, Nossaman & Walker, Walter L. Nossaman and Charles M. Walker, Los Angeles, for plaintiff and respondent.

Graham, Califf & Harper, Morris D. Coppersmith, Hirsch & Rosenblatt, by Leonard B. Hirsch, Beverly Hills, Robert L. Moore, Los Angeles, Charles E. Burch, Jr., San Diego, Fleming, Robbins & Tinsman, Blase A. Bonpane, Los Angeles, C. O. Heffernan, San Leandro, Ernest C. Griffith, Oscar W. Fehsel, Los Angeles, Elmore A. Gripp, Rock Island, Ill., H. A. Gebhardt and Morris Lavine, Los Angeles, for defendants and respondents.

GIBSON, Chief Justice.

Security-First National Bank, as trustee of an inter vivos trust, instituted an action for declaratory and other relief relating to construction of the trust instrument, administration of the trust, and distribution of income and corpus. The problems involved on this appeal arise solely from the attempted seizure by the Attorney General of the United States, as successor to the Alien Property Custodian, of the interests of certain beneficiaries of the trust and their successors in interest who were residents of Germany. The Attorney General appeals from the parts of the judgment which disposed of these problems adversely to his contentions.

The facts are undisputed. The trust was created in the year 1922 by J. M. Brockman,

who reserved a life estate in the trust property and made the following provisions relevant to this appeal. Paragraph 9 provides that after the death of the trustor the Robinson and Brockman buildings in Los Angeles, which the trustee carries on its books at \$5,056,540 and \$2,176,000 respectively, will be retained in trust to pay the income to 24 named nieces and nephews of the trustor and to the issue and widows of those of them who die, until the death of the last survivor of the 24 named beneficiaries, at which time the two buildings will be distributed to the issue of these beneficiaries. Under paragraph 11 the beneficiaries mentioned in paragraph 9 will, in addition, receive distribution of the corpus of a separate trust fund, created by the instrument in the amount of \$200,000, at the death without issue of Mrs. Margaret Thompson, who is to receive the income during her life. Paragraph 13 contains a spendthrift provision and provides as "an express term and condition" of the trust and as "a limitation upon the right, title, interest, estate, income or moneys payable to each and every beneficiary" that his interest shall be payable exclusively to him personally, solely and individually, and the personal receipt therefor from the

beneficiary is made a condition precedent to the payment or delivery by the trustee.<sup>1</sup> Paragraph 16 provides that if the trustee shall be "unable, for any reason whatsoever, to pay" any portion of the income or principal to a beneficiary "in accordance with all the express terms of this trust" the trustee shall forthwith convey or deliver such part to the beneficiary designated in paragraph 9, anything to the contrary in the trust notwithstanding.<sup>2</sup>

The trustor died in 1925. Of the 24 beneficiaries named in paragraph 9, the five who were citizens and residents of Germany are all deceased. Three of them left issue now living as citizens and residents of Germany. Seven of the American beneficiaries named in paragraph 9 and Mrs. Margaret Thompson are also still alive. The latter has no issue.

From April 3, 1940, interrupted communications due to war conditions prevented the continuation of payment of trust income to the German beneficiaries, and since that date the trustee has impounded their portions. On June 14, 1941, by the provisions of Executive Order 8389 as amended (see note following § 95a of 12 U.S.C.A.), it became unlawful for the trustee to distribute such income to them; their

1. Paragraph 13 of the declaration of trust reads: "It is an express term and condition of this trust, and a limitation upon the right, title, interest, estate, income or moneys payable to each and every beneficiary hereunder that such rights, titles, interests, estates and incomes of each and every beneficiary shall not be subject to assignment, pledge, mortgage, hypothecation, attachment, execution, judgment, anticipation or other disposition or impairment, nor shall the same pass to or be paid to any receiver, trustee or officer in bankruptcy, or appointed by any court or otherwise, but same shall be payable, transferable and deliverable solely, only and exclusively to each and every beneficiary hereinabove specifically designated and named, according to the terms of this trust, personally, solely and individually, and the personal receipt therefor from the herein designated beneficiaries entitled to the same shall be a condition precedent to the payment or delivery thereof by said Trustee."

2. Paragraph 16 of the declaration of trust reads: "If and in the event that this trust shall, for any reason, or at any time prior to its final termination fail, in whole or in part; or said Trustee shall be unable, for any reason whatsoever, to pay any portion of the net income and/or the trust estate, in accordance with the terms hereof, and to the beneficiaries hereinabove designated and entitled to receive the same, the Trustee shall, at the time of the failing of this trust, in whole or in part, or its inability to pay the income and/or principal, in whole or in part, to the beneficiaries designated herein and entitled to receive the same, in accordance with all the express terms of this trust, forthwith convey, transfer and deliver such part of the income and/or trust estate so failing, to the beneficiaries and in accordance with all the provisions hereinabove specifically named, set forth and expressed in Paragraph IX of this Declaration of Trust, anything to the contrary in this trust notwithstanding."

funds in the United States were "blocked." When on December 11, 1941, the United States declared war on Germany, the Trading With the Enemy Act (50 U.S.C.A. Appendix, § 1 et seq.) became operative to permit seizure of enemy property. In 1949 and 1952 the Attorney General, under the authority of that act, executed Vesting Orders Nos. 13539 and 19000 respectively, by which he vested in himself for the benefit of the United States "all right, title, interest and claim of any kind or character whatsoever" of the German beneficiaries "in and to and arising out of or under" the Brockman trust. On June 24, 1953, General License No. 101 was issued, releasing property previously blocked under Executive Order No. 8389 but providing that the License would not affect property which had been vested by the Attorney General. 8 C.F.R. (1958), § 511.101.

The judgment, insofar as pertinent here, declares that the funds impounded prior to June 24, 1953, were distributable to the beneficiaries designated in paragraph 9 other than the German beneficiaries and that the income and corpus impounded or becoming distributable on or after June 24, 1953, should be paid to the beneficiaries, including the Germans, according to the trust instrument.

The language of paragraphs 13 and 16 of the trust instrument leaves no doubt that the trustor intended that they be treated as a unit, and, when so treated, they clearly provide, by means of a gift over to the beneficiaries designated in paragraph 9, for the termination of any interest in the trust or its income which a beneficiary, because of a disability like the one involved here, cannot personally receive at the time the property becomes distributable. It is also clear that the trustor intended that those beneficiaries whose interests are terminated by the operation of paragraphs 13 and 16 would not be entitled to take under the reference in the gift over provision to the persons designated in paragraph 9.

[1,2] Obviously the requirement of paragraph 13 that payment must be made

to each beneficiary "personally, solely and individually" would not be satisfied by a payment to the Attorney General under the vesting orders. Since the vesting orders prevented payment to the German beneficiaries in the manner required by paragraph 13, the gift over provisions contained in paragraph 16 became operative and the rights of the German beneficiaries were terminated. The Attorney General could not acquire as a result of the vesting orders greater rights or interests than those held by the aliens (In re Estate of Knutzen, 31 Cal.2d 573, 578, 191 P.2d 747), and when their rights were terminated nothing remained which the Attorney General could obtain. Insofar as concerns the acquisition of the German interests by the government, the vesting orders, which terminated them, were self-destructive.

It is true that paragraph 13 is what is commonly called a spendthrift provision, and it has been held that such a provision, standing alone, will not prevent a vesting order from reaching the interests of beneficiaries of a trust. In re Estate of Zuber, 146 Cal.App.2d 584, 596, 304 P.2d 247; see 2 Scott on Trusts (2d ed. 1956), § 157.4, pp. 1123-1124. However, our determination that the Attorney General cannot obtain anything from the trust is not based on paragraph 13 alone but, as we have seen, upon the gift over provision contained in paragraph 16 read in conjunction with paragraph 13.

It may be noted that the trust was created in 1922, a few years after the first world war, during which the property of enemy aliens had been seized by the United States Government, and at a time when the collapse of the German currency created a danger of seizure by the German government of the foreign assets of German residents. The trustor, in drafting paragraphs 13 and 16, may thus have had in mind the purpose of avoiding seizure of the interests of the German beneficiaries. In any event, the provisions are clearly applicable to the vesting orders and prevent the obtaining of any part of the income or corpus by the Attorney General.



A similar conclusion was reached in the only two cases which present comparable facts. In *In re Estate of Thramm*, 80 Cal. App.2d 756, 183 P.2d 97, the testatrix had made bequests to American and German nationals and provided that if it were impossible to settle her estate "with Germany" a year after her death, everything should go to certain American relatives. The Alien Property Custodian issued a vesting order with respect to the interests of the German legatees. The court held that it was the intention of the testatrix that if her German relatives could not actually receive the bequests made to them, her relatives in the United States, and not some governmental agency, should take the bequests and that the American relatives and not the Alien Property Custodian were entitled to the property. In *Harvard Trust Co. v. Attorney General*, 329 Mass. 79, 106 N.E.2d 269, 271, in which a testamentary trust contained a gift over to "my then heirs-at-law" operative upon the trustee's inability "to distribute as hereinbefore provided," it was held, even in the absence of a provision requiring payment to the beneficiaries personally, that payment to the Attorney General would not fulfill the intention of the testatrix and that the vesting order caused the gift over to become effective.

The cases of *In re Estate of Neumeister*, 146 Cal.App.2d 290, 304 P.2d 67, and *In re Estate of Zuber*, 146 Cal.App.2d 584, 304 P.2d 247, on which the Attorney General relies, are not contrary to our conclusion. These cases, applying the rule stated in *Sinclair v. Crabtree*, 211 Cal. 524, 528, 531, 296 P. 79, that contingent future interests are property interests capable of transfer and inheritance, recognized the right of the Attorney General to certain contingent future interests of enemy aliens as to which he had issued vesting orders. Although in the present case the German beneficiaries acquired contingent future interests in the income and corpus of the trust at the time the trust was created, these interests, as we have seen, were ter-

minated as a result of the gift over provision, and the cases cited by the Attorney General are distinguishable because they did not involve such provisions.

[3] The basis of the distinction is clearly shown in the recent case of *Kammholz v. Allen*, D. C., 155 F.Supp. 511, 515-516, where the court stated that it would be against public policy to sanction the circumvention of the intent of Congress by deferring the payment to enemy aliens until such payments once again become legal, but that it is clearly not against public policy to avoid confiscation by providing that, if a gift to an alien fails, a gift over is made to an alternate legatee who is not barred from taking by virtue of the Trading With the Enemy Act. In *re Estate of Neumeister*, 146 Cal.App.2d 290, 304 P.2d 67, and *In re Estate of Zuber*, 146 Cal.App.2d 584, 304 P.2d 247, come within the first part of this statement because the instruments involved in those cases did not contain any provision for absolute termination of the interests of incapacitated beneficiaries but instead provided for the preservation of the interest of such beneficiaries until the incapacity be removed. On the other hand, the instruments involved in *Re Estate of Thramm*, 80 Cal.App.2d 756, 183 P.2d 97; *Harvard Trust Co. v. Attorney General*, 329 Mass. 79, 106 N.E.2d 269, and the present case, contain termination and gift over provisions of the type declared to be valid in the second part of the statement in the *Kammholz* case.

[4] We find no merit in the contention of the Attorney General that, even if the construction of the trust instrument which denies him any right to enjoyment of the income and principal of the trust were correct, the vesting orders nevertheless would entitle him to the property interests of the German beneficiaries as distinguished from the enjoyment of the property. When the interest of a beneficiary of a trust is devoid of any possibility of present or future enjoyment, it lacks all substantiality and cannot be recognized.

[5] Our determination that the rights of the German beneficiaries were brought to an end by the vesting orders leads to the conclusion that the American beneficiaries were entitled to the entire beneficial interest in the trust, but the Americans have not appealed, and the judgment is final as to them.

[6] Although the Attorney General has no right to any part of the income or corpus of the trust and no appeal has been taken by the persons whose pecuniary interests have been adversely affected by the judgment, the Attorney General nevertheless contends that he has been injured by it, giving him the right to appeal, on the theory that he is entitled to appear in the public interest to prevent the German beneficiaries from taking anything.

In our opinion the public did not have an interest in withholding property from the German beneficiaries after June 24, 1953, the date from which the trial court ordered that payments and distributions to the German beneficiaries be resumed. On October 19, 1951, a joint resolution of Congress (65 Stats. 451), 50 U.S.C.A. Appendix, preceding section 1 terminated the state of war between the United States and the government of Germany, and it provided that German property which had been vested, or which, before January 1, 1947, was subject to vesting, would retain its prior status in that respect. By implication it terminated the power of the Attorney General to vest property which was not subject to vesting prior to that date.

3. The reservations in the joint resolution and the General License with respect to property which had already been vested were made for the sole purpose of having the vested property available for the payment of war claims. (War Claims Act, 50 U.S.C.A. Appendix, §§ 2001-2013; see letter of President Truman, dated July 9, 1951, 97 Cong. Rec. 7762, asking that Congress terminate the state of war with Germany and, among other things, retain federal control of vested property for the purpose of paying war claims.) Since, as we have seen, the Attorney General cannot obtain any of the trust property, and since, therefore, the property will

On June 24, 1953, as we have seen, General License No. 101 was issued releasing property previously blocked under Executive Order No. 8389 but providing that the License would not affect property which had been vested by the Attorney General and making certain other exceptions not pertinent here.<sup>3</sup> 8 C.F.R. (1958), § 511.101.

The obvious conclusion is that, subject to the exceptions referred to above, the joint resolution and the General License brought to an end the public policy of preventing former enemies from holding assets in the United States. This is in accord with the following statement of President Truman in a letter dated July 9, 1951 (97 Cong. Rec. 7762), asking that Congress terminate the state of war with Germany: "This action \* \* \* will \* \* \* create a firmer foundation for the developing structure of peaceful and friendly relationships and will remove disabilities to which German nationals are subject. \* \* \*" [Italics added.]

The public interest thus will not be affected by any transfers of property to the German beneficiaries *subsequent* to the effective date of the General License. It was not until after that date that the German beneficiaries were given interests in the trust by the judgment of the trial court, and the judgment provides that only such property as has or will become available for distribution on or after that date will be distributed to the Germans. The public, therefore, has no interest in preventing the distributions to the German

not be available for the payment of war claims, the reservations contained in the joint resolution and the General License have no bearing upon this case.

Another exception in the General License is that it does not apply to any property blocked by reason of the interest of any individual or organization "which on December 31, 1946, was in any of the areas of Germany under control or administration of the Union of Soviet Socialist Republics \* \* \*," but the parties have agreed that all the German beneficiaries of the trust were in the Western Zone of Germany at that date.

beneficiaries which are directed by the judgment, and the Attorney General cannot properly be regarded as having been injured by the distributions in which, as we have seen, he has no pecuniary interest.

The judgment is affirmed.

**SHENK, CARTER, TRAYNOR,  
SCHAUER, SPENCE and McCOMB, JJ.,  
concur.**



164 Cal.App.2d 350

**Albert SHELL, Martha Shell, Arthur G. Johnston, Dorothy E. Johnston, Edward C. Brichta, Dora R. Brichta, Frank W. Douglas, Edith E. Douglas, Donald W. Teeter, Ann Teeter, Caspar J. Hexberg, Patricia M. Hexberg, Kenneth Thunen, Shirley Thunen, Gustave Kotta, Nelda M. Kotta, William F. Mitchell, Wanda Mitchell, Pete C. Rodriguez, Natalie Rodriguez, Herman T. Schneider, Rita B. Schneider, Ernest S. Coccary, and Helen A. Coccary, Plaintiffs and Respondents,**

**v.**

**Max SCHMIDT et al., Defendants,  
Max Schmidt, Defendant and Appellant.  
Civ. 17407.**

District Court of Appeal, First District,  
Division 1, California.

Oct. 20, 1958.

As Modified on Denial of Rehearing  
Nov. 19, 1958.

Hearing Denied Dec. 17, 1958.

Breach of contract action. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, St. Clair, J. pro tem., held that where there have been intentional major deviations from terms of contract the "good faith" required by the substantial performance rule is lacking; and held that on remand for trial on issue of damages only after appellate court determination

that contract had been breached, defendant had had no right to prove, or attempt to prove, substantial performance.

Affirmed.

### 1. Contracts Ⓒ295(1)

Under the "substantial performance rule," where builder exercised good faith and substantially performed contract, omissions and deviations have not substantially affected usefulness of building for intended purposes, owner has taken possession of building and is enjoying fruits of builder's work, and failure to make full performance can be compensated in damages, builder may, in an action on contract, recover contract price, less amount allowed as damages.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Performance Rule".

### 2. Appeal and Error Ⓒ1195(1) Contracts Ⓒ295(1)

Where there have been intentional major deviations from terms of contract the "good faith" required by the substantial performance rule is lacking; and on remand for trial on issue of damages only after appellate court determination that, by virtue of intentional deviations, contract had been breached, defendant was foreclosed by law of case from proving, or attempting to prove, substantial performance.

### 3. Appeal and Error Ⓒ171(1)

On appeal in breach of contract action, defendant was bound by his theory in trial court and on appeal that lack of willfulness was a necessary prerequisite to invoking the "value" rule (measuring damages by difference in value between building as constructed and as it should have been constructed) instead of the "cost" rule (making cost of reconstruction measure of damages).

See publication Words and Phrases, for other judicial constructions and definitions of "Cost Rule" and "Value Rule".



**4. Damages** ⇨120(3)

Where there had been intentional major deviations from terms of contract, builder could not successfully claim the "lack of willfulness" which, under theory advanced by him, was a necessary prerequisite to invocation of the "value" rule for measuring damages.

**5. Damages** ⇨163(1)

Defendant seeking to invoke the "value" rule for measuring damages for breach of building contract has burden of proving that economic waste would result from replacement of omissions and defects; and defendant himself advancing theory that the "value" rule can be applied only if a substantial part of what has been done must be undone in order to meet contract requirements had burden of proving that such condition was met.

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James W. Harvey, Walter K. Olds, George Olshausen, San Francisco, for appellant.

Ropers & Majeski, Redwood City, for respondents.

ST. CLAIR, Justice pro tem.

Defendant appeals from a judgment against him in the amount of \$47,400 in favor of the 24 plaintiffs.

The defendant is a builder-contractor. Plaintiffs are third party beneficiaries of a contract between the defendant and the United States Government and sue for a breach thereof.

Plaintiffs, twelve couples, bought similar houses in a tract built by defendant. The complaint originally alleged causes of action for fraudulent misrepresentation and breach of contract. On a prior appeal, the court held that the causes of action for fraudulent misrepresentation were not proved as to nine couples, but that causes for breach of contract were established for all. The judgments were "reversed with instructions to the trial court to retry the issue of damages only, and when such damages have been ascertained, to enter

judgments in favor of respondents in the amounts so fixed." *Shell v. Schmidt*, 126 Cal.App.2d 279, 294, 272 P.2d 82, 91.

At the second trial plaintiffs waived their separate and individual causes of action for fraud and went to trial on a single cause of action by all plaintiffs, as third party beneficiaries, for breach of contract.

There was and is some difference of opinion as to what the law of the case is, as decided by the first opinion. All parties agreed, however, that it is the law of the case that defendant breached the contract. The principal problem was the choice of the applicable measure of damages.

The first opinion established the measure of damages, in the general words of Civil Code, section 3300, and the trial court here quite properly instructed in those words. However, that did not answer the refinement thereof raised by the defendant.

At this trial it was the theory of the plaintiffs that the proper measure of damages was what will hereafter be referred to as the cost theory, i. e., the cost of making the work conform to the contract. The defendant vigorously advanced what will hereafter be referred to as the value theory, i. e., the measure of damages is the difference between the value of the structure as planned and its value as built.

Before examining the contentions of the parties, a review of the record at the second trial is necessary; first, to look at certain offers of proof made by the defendant and, secondly, to determine if the defendant was in fact precluded from proving parts of his offer and the resultant effect, on defendant's position, of the proof he made.

The principal items of deviation from the specifications that constituted the admitted breach of the contract were: (1) the exterior walls had no wood sheathing and consisted of construction paper covered with chicken wire and thereon an application of stucco; (2) the installation of one floor furnace of 35,000 B.T.U. capac-

ity instead of two furnaces of 30,000 B.T.U. capacity each; and (3) the use of sheet rock with taped joints for the interior walls instead of gypsum lath and plaster.

In the first opinion the court said: "All testified that their homes were not only underheated, but that, because of the inadequate exterior walls, they became damp and cold, and that mold and mildew grew on the back room walls. The evidence is ample and substantial to the effect that largely because of the inadequate exterior walls, and partly because of the inadequate heating equipment, the plaintiffs were made quite uncomfortable, and did not receive a house of the quality and type called for by the plans and specifications." 126 Cal.App.2d 279, at page 284, 272 P.2d 82, at page 86, supra.

Plaintiffs advance this as the law of the case. Defendant disagrees.

Plaintiffs, without objection, at the second trial testified at length to the same facts. Some testified to the inferences referred to by the court. Certainly the defendant had in mind such inferences as he put in evidence to rebut them.

In addition to the above, plaintiffs put in experts who testified as to the cost of correcting the major breaches of the contract.

At the end of the plaintiffs' case the defendant made several offers of proof. The offers were formalized twice, in chambers, and there was a great deal of discussion concerning them. The following would appear to be a fair statement of what the defendant offered to prove.

*As to the three breaches.*

1. *Exterior wood sheathing.* Defendant made every effort to obtain sheathing but was unable to do so. None was available. Experts would testify that the type of construction used (somewhat exotically known as bellyband type of construction) and the manner in which it was done was equally as good as wood sheathing, in fact it was better because, at the time, only green lumber was available and its shrinking would crack the stucco. Experts would

say that the dampness was not a result of using bellyband construction instead of wood sheathing; it is a matter of atmosphere, a condition caused by the manner in which the houses were vented; it is a humidity problem that arises from many factors.

2. *Interior walls.* Defendant made every effort to obtain plastering labor and materials essential to plastering the walls but was unable to obtain the same. The wall board that was substituted for the plaster is equally as good and can be used under the applicable F.H.A. regulations.

3. *The furnace.* Defendant provided what he had been advised was a better heating system than the one called for in the contract. One floor type of 50,000 B.T.U. capacity is preferable for heating a house to two 30,000 B.T.U. capacity wall type furnaces. Defendant was able to put in the floor type furnace because he had put in the much better conventional type of foundation rather than the slab type called for in the specifications.

*As to the measure of damages.*

*Willfulness.*

1. There was no willfulness or intentional action on defendant's part in making the first two omissions in question. He was compelled to complete the houses the way he did because of the shortages of labor and material. Defendant orally reported his inability to get materials to F.H.A. and was orally authorized to go ahead with what he could get. (Exhibit A attached to plaintiffs' complaint, a copy of application by defendant to F.H.A. for increase in selling price; this application showed some of the changes.)

2. *Substantial performance.* The houses, as built, are superior to the houses called for in the specifications, are of better construction and built on a better foundation.

3. *Value.* The houses as built were more valuable than the houses called for in the specifications. Certain of the plaintiffs sold their houses at a higher price than was paid the defendant for them.

*Defendant's evidence at the second trial.*

The exterior wooden sheathing's function would have been "backing" for the plaster; it had no insulating function or value at all. The boards are not put on close together. The sheet rock used in the interior is composed of the same material as plaster but is preformed in a factory instead of put on wet on the wall. It is taped together.

Dampness and mildew is a matter of ventilation. When by some circumstances of the location of windows and doors a dead air space prevails in a room, that creates dampness.

As to the exterior, it was not necessary to remove the stucco; plywood could be placed over the stucco, wire netting over the plywood and then stucco over that.

On the interior, one could leave the plasterboard up, put wire netting over it and then plaster.

The cost of the last two operations would be \$1,391 plus 11% profit, or a total of \$1,544.

After the above two procedures, the houses would be superior to the original proposed house.

There is nothing in the original specifications that says anything about how the exterior sheathing and interior plastering are to be applied.

If the houses had the exterior sheathing they would not (1) save any loss of heat through the walls, (2) act as a vapor barrier, or (3) be any warmer. Construction methods of walls have no effect on moisture and mildew in a house. It is a condition that comes from heating the house. As the temperature inside is raised, humidity is raised and a dew point is reached; condensation occurs, strikes a cold wall and causes mold.

Nowadays wooden sheathing is not often used on account of the cracking that comes from the wood.

The jury quite evidently did not believe much of the testimony.

All during the trial and up to the time of oral argument, the defendant took the position that he had substantially performed the contract, and from that fact certain hereinafter referred to matters flowed. During the offer of proof, counsel for defendant said: "Now, it seems to me that we should be entitled to elicit evidence to show that what was done is equally as good as what was called for and that, from that standpoint, we have substantially complied with our contract."

[1,2] There are many statements of the rule of substantial performance. *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 197 P. 105, is a leading case in California and was cited by both parties to the trial court. The rule as laid down there reads: "It has now been greatly relaxed, and it is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance." (185 Cal. at page 289, 197 P. at page 107).

It was to this rule that the defendant's offers of proof were addressed. He maintained that if he could show that he had no bad faith, his deviation from the contract would not be "willful" within the meaning of the rule. The learned trial judge took the position that "willful" meant "intentional" (as indeed Black's Legal Dictionary says it does) and that the deviations were obviously "intentional"; that he would not permit proof of the excuses for nonperformance as he was faced



with the prior decision and the law of the case that these deviations constituted breaches of the contract for which the defendant was liable.

Although not expressed in so many words, it appeared to be the theory of counsel for plaintiffs, and acquiesced in by the court, that to permit the defendant so to do would be retrying the matter of liability whereas it was the law of the case that defendant was liable.

The trial court's logic was impeccable. If one of the necessary components of substantial performance was that the deviations from the contract were not willful and if willful means intentional, and if the defendant obviously acted intentionally, then it could not be substantial performance.

In none of the California cases discussing the rule of substantial performance is mention made of whether or not there is a breach of the contract when there is substantial performance. There is a remarkable lack of definiteness of the legal status of the contract vis-à-vis the legal status of the contracting parties.

In *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.*, 48 Cal.App. 452, 192 P. 138, the problem came up as a matter of pleading and findings. Plaintiff, the contractor, had alleged full performance of the contract. He proved substantial performance. The court made detailed findings, perhaps probative, that showed substantial performance by plaintiff and the amount of recoupment by defendant and then made an ultimate finding that the work was done in accordance with the contract.

Defendant insisted on reversal. The court said: "Since a substantial performance is performance (*Rowe v. Gerry*, 112 App.Div. 358, 98 N.Y.S. 380), and all that is required to sustain an allegation of performance, and since the probative findings referred to show such performance, it follows that, instead of being inconsistent with the allegation of full performance, the findings to that effect are in full accord with

and support the same." (48 Cal.App. at page 458, 192 P. at page 140.)

If "substantial performance" is "performance" then, in the instant case, the ruling that the contract had been breached would seem to preclude the defendant from advancing substantial performance at the second trial.

In addition to the difficulties created for the defendant's theory of substantial performance by the logic of the trial judge's position and by the *Musto* case, he was faced with *Perry v. Quackenbush*, 105 Cal. 299, 38 P. 740. In appellant's reply brief he dismisses the case, claiming it is not applicable because it is a contractor's action for compensation without any cross-complaint for damages.

Appellant is in error. It was a suit by the purchaser against the contractor, to cancel a note and mortgage given defendant as consideration for building a house.

The trial court in the *Perry* case found, in effect, that there had not been substantial performance. After an extended discussion of the equitable rule of substantial performance the court said: "Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining whether there has been a substantial performance, that the deviations are so slight that they might have been made by one who was honestly endeavoring to comply with his contract.

"Good faith, however, on the part of the contractor, is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for; and, to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure. The court cannot say that any thing is immaterial which the parties have made material by their contract. One has the right to determine for himself what he deems a good foundation, or what materials he desires to be used; and, if he contracts for them, neither the contractor nor the court has the right to compel him

to accept something else, which may be shown by the witnesses to be just as good, or even better." (105 Cal. at pages 309-310, 38 P. at page 742.)

Another hurdle facing the defendant in his attempt to invoke the value rule as the measure of damages based on an alleged substantial performance of the contract is that the degree of deviation must be minor. In the *Thomas Haverty Co.* case, *supra*, the court, in analyzing the rule of substantial performance, and its growth, uses the word "trivial" to describe the degree of deviation that is permitted. The word "trivial" is used in the same way in the *Corpus Juris Secundum* statement of the rule of substantial performance, Contracts, § 509, page 1087 of Vol. 17. The *Musto* case, *supra*, also uses the word trivial to describe the permissible deviations.

The trial judge time and again considered the application of the component of triviality and repeatedly pointed out that these were major deviations, not trivial.

It is difficult to see how deviations major enough to constitute a breach of the contract could be, in any semantic or actual sense, trivial.

The defendant repeatedly offered to prove that the deviations from the contract had been in good faith, either by direct proof thereof or the negative thereof, by proving that the deviations were not willful. At the oral argument on appeal defendant's position was that the cases used willful or intentional in the sense of being wanton or almost intentional disregard of the other person's rights; not an intentional adjustment to something that makes performance difficult or impossible.

Can there be "good faith" where there have been deviations from the contract sufficient to constitute, as a matter of law, breaches of the contract?

At 6 A.L.R., 137 there is an annotation entitled "Willful or intentional variation by contractor from terms of contract in regard to material or work as affecting measure of damages."

All the cases in the annotation (California, D.C., Mass., Minn., Mont., New York, N.D., Penn.) (the California case was *Perry v. Quackenbush*, *supra*) indicate that the majority rule is that whether or not the deviation from the contract was intentional is relevant in determining if there has been substantial performance. They do not indicate that there need be malice or fraud on the part of the contractor to show a lack of substantial performance, nor that the absence of such a finding alone would entitle the contractor to a different measure of damages.

Tracing the annotation through the A.L.R. Blue Book, we find the 1941 California case of *Henderson v. Oakes-Waterman, Builders*, 44 Cal.App.2d 615, 112 P.2d 662, cited as part of the annotation. One of the reasons this is of especial interest is that *Henderson v. Oakes-Waterman, Builders*, was cited to the trial court in the second trial and relied upon, in part, by him.

These cases hold there cannot be the "good faith" required by the substantial performance rule if there have been willful and intentional major deviations from the terms of the contract.

There is no question that the defendant's position was and is that although he did not do what was called for, he did something equally as good and that that was substantial performance of the contract.

No case was cited by defendant, and none found, that held that major deviations from the contract, that had been held to constitute a breach of the contract, could constitute substantial performance.

We hold that under the law of the case, and the factual developments, including the facts defendant offered to prove, the defendant was not entitled to prove or attempt to prove, substantial performance of the contract on his part.

The above holding does not, however, dispose of the appeal. In his reply brief, defendant advanced another theory as to why he was entitled to instructions on the value theory instead of, or at least alternatively to, the cost theory.

On appeal, the defendant, to all intents and purposes, abandoned his contention that he should have been permitted to prove substantial performance, and claims the right to prove lack of willfulness for another reason. At the oral argument, defendant said: "If there is an inexcusable or willful violation, then the cost of reconstruction is the measure of damages, no matter how high. If there is not a willful violation, then the cost of reconstruction is the measure of damages, unless it is disproportionately high—I will come to that in a moment—in which case, if it is disproportionately high, and there is no willful breach, the measure of damages is the difference in value between the houses as constructed and as they should have been constructed."

Nowhere in the cases cited by defendant, or in any cases or authorities found by the court was there found a rule expressed in exactly this way. In the books there are many expressions of what circumstances or set of circumstances are required to "trigger" the change from the cost rule to the value rule.

Professor Williston, in his work on Contracts (Revised Edition) section 1363, pages 3825-3826 of Vol. 5, advances a rule that does not require "good faith" or "lack of willfulness"; only requiring that the defect not be remediable from a practical standpoint to "trigger" the change. The Restatement of Contracts, section 346, pages 572-573, does not require good faith or lack of willfulness but does require a showing of "unreasonable economic waste."

Corbin on Contracts, Vol. 5, page 408, sections 1089 et seq. states that the cost theory prevails "if this is possible and does not involve unreasonable economic waste" (p. 409). The author goes on to say, at page 410: "Without question, the contract breaker should pay the cost of construction and completion in accordance with his contract unless he proves affirmatively and convincingly that such construction and completion would involve an unreasonable economic waste."

The defendant does not invoke, or seek to invoke the Williston, Restatement, or Corbin rules but cites, in his Reply Brief, the rule laid down in American Jurisprudence, Vol. 9, Building and Construction Contracts, section 152, page 89. The full statement of this rule is: "The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value. In some jurisdictions, however, it seems to be the rule that the measure of damages for defective work under a building contract is such a sum as is required to make the building conform to the plans and specifications, regardless of whether it is necessary to tear down and reconstruct part of the work already done."

[3] It would appear that defendant is bound by his theory of the case in the trial court and here on appeal. Proof of lack of willfulness is a necessary component, amongst others, which he must prove to "trigger" the invoking of the value rule, vis-à-vis the cost rule, on which latter the trial judge instructed.

While neither side has come up with a California case in which the upper court reversed or affirmed on the precise narrow point of choice between the cost or value



rule of measure of damages, it is clear that in California the difference is understood and applied.

In the leading case of *Thomas Haverty Co. v. Jones*, supra, the court at page 296 of 185 Cal., at page 110 of 197 P. said: "We do not think the findings sustain the contention of the defendant that the court measured the damages by the difference in the service value of the building rather than by the difference in the market value thereof. For the defects classed as remediable the damage was measured by the reasonable cost of correction thereof. For the other defects, it is plain that the damages allowed did not consist of the difference in cost, but were measured by the difference between the value of the building with those imperfections and its value without such imperfections. This contention, therefore, is not sustained by the record."

There is an excellent collection of cases from the various jurisdictions and an annotation on the cost and value theories in 123 A.L.R. 515. It is probably true, as stated therein, that the majority of the jurisdictions use the cost theory vis-à-vis the number of jurisdictions that use the value theory only. However, almost all of the jurisdictions that use the cost theory also present the exception either in the terms of the Williston, Restatement, Corbin or the American Jurisprudence versions of the rule.

There is an interesting variation on the general rule, to wit, the defendant is entitled to either the cost or value rule, whichever is the lower or less burdensome to him. Corbin, supra, refers to the rule and cites *Texas Pacific Coal and Oil Co. v. Stuard*, Tex.Civ.App., 7 S.W.2d 878, and *Bigham v. Wabash-Pittsburg Terminal Ry. Co.*, 223 Pa. 106, 72 A. 318.

*Texas Pacific Coal and Oil Co. v. Stuard*, supra, is not authority for the statement, and is distinguishable on a peculiar set of facts. The plaintiff had pleaded and proved that *either of two measures of damages would fully compensate him for his loss*

and the court said that under either or both theories the defendant was entitled to have the less expensive chosen.

*Bigham v. Wabash*, supra, adopted the measure of damage set out in the earlier Pennsylvania case of *Seely v. Alden*, 61 Pa. 302, 100 Am.Dec. 642, which latter case was a *tort case for pollution of a stream*. No comment was made re adopting a tort rule for a contract case. In later cases, Pennsylvania followed the general rule.

The applicability of the above minor variant rule to the instant case is that the defendant leans heavily on the New York case of *Bellizzi v. Huntley Estates*, 1 A.D. 2d 683, 147 N.Y.S.2d 74, 76. This case adopts the variant rule. The court said: "The court excluded evidence offered by defendant as to the value of the property, charged the jury that the measure of damages was the cost of making the driveway as the parties agreed, refused to charge that the rule of damages 'is the difference between the value of the building as constructed and its value had it been constructed conformably to the contract or the cost of repairs, whichever is the lesser.' In our opinion, such proof was erroneously excluded. The evidence should have been received, and the jury should have been instructed that if there was substantial performance of the whole contract on the part of the defendant, or if there was a breach of the contract by defendant and the failure to perform was not in bad faith, and destruction and reconstruction were necessary to get a driveway as was agreed to be built, the jury could not allow the cost thereof if such cost would exceed the difference between the value of the premises as they were with the driveway as built and the value with a driveway as it should have been built."

The New York court cited the Restatement, Williston, Corbin and the early New York case of *Walter v. Hangen*, 71 App. Div. 40, 75 N.Y.S. 683. As quoted above, it is clear that neither the Restatement nor Williston supports such a variant rule. We have previously discussed the Corbin

reference to the variant rule and the paucity in number and lack of real support that his two cited cases give to the variant rule. *Walter v. Hangen*, *supra*, supports the variant rule.

In logic, the variant rule would not seem proper and certainly it is by way and far the minority rule.

*Cases relied on by defendant.*

*Walsh v. Cornwell*, 272 Mass. 555, 172 N.E. 855. Defendant relies heavily on this case, arguing that it is peculiarly persuasive under the facts. There, the selling price of the house was \$13,400 and the cost of the reconstruction was "at least \$4,000." Here, the selling price was \$12,000 and the jury fixed the cost of reconstruction at \$3,950.

The difficulty with the defendant's argument is that the *Walsh* case did not hold that the cost of reconstruction was so high as to bring into play the value rule.

The auditor (a fact finder) found that because of the defendant's "failure to build according to the plans and specifications serious defects resulted in the finished house" and that "it would have cost \* \* \* at least \$4000 to tear down parts of the structure and rebuild it to accord with \* \* \* the contract \* \* \*", but "it would not be practicable and economical to make all alterations necessary to make the house conform \* \* \*." (172 N.E. at page 856.)

The court expressly said that the case was not tried or argued on the theory of any "intentional departure from the contract in a material matter." (172 N.E. at page 857.)

The court then applied the value rule, citing some Massachusetts cases and *Williston*, sections 1480-1483, 1485.

The "trigger" in this case was the finding that it was not "practicable and economical to make all alterations \* \* \*." This would seem quite close to the *Williston* statement of the rule. *H. P. Droher and Sons v. Toushin*, 250 Minn. 490, 85 N.W. 2d 273.

Here, it was the builder that was suing for the balance of the contract price, the total price being \$44,000.

The trial court found that plaintiff did *not* construct the house according to the plans and specifications.

The principal, practical difficulty was that a steel pole in the basement which acted as a support for a beam on which the floor joists rested was lower than it should have been.

Plaintiff insisted that he had installed the pole according to the specifications but the trial court findings were against it.

It was uncontradicted that it would cost in excess of \$20,000 to repair the house. The court said: "On the cost of repair, James H. Speckmann, Severt Eric Olson, Robert W. Johnson, and Henry A. Anderson all testified that, in order to correct the defects existing in the house so as to make it plumb, level, and straight as it should have been built, it would be necessary to jack up the low beam in the basement in the center of the house and that the result of so doing would cause the plaster to crack, parts of the house would have to be rebuilt, and the whole job would require a great deal of work and expense and that in their opinion it would cost in excess of \$20,000 to repair the damage. Olson, who is a builder during many years' experience, testified that he would not take the job on a contract for \$20,000." (85 N.W.2d at page 282.)

The court, after citing the aforementioned rules from the Restatement and from *American Jurisprudence* said: "It would seem that the better rule and the one followed by a majority of the courts is that, where there is a substantial good-faith effort to perform the contract but there are defects of such a nature that the contract has not been performed according to its terms, which defects can be remedied without the destruction of a substantial part of the building, the owner is entitled to recover the cost of making the work conform to the contract but, where it appears that the cost or remedying the de-

fects is grossly disproportionate to the benefits to be derived therefrom, the owner is entitled to recover the difference between the value of the property as it would have been if the contract had been performed according to its terms and the value in its condition as constructed. Cases such as we have here, where the evidence establishes a substantial good-faith performance, are to be distinguished from those where has been a wilful failure to perform at all, such as we had in *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502."

The case was sent back for retrial on a very confused issue. The trial court, in its *opinion*, had indicated it was considering the cost rule as a measure of damages. In its findings it had used the value rule.

The court said (85 N.W.2d at page 281): "In view of the extensive damage which would have occurred as a result of any effort to correct the defects in this house, it was proper to apply the difference-in-value theory in assessing damages."

The only evidence put in to support the value rule was that one of the defendants testified that if the house had been built in accordance with the specification it would have been worth \$65,000 to \$68,000; that as it was constructed it was worth \$48,000.

The court sent it back for a retrial in the difference in value.

It would appear that the court applied the majority rule and did not reverse the case because the cost rule had been adopted in a case where the cost of replacement was "disproportionately high."

The only case cited by defendant which explicitly states that substantial performance has nothing to do with actions for damages by the owner against the builder is *Karlinski v. P. R. and H. Lumber and Construction Co.*, 1938, 68 N.D. 522, 281 N.W. 898. It is unlikely that substantial performance could have been found in that case. The contract was to repair and build an addition to a house, and install a

furnace. The defendant cut through some joists, weakening the floor and causing the house to sag, the walls to crack, the stairway and a clothes-chute to sag, and the plaster to crack. The downstairs floors were not level. Some of the upstairs floor boards did not meet. The corner of the house sagged. In an attempt to jack up the house, the cellar wall gave way and collapsed into the basement. The cement in the basement was soft and full of holes. The chimney was cracked on three sides. Nails and joints were uncovered. Plaster fell out. The floors were not scraped. Some of the steps were loose and squeaked. The court held it was error to instruct the jury that the measure of damage was the difference in the value of the house as constructed and as contracted for, and that the jury should have been required to determine whether the defects were remediable, and if they were without taking down and reconstructing a substantial portion of the building, the damages were to be the cost of reconstruction, and if not, the damages were to be the difference in value. This case would appear to follow the *Williston* rule, not defendant's.

*Hansen v. Andersen*, 246 Iowa 1310, 71 N.W.2d 921, 923, quotes the language from 9 Am.Jur. 89, section 152 which seems to use "good faith" as an alternative to "substantial performance" to invoke the difference in value rule as to the damages. However, the court apparently believed this to be a case of substantial performance because it also quoted the language at 9 Am.Jur. 33, section 43 regarding the measure of damages in a substantial performance case as the same rule "in a somewhat different form."

The instant case was tried below and argued on appeal on the basis that the trial court refused to let the defendant prove "lack of wilfulness." In the trial court the defendant wanted to prove lack of willfulness, in the main, to bring himself within the substantial performance rule.

It would appear that defendant seeks to make "lack of wilfulness" the same as



the good faith in which the defendant contractor is required to have acted under the general rule set forth in American Jurisprudence.

In the leading case of *Thomas Haverty Co. v. Jones*, supra, 185 Cal. at page 289, 197 P. at page 107, the court said that the omissions or deviations must not be "willful or fraudulent" (emphasis added). It is true that the court was there talking of the conduct necessary for a contractor to bring himself within the substantial performance rule and not the problem of whether to use the cost or value theory.

In *Perry v. Quackenbush*, supra, again talking about bringing oneself within substantial performance, the court said the failure must not have resulted from design or bad faith.

One of the obvious deductions from the above two leading California cases is that, in substantial performance cases, the word "willful" or "design" has no connotations of fraud or bad faith; else there would be no necessity to add the disjunctive of "or fraudulent" in the *Thomas Haverty* case, or of the "bad faith" in the *Perry v. Quackenbush* case.

The "lack of wilfulness" or "good faith" that defendant sought to prove would appear to be the negative of the "fraudulent" of the *Thomas Haverty Co.* case, supra, or the "bad faith" of the *Perry* case, supra, and not the negative of the simple willful in the sense of intentional.

The *Haverty* and *Perry* cases, although substantial performance cases, are particularly relevant to this discussion as the defendant vigorously contended that, in effect, he can prove substantial performance twice: once in the main case of liability and once in the choice between the cost or value theories as to the measure of damages.

In our previous discussion of whether or not the defendant had the right to prove, or attempt to prove, substantial performance, we found that the majority and better rule is that there cannot be the "good faith" required by the substantial performance rule if there have been intentional major deviations from the terms of the contract. See 6 A.L.R. 137.

[4] We hold that under the law of the case, and the facts proved and offered to be proved, there has been or would be a complete failure to prove, and it would be impossible to prove the "good faith" or "lack of wilfulness" required under the rule contended for by the defendant in the instant case.

In addition, it should be noted that the defendant did not prove, or offer to prove, the other factors of the American Jurisprudence rule, to wit: "a substantial part of what has been done must be undone." To the contrary, defendant's expert witness Albert Leroy testified that it would not be necessary to undo any of the work. He would simply (1) put the missing wood sheathing over the existing exterior stucco and re-stucco and (2) put plaster over the existing interior boards.

[5] As quoted, Professor Corbin argues that the burden is on the defendant to affirmatively and convincingly prove that economic waste would result from the replacement of the omissions and defects. In all fairness this would appear proper as it is the defendant who is seeking to prove a situation whereby he will get equitable relief from a rule of law. The same reasoning would apply as to proof that a substantial part of what has been done must be undone.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur

Hearing denied; CARTER, J., dissenting.

164 Cal.App.2d 619

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Louie Ellis WESTON, Jr., Defendant and  
Appellant.

Cr. 2845.

District Court of Appeal, Third District,  
California.

Oct. 28, 1958.

Defendant was convicted of offense of taking the motor vehicle of another without consent of owner and with intent to temporarily deprive owner of the possession of vehicle in violation of statute after prior conviction for a similar offense. The Superior Court, Mendocino County, Hale McCowen, J., rendered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that the evidence supported conviction.

Judgment affirmed.

# 1. Criminal Law ¶641(1)

On appeal from conviction for taking motor vehicle of another without consent of owner and with intent to temporarily deprive owner of possession of vehicle in violation of Vehicle Code, record showed that defendant was duly defended and that he received a fair trial. West's Ann.Vehicle Code, § 503.

# 2. Automobiles ¶355(10)

Evidence supported conviction for taking the motor vehicle of another without consent of owner and with intent to temporarily deprive owner of possession of vehicle in violation of Vehicle Code. West's Ann.Vehicle Code, § 503.

Edmund G. Brown, Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant above named was charged with a violation of section 503 of the Vehicle Code, the information alleging that he did "take a motor vehicle not his own, to-wit, the motor vehicle owned by Doyle Crane, without the consent of the said Doyle Crane and with intent to temporarily deprive the said Doyle Crane of the possession of said motor vehicle." He was also charged with a prior conviction of a similar offense. He pleaded not guilty to the offense charged, but admitted the prior conviction. Following a trial, at which he was represented by the public defender, the jury returned a verdict of guilty. Judgment was pronounced and defendant has appealed from the judgment.

Upon appellant's request that an attorney be appointed to represent him upon the appeal, the court appointed Mr. Douglas C. Busath of the Sacramento Bar. Mr. Busath has informed the court that after a thorough review of the record it is his opinion that appellant had a fair trial and there are no meritorious grounds of appeal.

[1, 2] However, we have made a careful study of the entire record and agree that the appeal is without any merit whatever. The evidence is overwhelming that appellant took an automobile belonging to Doyle Crane in the city of Ukiah and, without the owner's permission, drove it to Clear Lake in Lake County where he was apprehended while in possession of the automobile. The record shows that appellant was ably defended; that he received a fair trial and that the evidence fully supports the judgment.

The judgment is affirmed.

Douglas C. Busath, Sacramento, for appellant.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

164 Cal.App.2d 739

**PERFECTION PAINT PRODUCTS, a  
Corporation, Plaintiff and Respondent,**

**v.**

**Girthon JOHNSON, Defendant and  
Appellant.**

**Civ. 17989.**

**District Court of Appeal, First District,  
Division 1, California.**

**Nov. 3, 1958.**

Proceeding wherein plaintiff levied execution on defendant's wages pursuant to judgment. The Superior Court, Alameda County, Allen G. Norris, J., entered order denying defendant's claim of exemption, and defendant appealed. The District Court of Appeal, Peters, P. J., held that under statute providing that all earnings of debtor are exempt from execution or attachment if necessary for use of debtor's family residing within state unless debts are incurred by debtor, his family, or wife, for common necessities of life, burden of proof was upon defendant to establish his right to such an exemption, and where defendant's summary of obligations listed one obligation simply as "incidentals", and another as "installment contracts" which were not shown to be reasonably necessary for defendant or his family, and wife earned a certain amount of money per month which when added to the family balance sheet showed an excess of income over expenses, trial court did not abuse its discretion in finding that certain amount of defendant's income was subject to execution.

Affirmed.

### **1. Appeal and Error ☞770(1)**

Where appellee filed no brief on appeal from trial court's order to effect that certain amount of appellant's monthly wages were subject to execution, District Court of Appeal could accept as true statement of facts in appellant's opening brief and could assume that appellant's claim that all of his wages were entirely

exempt because necessary for support of his family was meritorious. West's Ann. Rules on Appeal, rule 17(b).

### **2. Appeal and Error ☞773(5)**

Appellee's failure to file brief on appeal of case to District Court of Appeal does not mean that case will automatically be reversed, since burden to show error is on appellant, and therefore District Court of Appeal must examine appellant's brief to see if points raised are meritorious, and, if found not to be meritorious, should affirm. West's Ann. Rules on Appeal, rule 17(b).

### **3. Exemptions ☞48(1), 68**

Basic theory underlying statute exempting all of earnings of debtor if necessary for support of debtor's family residing within state unless such debts were incurred by debtor, his wife or family, for common necessities of life, is that a debtor and his family, regardless of the debtor's improvidence, will retain enough money to maintain a basic standard of living in order that the debtor may have a fair chance to remain a productive member of the community, and statute should be liberally construed in order to effectuate this purpose. West's Ann. Code Civ. Proc. § 690.11.

### **4. Exemptions ☞148**

Burden of proof is upon judgment debtor to establish his right to exemption under statute exempting from execution all the earnings of debtor if necessary for use of his family residing within state and supported in whole by debtor, unless debts for which execution is sought were incurred by debtor, his wife, or family, for common necessities of life. West's Ann. Code Civ. Proc. § 690.11.

### **5. Exemptions ☞68**

The determination of what is necessary for the use of the debtor's family under statute exempting from execution all of the earnings of debtor if necessary for use of his family residing within state and supported in whole by debtor, unless debts for which exemption is sought were



incurred by debtor, his wife, or family, for common necessities of life, must be largely left to the discretion of the trial court. West's Ann.Code Civ.Proc. § 690.11.

#### 6. Exemptions § 123

Under statute exempting from execution all the earnings of debtor if necessary for use of his family residing within state and supported in whole by debtor, unless debts for which execution is sought were incurred by debtor, his wife, or family, for common necessities of life, defendant's summary listing of one obligation as "incidentals" and another as "installment contracts" without any further explanation by defendant whether they were necessary for defendant or his family, plus fact that defendant's wife earned a certain amount per month which if added to family balance sheet would show excess of income over expenses, did not entitle defendant to exemption of all of his earnings. West's Ann.Code Civ.Proc. § 690.11.

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Jane H. Van Hook, Oakland, for appellant.

Stanley M. Fernwood, Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff has a final judgment against defendant for over \$3,800. Plaintiff levied execution on defendant's wages. Defendant claimed that such wages were entirely exempt because all of his earnings were necessary for the support of his family, supporting such claim by the required affidavit. Plaintiff filed an affidavit in opposition. A hearing was had. No transcript of that hearing has been filed. The trial court entered a minute order to the effect "that Thirty-eight Dollars (\$38.00) of the monthly wages is subject to execution." Defendant appeals.

[1,2] Plaintiff has failed to file a brief in support of the order. In such event, under Rule 17(b) of the Rules on Appeal "the court may accept as true the state-

ment of facts in the appellant's opening brief." The court may assume that the point urged on appeal is meritorious. *Postin v. Griggs*, 66 Cal.App.2d 147, 151 P.2d 887; *Bendlage v. Kohlsaatt*, 54 Cal. App.2d 136, 128 P.2d 691. But this does not mean that the case will automatically be reversed. The burden to show error is on appellant. Therefore, the court must examine appellant's brief to see if the points raised are meritorious, and, if found not to be meritorious, should affirm. See, generally, 4 Cal.Jur.2d § 496, p. 334.

In his affidavit claiming the exemption defendant lists his income as \$348 per month and his "necessary monthly expenses" as \$375.50. Included in the list are "Installment Contracts—\$71.00" and "Incidentals—\$25.00." Appellant states in his brief that he and his wife testified at the hearing as the only witnesses; that appellant testified that he is regularly employed by Crown Paint Company and receives from them \$348 monthly as wages; that his wife works intermittently as a domestic, averaging about \$16 a week from this source.

Appellant claims that on such a record, as a matter of law, he is entitled to an exemption of all of his wages under section 690.11 of the Code of Civil Procedure. That section provides that one-half of the earnings of a wage earner for a fixed period are exempt from execution without filing a claim and that "All of such earnings, if necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor" are exempt, upon filing a claim therefor unless the debts are incurred "for the common necessities of life" or for personal services of an employee of the debtor. Of course, whether such earnings are "necessary for the use of the debtor's family" presents a question of fact.

[3-5] The basic theory of such exemption is that a debtor and his family, regardless of the debtor's improvidence, will retain enough money to maintain a basic standard of living in order that the debtor

may have a fair chance to remain a productive member of the community. *Bailey v. Superior Court*, 215 Cal. 548, 11 P.2d 865; *Avilla v. Avilla*, 81 Cal.App.2d 210, 183 P.2d 668. The statute should be liberally construed in order to effectuate this purpose. *Holmes v. Marshall*, 145 Cal. 777, 79 P. 534, 69 L.R.A. 67; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal.App. 749, 108 P. 717. But the burden of proof is upon the judgment debtor to establish his right to such an exemption. *Carter v. Carter*, 55 Cal.App.2d 13, 130 P.2d 186; *Bertozzi v. Swisher*, 27 Cal.App.2d 739, 81 P.2d 1016; *Murphy v. Harris*, 77 Cal. 194, 19 P. 377. In determining whether the debtor has met this burden of proof the trial court is necessarily vested with wide discretion. This is so because the determination of what is "necessary for the use of the debtor's family" is not subject to precise definition, and differs with each debtor. Thus, the determination must be largely left to the discretion of the trial court. *Sanker v. Humborg*, 48 Cal.App.2d 205, 119 P.2d 433; see also *Los Angeles Finance Co. v. Flores*, 110 Cal.App.2d Supp. 850, 243 P.2d 139.

The trial court has impliedly found that the debtor has not met the required burden, and that \$38 a month of his income is subject to execution, i. e., not "necessary" for him or for his family. In attacking this finding we are not supplied with a reporter's transcript. We are furnished with the two affidavits, and appellant's opening brief, which purports to summarize the evidence produced at the hearing. According to the affidavit and summary, appellant's obligations exceed his income by \$27.50. But one such obligation is listed as "Incidentals" for which \$25 is allocated. This does not prove, as a matter of law, that such "incidentals" were reasonably necessary for the debtor or his family. Another ambiguous and unexplained item is "Installment Contracts—\$71.00." What the installments were for and whether the articles involved were necessary for the family does not appear. Appellant also concedes that his wife earns

over \$64 per month as a domestic. If this figure be included, the family balance sheet shows an excess of income over expenses.

[6] Under these circumstances it cannot be held that, as a matter of law, the trial court abused its discretion in finding that \$38 a month of the debtor's income was subject to execution. The appellant has failed to meet the burden of establishing that all of his wages, including the \$38, were "necessary" for the use of his family.

The order appealed from is affirmed.

BRAY, J., and ST. CLAIR, J. pro tem.,  
concur.



**C. F. BOLSTER CO., a copartnership,  
Plaintiff and Respondent,**

**v.**

**J. C. BOESPFLUG CONSTRUCTION COMPANY, a corporation, and The Travelers Indemnity Company, a corporation, Defendants and Appellants.\***

**Civ. 23195.**

**District Court of Appeal, Second District,  
Division 2, California.**

**Oct. 22, 1958.**

Plastering subcontractor's action against the general contractor and its surety for extra work allegedly done by subcontractor at defendant contractor's direction in construction of certain buildings. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment for subcontractor and general contractor and its surety appealed. The District Court of Appeal, Herndon, J., held that evidence sustained finding that extra work done by subcontractor was necessitated because of failure of general contractor to prepare sur-

\* Opinion vacated 334 P.2d 247.

faces in accordance with specifications and that general contractor's actions constituted waiver of requirement that claims for extra work could not be recognized unless agreed to in writing before work was done.

Affirmed.

#### 1. Contracts ☞350(1)

In action by plastering subcontractor against general contractor and its surety for extra work allegedly done by subcontractor at general contractor's direction in construction of certain buildings, evidence sustained finding that extra leveling coat of cement plaster which subcontractor applied to the exterior concrete surfaces of buildings was necessitated by failure of general contractor to properly prepare surfaces to receive the two coats of plaster called for by specifications.

#### 2. Contracts ☞232(2)

"Extra work" as used in connection with a building contract means work arising outside of and entirely independent of the contract, something not required in its performance and not contemplated by parties, and not controlled by contract.

See publication Words and Phrases, for other judicial constructions and definitions of "Extra Work".

#### 3. Contracts ☞232(1)

Extra work as used in construction contract may be performed by contractor for owner or by subcontractor for general contractor.

#### 4. Contracts ☞232(7)

Where extras in construction job are of a different character from work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered.

#### 5. Contracts ☞350(1)

In action by plastering subcontractor against general contractor and its surety for extra work allegedly done at request of general contractor, evidence sustained finding that extra leveling coat of plaster placed on outside concrete surfaces because of failure of general contractor to prepare

such surfaces properly was extra work required by general contractor.

#### 6. Contracts ☞350(1)

In action by plastering subcontractor against general contractor and its surety to recover for extra work done in performance of subcontract, evidence sustained findings that extra leveling coat of plaster on concrete exterior surfaces of building was done at general contractor's direction, that extra coat was necessitated by imperfect performance of concrete work for which general contractor was responsible, and that general contractor was fully aware that architect's requirements could not be fulfilled without doing extra work.

#### 7. Appeal and Error ☞991

Resolution of purely factual questions respecting performance of extra work by building subcontractor was for the trial court.

#### 8. Appeal and Error ☞996

Since findings on factual questions were supported by substantial evidence, District Court of Appeal was without power to substitute its deductions for those of the trial judge.

#### 9. Contracts ☞332(3)

Requirement that waiver of condition that authority for extra work be in writing must be pleaded, is satisfied by allegations of facts which would constitute a waiver.

#### 10. Contracts ☞332(3)

In subcontractor's action against general contractor for extra work done in performance of subcontract which provided that claims for extra work would not be allowed unless approved in writing, complaint incorporating subcontract and alleging that in addition to the work required to be done under the terms of subcontract and at the special instance and request of general contractor, subcontractor applied a leveling coat of cement plaster to the building, constituted sufficient pleading of waiver of requirement of written authority.

#### 11. Contracts ☞232(4)

Where subcontractor required by building specifications to apply two coats of



plaster to exterior surfaces submitted written offer to apply an extra leveling coat in order to cure imperfections in general contractor's work and general contractor thereafter directed subcontractor to proceed without referring to necessity of compliance with requirement of subcontract for written authority, general contractor's action constituted a waiver of provision that no claim would be allowed for extra work unless authorized by a written order.

## 12. Appeal and Error §§991, 996, 1011(1)

Generally, existence of an implied contract is usually a question of fact for trial court and where evidence is conflicting or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, question of fact is presented for decision of trial court.

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Monteleone & McCrory, Los Angeles, for appellants.

Mantalica, Barclay & Teegarden, Lewis C. Teegarden, Los Angeles, for respondent.

HERNDON, Justice.

In the court below plaintiff, C. F. Bolster Co., a subcontractor, recovered judgment against defendant, J. C. Boespflug Construction Company, the general contractor, and The Travelers Indemnity Company, its surety, for extra work allegedly done by plaintiff at defendant contractor's direction in the construction of certain school buildings for the Los Angeles City High School District. By the terms of a subcontract, dated October 12, 1954, plaintiff undertook to do the interior and exterior plastering work on the project in conformity with and subject to the plans and specifications for the agreed sum of \$201,914.

The trial court made findings which sustained plaintiff's allegations that an extra leveling coat of cement plaster which it applied to the exterior concrete surfaces of said buildings was necessitated by the failure of the defendant properly to prepare them to receive the two coats of plaster called for by the specifications; that this

extra work was done at defendant's direction and that the reasonable value of the labor and materials utilized therein was \$8,135.96. Plaintiff took judgment for this amount with interest and attorneys' fees.

The subcontract incorporates by reference the plans and specifications on the project which were prepared by the architect, Mr. A. C. Zimmerman. See *Enochs v. Christie*, 137 Cal.App.2d Supp. 887, 889, 291 P.2d 200; *Bell v. Rio Grande Oil Co.*, 23 Cal.App.2d 436, 440, 73 P.2d 662. Under the terms of the specifications so incorporated, all materials furnished and work done were subject to the architect's inspection and approval for the owner. The architect was declared to be the interpreter of the specifications and the judge of the quality of materials, workmanship and performance.

An entire section of the specifications, section "K", deals with the plastering work which was plaintiff's responsibility under the subcontract. This section required plaintiff to apply two coats of plaster: first a "brush coat" which was essentially a coat of paint consisting of colored stucco without sand; and, second, a "dash coat", which was described in the testimony as a soupy mortar mix sometimes applied with a "dash brush." The specified thickness of the dash coat was  $\frac{3}{8}$  of an inch and it was provided that "[t]he dashing shall be done with a plasterer's dash brush using a strong whipping motion to secure a good bond." It was provided in paragraph 56 of section "K" that "[a]t least one week prior to starting the work, the contractor shall make up samples of stucco work under the direction of the architect. The finished work shall match the approved samples in color and texture."

The specifications (section K) require that "Concrete surfaces to be plastered shall be finished, cleaned and sandblasted as specified in the section on Portland Cement Concrete. Before starting plastering, the subcontractor for the work of this section shall inspect all surfaces to be plastered and report to the contractor and inspector any surfaces to be plastered which have not

been prepared for plastering as specified  
\* \* \*"

On February 11, 1955, plaintiff wrote defendant a letter reading as follows: "On the above project, we would like permission to machine apply the exterior stucco coat. It has been our experience, and the experience of the industry as a whole, that machine application produces a finished surface that is much superior to hand application. There will be no change in price." It will be noted that the foregoing requested a change from the method of application required by the above quoted section of the specifications which provided for application of the dash coat "with a plasterer's brush." Defendant transmitted the above letter to the architect on February 15, 1955, who wrote defendant as follows:

"Where stucco dash coat is specified, (Par. 55, Sec. K, Contract Specifications), the Architect will approve the application of stucco by machine, provided it is an air spray machine and the exterior woodwork is properly masked. A demonstration of the method of masking and application will have to be approved by the Inspector and the Architect before starting the stucco work. If the methods are approved, the Architect will process a change order to the above-referenced paragraph. Par. 56, Sec. K, Contract Specifications, requires samples of stucco work. If possible, these samples should be made at the time the machine application is demonstrated. As to the texture of the dash coat, the Architect has in mind a texture produced by a slight troweling of the dash coat. When you get ready to make the samples, the Architect will give you the address of a building to look at."

Defendant promptly transmitted the architect's letter to plaintiff, and subsequently notified plaintiff of the building to which the architect referred. By appropriate change order the specifications were modified to permit plaintiff to apply the stucco by means of a gun instead of by hand.

The section of the specifications on Portland Cement Concrete, section "E" (to which the above quoted plastering specifications referred), deals with the requirements of the concrete work for which *defendant* was responsible in this case. The provisions of this section required defendant to grind down or otherwise remove fins, pour lines, bulges, stains and irregularities of surfaces, and to sandblast the concrete surfaces which were to be plastered. It was further provided that "In addition, all exterior surfaces to be plastered with a dash coat shall have all irregularities removed which will show through the dash coat of plaster \* \* \*."

There is substantial evidence in the record, both testimonial and photographic, tending to prove the unsatisfactory conditions of the concrete surfaces of the exterior walls which defendant constructed and on which plaintiff was obligated to apply plaster. There is testimony as to the existence of excessive numbers of ridges, protrusions, indentations, and other irregularities on the surface of the concrete which had to be removed by grinding or sandblasting operations conducted by defendant. And there is evidence that as a result of the sandblasting operations, there was considerable pitting and scoring of the concrete surfaces on which plaintiff was required to work.

Plaintiff offered expert testimony to prove that two coats of plaster, consisting of a brushcoat and a 3/32-inch dash coat, as called for by the specifications, would not cover the irregularities and imperfections in the concrete surfaces as prepared by defendant. There is testimony by an ex-employee of defendant which gives substantial support to plaintiff's contention that defendant was having serious difficulty in bringing the concrete surfaces up to specifications. This witness testified that at the time the concrete work was done he was defendant's construction superintendent on the job; that when the forms were removed "the concrete was in fair condition, except, when we started sandblasting, it opened a lot of voids, and that required

a lot of filling"; that in his opinion a  $\frac{3}{32}$ -inch dash coat of stucco would not have been sufficient to cover the imperfections, and that his estimate of the cost of putting the concrete in shape so that the imperfections would be satisfactorily covered by the specified dash coat "would run around ten to twelve cents a square foot." The witness testified to conversations with plaintiff's representatives in which various methods of preparing the concrete surfaces for the application of plaster were discussed.

In June, 1956, plaintiff's employees prepared a number of samples of external stuccoing on a wall of one of the buildings which defendant had constructed. Among these samples were examples of both hand and machine application, including one consisting of a brush coat and a dash coat applied by hand as called for in the specifications. When these several samples were submitted to the architect for his approval, he rejected all except one which had been prepared by machine application with *three* coats of plaster. This sample had been prepared by the application of a machine-applied base or "float" coat of plaster considerably thicker than the dash coat called for in the specifications, followed by two machine applied dash coats.

In late July or early August defendant requested a bid from plaintiff for preparing the external concrete surfaces for the admitted purpose of avoiding any dispute as to responsibility for preparing the concrete surfaces. On August 18, 1955, plaintiff replied by letter with an offer to apply a "leveling coat" of plaster to the external concrete surfaces at an additional cost of \$11,368. Defendant did not immediately respond to this offer. However, on September 28, 1955, defendant wrote to plaintiff as follows:

"With reference to your letter of August 18, 1955, regarding application of a leveling coat to exterior concrete surfaces, this is to advise that no such

change was requested or authorized by this office.

"Subsequent to receipt of your letter the architect inspected the concrete surfaces of the buildings to receive dash coat and has approved the surfaces as fully complying with the requirements for preparation of concrete surfaces outlined in Section E of the contract specifications.

"The architect, at the same time, selected and approved one of the samples that you applied over said surfaces. This application of stucco dash coat will be applied by you in strict accordance with the specifications, particularly, Section K, and must meet with the architect's approval. Earlier in the year the architect gave conditional approval of a machine application for the dash coat, provided that such application first be approved by him. If it is impossible for you to secure a satisfactory and approved job, using mechanical methods, it may be necessary to revert to hand methods outlined in the specifications, which is your responsibility under the terms of our subcontract."

Plaintiff replied the following day as follows: "In accordance with our subcontract for plastering on the above mentioned construction, we are now, and have been for some time, ready to proceed with the application of dash coat of plaster on exterior concrete walls but have been unable to do so because surfaces have not been prepared for plastering. Pursuant to our contract and the specifications, we do hereby report to you that the concrete surfaces to be plastered have not been prepared for plastering as specified in the section of specifications on concrete Portland Cement. This surface preparation to be done is a part of Portland Cement concrete work as set forth in Section E, Paragraph 1-G and Section E, Paragraph 77 of specifications. This report is hereby given you pursuant to Section K, Paragraph 48 of



specifications. When surfaces have been prepared, we shall proceed forthwith with the dash coat. Delay on your part is preventing us from proceeding and is resulting in additional costs to us in performance of our subcontract."

The foregoing assertions by plaintiff that the concrete surfaces were not properly or adequately prepared provoked a reply from defendant on October 4, 1955, in which defendant insisted that the concrete surfaces fully complied with the requirements of section "E" of the specifications, and proceeded to identify the buildings which were or would be ready to receive the plaster. The letter concluded: "*You are herewith requested to proceed with your work as directed* and cooperate in a proper manner to complete this job to our mutual advantage and preclude any further delays." (Emphasis added.)

Plaintiff replied to the letter of October 4 by letter dated October 13, 1955, stating: "Pursuant to the request contained in your letter of October 4, 1955, we are 'proceeding with the work as directed' by you. Before we can properly apply the dash coat as provided in the specifications, it is necessary that certain preparatory work be done to put the surfaces in a condition to receive the dash coat. At your request, we have begun such preparation, which consists of applying a stucco float finish to cover imperfections and irregularities in the concrete. Obviously there is a dispute between us concerning responsibility for doing the work above described, and it is our contention that such preparatory work is not a part of the plastering specifications. However, at your request we are proceeding with the work. The dispute can be resolved upon completion of the contract. In the meantime for our own protection, we are treating this preparatory work as extra work and will bill you accordingly."

It does not appear that defendant made any reply to the last quoted communication. Plaintiff thereafter proceeded with the plastering of the exterior walls of the

four buildings utilizing the base or "float" coat described above followed by the application of two "dash" coats. In other words, plaintiff followed the method of application used in producing the sample which the architect had approved.

Both in the trial court and on this appeal, defendant has insisted most vigorously that the exterior plastering work for which plaintiff is compensated by the judgment at bar was neither requested by defendant nor necessitated by defective concrete surfaces, but was required by the inspector and architect as a condition of granting plaintiff's request for permission to apply the plaster by a machine method in lieu of the hand method called for in the specifications. This contention centers upon an issue of fact and constitutes an attack upon the trial court's Finding of Fact No. IX which reads as follows: "In addition to the work required of plaintiff under the terms of said subcontract and at the request of the defendant, J. C. Boespflug Construction Company, the plaintiff performed extra services and supplied extra materials consisting of an additional coat of cement plaster to all of the exterior concrete surfaces of the buildings at Westchester High School. By reason of said extra work, plaintiff's costs were increased and the reasonable value of said labor and materials is the sum of \$8,135.96. Said sum became due and payable on September 16, 1956."

[1] Our review of the record convinces us that the challenged finding is amply sustained by substantial evidence.

It is clear from the recited evidence that as late as mid-October, 1955, plaintiff and defendant were in disagreement as to what performance by plaintiff would be necessary in order to produce exterior wall surfaces which would conform to the requirements of the specifications and meet with the approval of the architect. There was abundant evidence that the concrete surfaces as they appeared in August were quite unsuitable to receive the application of plaster. Defendant's request for plain-

tiff's bid on the job of preparing the concrete could be construed most reasonably as indicating defendant's recognition that extra work was necessary. It bears repetition that the architect previously had rejected the sample of stucco work consisting of two coats applied in the manner prescribed in the original specifications and had approved a three-coat sample applied in the manner later followed by plaintiff in completing the work. It may be inferred from the evidence that defendant was fully informed concerning the architect's declarations in this regard. Defendant was advised by plaintiff's letter of October 13 that plaintiff considered itself under direction to apply the plaster in the manner which the architect had approved. In these circumstances, particularly in view of the urgency of the situation then existing, the last paragraph of defendant's letter of October 4 instructing plaintiff to proceed "as directed" was susceptible to interpretation as a demand that plaintiff proceed without further delay to apply the stucco in a manner that would satisfy both the architect and the specifications.

[2-8] Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract. *Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council*, 128 Cal. App.2d 676, 683, 276 P.2d 52; *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 321, 323, 110 P. 933; see 6 Cal. Jur. 370, § 224. Extra work may be performed by the contractor for the owner (*Punton v. Sapp Bros. Construction Co.*, 143 Cal. App.2d 696, 701, 300 P.2d 271; *Parkford v. Union Drilling & Petroleum Co.*, 118 Cal. App. 538, 544, 5 P.2d 440) or by the subcontractor for the general contractor. *Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council*, supra, 128 Cal. App.2d 676, 683-685, 276 P.2d 52. Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered. *Park-*

*ford v. Union Drilling & Petroleum Co.*, supra, 118 Cal. App. 538, 544, 5 P.2d 440; 17 C.J.S. Contracts § 371h, p. 854. In the instant case, as we have pointed out, the finding that extra work was required by the defendant is supported by substantial evidence to be found in the circumstances, in the communications attending the controversy and in the construction apparently placed on the contract by the parties as indicated by their conduct. Cf. *Wyman v. Hooker*, 2 Cal. App. 36, 41, 83 P. 79; *Punton v. Sapp Bros. Construction Co.*, supra, 143 Cal. App.2d 696, 701, 300 P.2d 271; *Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council*, supra, 128 Cal. App.2d 676, 681-683, 276 P.2d 52. Considering all the circumstances appearing from the record, it was not unreasonable for the trial judge to conclude that the extra work on the building was done at defendant's direction, that it was necessitated by imperfect performance of concrete work for which defendant was responsible and that defendant was fully aware that the architect's requirements could not be fulfilled without doing the extra work. See *Bavin & Burch Co. v. Bard*, 81 Cal. App. 722, 728-729, 255 P. 200; *Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council*, supra; 9 Cal. Jur.2d 296, § 13. The resolution of these purely factual questions is within the exclusive province of the trier of the facts. See *Greenwald v. Royal Indemnity Co.*, 112 Cal. App.2d 183, 185, 245 P.2d 1115; *Lowry v. Law*, 27 Cal. App. 483, 492, 150 P. 660. Since the findings are supported by substantial evidence this court is without power to substitute its deductions for those of the trial judge. *Primm v. Primm*, 46 Cal.2d 690, 693-694, 299 P.2d 231; *Crawford v. Southern Pacific Co.*, 3 Cal. 2d 427, 429, 45 P.2d 183; *New v. New*, 148 Cal. App.2d 372, 383, 306 P.2d 987.

[9-11] Defendant contends that a provision of the subcontract requiring a written change order specifying any extra work to be done bars any recovery by plaintiff. Section 12 of the subcontract provides as follows: "No claims for extra work \* \* will be recognized or paid for unless

agreed to in writing before the work is done \* \* \* in which writing shall be specified in detail the extra work or changes desired, \* \* \*." Since no written authorization of this character was given, it is defendant's argument that plaintiff was required to plead and prove a waiver of this condition. See 25 Cal.Jur. 931, § 6. It is settled, however, that this requirement of pleading is satisfied by the allegation of facts which would constitute a waiver. *Estrada v. Queen Ins. Co.*, 107 Cal.App. 504, 508, 290 P. 525. In the instant case the complaint incorporated the subcontract, including the requirement of a writing in connection with any extra work, and alleged "that in addition to the work required to be done by plaintiff under the terms of said subcontract, and at the special instance and request of the defendants, the plaintiff applied a leveling coat of cement plaster to the \* \* \* buildings \* \* \*." This pleading of a waiver is sufficient. *Estrada v. Queen Ins. Co.*, supra, 107 Cal.App. 504, 508, 290 P. 525.

The second phase of defendant's argument on this point is that the evidence is insufficient to sustain the finding of a waiver by defendant of the required writing. However, we have found the evidence sufficient to support the finding that the extra work was done at defendant's special instance and request. Plaintiff previously had submitted a written offer to do this work for a specified amount. Defendant thereafter directed plaintiff to proceed without referring to the necessity of compliance with the requirement of section 12 of the subcontract. It has been held that proof of similar conduct is sufficient to support the finding of a waiver. *Wilson v. Keefe*, 150 Cal.App.2d 178, 181, 309 P.2d 516; Cf. *Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council*, supra, 128 Cal.App.2d 676, 682-683, 276 P.2d 52; and see 9 Cal.Jur.2d 296, § 13. As stated in *Wyman v. Hooker*, 2 Cal.App. 36, 41, 83 P. 79, 81: "The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a sepa-

rate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates."

It was a purely factual question whether plaintiff adequately complied with the contractual provision requiring it to report to the contractor any surfaces not properly prepared before starting to plaster. It is implicit in the findings that the trial court resolved this issue in plaintiff's favor. Apart from the written communications from which we have quoted in our recital of the evidence, the record reveals that there were various discussions between the parties during the summer of 1955 in which the imperfections in the concrete surfaces were extensively discussed. Obviously, we cannot say that this evidence was insufficient to support a finding that the condition under discussion was adequately fulfilled. The same disposition must be made of defendant's argument that the extra work was occasioned solely by the change from the hand method to the machine method of application.

While it is true that the architect was constituted "the judge of the quality of materials and workmanship", his approval of the concrete surfaces could not properly be regarded as a binding adjudication of the issues which the trial court was called upon to decide in this case. There was no reason to believe that the architect as representative of the school district would ultimately have accepted buildings which failed to measure up to prescribed standards. It seems reasonable to conclude that as of mid-October, 1955, neither plaintiff nor defendant could predict with assurance whether or not the architect would accept the buildings after an application of the stucco in the manner provided by the original specifications. Indeed, the architect's rejection of a sample prepared in that way was a fact sufficient to support a finding that he probably would not have accepted them. At that time both plaintiff and defendant were faced with the necessity of making immediate decisions on the basis of their respective evaluations of the requirements of the specifications and



of the conditions presented. Completion time was running out, and there appeared to be ample basis for apprehension of substantial liabilities in the event of further delay. It was within the sole province of the trial court to determine the factual questions upon which liability here depended: what quality of performance was being demanded of plaintiff; what methods were appropriate or essential to accomplish acceptable performance; whether extra work was necessary, and, if so, whether it was necessitated by faulty concrete surfaces or by plaintiff's choice of method, and whether plaintiff reasonably complied with the conditions on its part to be performed.

[12] "It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court." *Medina v. Van Camp Sea Food Co.*, 75 Cal.App.2d 551, 555-556, 171 P.2d 445, 448; *Caron v. Andrew*, 133 Cal. App.2d 412, 416, 284 P.2d 550.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



164 Cal.App.2d 663

**Ione A. NOMM, Plaintiff, Cross-Defendant and Respondent,**

**v.**

**Voldemar NOMM, Defendant, Cross-Complainant and Appellant.**

**Civ. 17998.**

**District Court of Appeal, First District, Division 1, California.**

**Oct. 29, 1958.**

Divorce action. The Superior Court, San Mateo County, A. R. Cotton, J., entered an order pendente lite, enjoining defendant husband from entering the dwelling house

of the parties, and an appeal was taken. The District Court of Appeal, St. Clair, J. pro tem., held that where, subsequent to the appealed order, an interlocutory decree was entered awarding the house to plaintiff wife, and no appeal was taken from the interlocutory decree, and the time for filing notice of appeal therefrom had run, question presented by appealed order was moot and the appeal would be dismissed.

Appeal dismissed.

#### 1. Appeal and Error ⇨447

An appeal from an injunction pendente lite does not affect the power of the court to hear and decide the case on the merits, even though some of the same issues as were involved in the injunction pendente lite were disposed of by the latter judgment.

#### 2. Appeal and Error ⇨790(3)

In divorce action, where an interlocutory decree awarding house to plaintiff wife was entered subsequent to an order enjoining defendant husband from entering the house, and no appeal was taken from the interlocutory decree, and the time for filing notice of appeal therefrom had run, question of propriety of restraining order was moot and an appeal therefrom would be dismissed.

#### 3. Appeal and Error ⇨781(4), 792

Either on motion of one of the parties or on the court's own motion, appeals may be dismissed as involving only moot questions.

Goth & Dennis, Redwood City, for appellant.

Walter S. Hunter, San Mateo, for respondent.

ST. CLAIR, Justice pro tem.

This is an appeal from an order *pendente lite* in a divorce action.

The order in question, issued after a hearing on an order to show cause, read, in part: "Wherefore, It Is Hereby Ordered, Adjudged And Decreed that the defendant be and he is hereby restrained and enjoined

from entering the dwelling house of the parties hereto at 232 Twenty Seventh Avenue, San Mateo, California from and after 5:00 o'clock P. M. of Friday, September 13, 1957 and until the further order of this court."

The action came to trial and an interlocutory decree was entered on March 4, 1958, awarding the house to plaintiff. No appeal has been taken from the interlocutory decree.

[1,2] The questions presented by this appeal are now moot. An appeal from an injunction *pendente lite* does not affect the power of the court to hear and decide the case on the merits, even though some of the same issues as were involved in the injunction *pendente lite* were disposed of by the later judgment. *Doudell v. Shoo*, 159 Cal. 448, 455, 114 P. 579; *Gray v. Bybee*, 60 Cal.App.2d 564, 571, 141 P.2d 32. The interlocutory decree in this case has awarded the home to plaintiff. An adjudication that the court should not have restrained defendant from entering it between September 13, 1957 and March 4, 1958, the date of the decree, could now have no real consequences. The order being prohibitory in form, but mandatory in its nature, its effect would have been stayed by the appeal. See *Food & Grocery Bureau of Southern California v. Garfield*, 18 Cal.2d 174, 177, 114 P.2d 579; *Smith v. Smith*, 18 Cal.2d 462, 465, 116 P.2d 3. The decree would supersede the restraining order, and defendant would not be entitled to possession now. Any determination of whether he should have been entitled to enter during the six months from September to March would be futile. The question might still have some vitality had an appeal been taken from the interlocutory decree, but no such appeal has been taken, and the time for filing the notice of appeal has now run.

[3] Either on the motion of one of the parties (*Mortgage Guarantee Co. v. Kolkey*, 30 Cal.App.2d 629, 630, 86 P.2d 1073) or on the court's own motion, appeals may be dismissed as involving only moot questions. *Piru Citrus Ass'n v. Williams*, 95

Cal.App.2d 911, 917, 214 P.2d 426; *County of Los Angeles v. Department of Social Welfare*, 114 Cal.App.2d 827, 250 P.2d 716.

The question being moot, the appeal is dismissed.

PETERS, P. J., and BRAY, J., concur.



164 Cal.App.2d 665

Betty ADAMS, Plaintiff and Respondent,

v.

CITY OF SAN JOSE, a Municipal Corporation,  
Defendant and Appellant.

Civ. 17901.

District Court of Appeal, First District,  
Division 2, California.

Oct. 29, 1958.

Action to recover for personal injuries sustained in fall allegedly caused by defect in city sidewalk. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment for plaintiff and city appealed. The District Court of Appeal, Draper, J., held that evidence, consisting mainly of photographs showing condition of sidewalk, was sufficient to sustain findings of jury as to existence of a dangerous defect in sidewalk which was sufficient to give city constructive notice thereof.

Affirmed.

#### 1. Evidence ⇄380

In action for personal injuries allegedly caused by fall on defective sidewalk, admission of photographs, which were identified by attendant at adjoining parking lot as accurately showing the condition of the sidewalk, did not constitute an abuse of discretion, notwithstanding fact that photographer did not testify, that there was no evidence of date pictures were taken, and

that parking lot attendant stated he could not remember whether pictures accurately showed condition of sidewalk as it had been on day of accident.

## 2. Evidence Ⓒ380

Testimony of a photographer is not necessary to establish admissibility of a photograph and all that is required is the testimony that photograph is a correct representation of the objects it portrays.

## 3. Appeal and Error Ⓒ970(2)

### Evidence Ⓒ382

Whether photograph accurately represents an object or scene is primarily a question for the trial court, and its ruling will be sustained unless an abuse of discretion is apparent.

## 4. Municipal Corporations Ⓒ791(2)

A city may be charged with constructive notice of defect in sidewalk if condition has existed for some time and is sufficiently conspicuous to have been discovered by reasonable inspection. West's Ann. Gov.Code, § 53051.

## 5. Municipal Corporations Ⓒ768(1), 791(2)

Where defect in sidewalk is minor, constructive notice does not follow from its existence over a period of time, nor does a minor or trivial defect amount to a dangerous or defective condition within meaning of statute respecting municipal liability for injuries caused by defective sidewalks. West's Ann. Gov.Code, § 53051.

## 6. Municipal Corporations Ⓒ821(6, 16)

Whether a given condition in sidewalk is dangerous or defective is normally a question of fact as is the question of whether condition was such as to impart constructive notice.

## 7. Appeal and Error Ⓒ930(1), 989

If matters are treated as question of fact, sole function of appellate court is to determine whether there is substantial evidence to support verdict upon such issues, and in such determination court must accept evidence most favorable to respondent together with every reasonable inference which may be drawn therefrom.

## 8. Municipal Corporations Ⓒ819(1, 6)

In pedestrian's action for personal injuries received in fall allegedly caused by defect in sidewalk, evidence sustained findings of jury that there was a dangerous defect in sidewalk and that such defect had existed long enough to give city constructive notice thereof.

Ferdinand P. Palla, City Atty., City of San Jose, San Jose, Jensen Zavarlis & Pestarino, Elmer D. Jensen, San Jose, for appellant.

Johnson, Thorne, Speed & Bamford, John E. Thorne, San Jose, for respondent.

DRAPER, Justice.

This is an action for damages for personal injuries sustained in a fall assertedly caused by defects in a sidewalk of defendant city. Jury verdict was for plaintiff, and defendant appeals from judgment entered upon that verdict.

The court admitted in evidence three photographs of the sidewalk area at the scene of the accident. They were identified by an employee of the parking lot which immediately adjoined the sidewalk. The owners of that lot were joined as defendants in this action. Although their motion for nonsuit was later granted, they were parties at this time and their employee was called as an adverse witness. Code Civ.Proc. § 2055. He identified the photographs as fairly representing the area where the accident occurred although, on voir dire, he testified that he did not remember whether they accurately showed the condition of the sidewalk as it had been on the day of the accident. Upon his testimony, and over appellant's objections, the photographs were admitted. The photographer did not testify and there was no evidence of the date the pictures were taken. Appellant assigns these rulings as error, contending that no adequate foundation was laid.

[1-3] The testimony of the photographer is not necessary to establish admis-



sibility of a photograph. *People v. Doggett*, 83 Cal.App.2d 405, 409, 188 P.2d 792. All that is required is testimony that the photograph is a correct representation of the objects it portrays. *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 201-202, 215 P. 675; see also *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 538, 123 P. 359; 18 Cal.Jur.2d 705-707. Whether a photograph accurately represents an object or scene is primarily a question for the trial court, and its ruling will be sustained unless an abuse of discretion is apparent. *Olson v. Meacham*, 129 Cal.App. 670, 673, 19 P.2d 527; *Hayes v. Emerson*, 110 Cal.App. 470, 473, 294 P. 765. No such abuse appears here, and the trial court's ruling that the photographs accurately show the scene of the accident is accepted by us. Evidence of this scene was relevant. *Barone v. Jones*, 77 Cal. App.2d 656, 660, 176 P.2d 392, 177 P.2d 30.

Appellant contends that the evidence is insufficient to sustain the verdict, arguing that it shows the sidewalk defect to be but minor or trivial, and thus not actionable. The only evidence relating in any way to the extent or nature of the defect consists of the testimony of plaintiff, that of the parking lot attendant, and the above photographs. Plaintiff testified "I stubbed my toe on a bad place in the sidewalk and I went down," and stated that the photographs showed the place in the sidewalk where she caught her foot. The parking lot attendant testified that there was "a little eruption" in the sidewalk. As to the photographs, we have pointed out that before their admission the attendant said he could not remember the condition of the sidewalk on the day of the accident, two years before trial, sufficiently to state whether the pictures accurately represent that condition. However, following admission of the photos, he testified that the sidewalk had been in the condition shown by them for about a year before the accident. Appellant relies upon the witness' testimony that he did not remember the condition of the sidewalk as showing that the later testimony is not reliable. How-

ever, the statements as to his lack of memory present only a conflict with the testimony last referred to. Under the well-established rule, conflicts in the testimony are to be resolved by the trier of the fact, rather than by an appellate court. When the photographs were admitted, the judge pointed out that the weight to be given them was "up to the jury." The jury's implied finding is that the photographs accurately portray the sidewalk at the date of the accident, and we have no occasion to disturb that finding.

Appellant, however, contends that even if the photographs were properly before the court, the evidence is insufficient to support the verdict.

[4,5] To sustain the verdict, the evidence must show (a) that the injury resulted from a dangerous or defective condition of the sidewalk, (b) which was known to defendant and (c) which defendant did not repair within a reasonable time after acquiring knowledge thereof. Gov.Code, § 53051. Here there was no express notice to the city of any defective condition of the walk. However, a city may be charged with constructive notice if the condition has existed for some time, and is sufficiently conspicuous to have been discovered by reasonable inspection. *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 427, 260 P.2d 55. Of course, where the defect is minor, constructive notice does not follow from its existence over a period of time. *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725. Nor does a minor or trivial defect amount to a dangerous or defective condition within the meaning of the statute. *Whiting v. City of National City*, 9 Cal.2d 163, 165, 69 P.2d 990.

[6,7] Whether a given condition is dangerous or defective is normally a question of fact (*George v. City of Los Angeles*, 11 Cal.2d 303, 308, 79 P.2d 723), as is the question whether the condition was such as to impart constructive notice (*Van Dorn v. City & County of San Francisco*, 103 Cal.App.2d 714, 717, 230 P.2d 393;

Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643). If these issues are treated as questions of fact, our sole function as an appellate court is to determine whether there is some substantial evidence to support the verdict upon such issues. 4 Cal.Jur.2d 482. In this determination, we must accept the evidence most favorable to respondent, together with every reasonable inference which may be drawn therefrom. 4 Cal.Jur.2d 487. Upon careful study of the photographs (particularly defendant's Exh. 3) in the light of these rules, we are satisfied that there is sufficient evidence to support the verdict.

[8] Appellant, however, suggests that these issues present questions of law, to be determined by this court. It is true that what constitutes a minor defect "is not always a mere question of fact." Whiting v. City of National City, supra, 9 Cal.2d 163, 165, 69 P.2d 990, 991. A like rule has been applied in determining whether the defect is sufficiently conspicuous to charge the city with constructive notice. Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977; Nicholson v. City of Los Angeles, supra, 5 Cal.2d 361, 54 P.2d 725. However, treating the question as one of law, to be reviewed by the appellate court without regard to the finding of the trial court (Beck v. City of Palo Alto, 150 Cal.App.2d 39, 42, 309 P.2d 125), our study of the photographs here precludes our determining that the defect was not dangerous or that it was not sufficient to give the city constructive notice. Peters v. City & County of San Francisco, supra, 41 Cal.2d 419, 260 P.2d 55.

Appellant cites decisions in which defects of less than specified depths have been held minor (see cases collected in Beck v. City of Palo Alto, supra, 150 Cal.App.2d 39, 43, 309 P.2d 125). Here, however, there is no testimony as to the dimensions of the sidewalk defect. Thus we cannot apply the rules of those decisions. We have before us only the photographs. As we have pointed out, our study of them leads us to the conclusion that the jury's verdict cannot be disturbed upon this appeal.

Appellant also argues that there is no evidence to show the existence of the defect for a period sufficient to charge the city with constructive notice. This contention overlooks the testimony of the parking lot attendant that the sidewalk had been in the same condition as shown in the photographs "for about a year" before the accident.

Whether viewed as a question of fact or of law, the evidence is sufficient to sustain the verdict.

Judgment affirmed.

KAUFMAN, P. J., and MARTINELLI, J. pro tem., concur.



164 Cal.App.2d 517

Jay Rocky PETERSON, by and through his Guardian ad litem, Ivan F. Peterson, and Ivan F. Peterson, Individually, Plaintiffs and Respondents,

v.

The ALLSTATE INSURANCE COMPANY, et al., Defendants,

The Allstate Insurance Company, a corporation, Defendant and Appellant.

Lorena Anna BAILEY, Cross-Complainant and Respondent,

v.

The ALLSTATE INSURANCE COMPANY, a corporation, Cross-Defendant and Appellant.

Civ. 9407.

District Court of Appeal, Third District, California.

Oct. 24, 1958.

Action on tort judgment. The judgment debtor cross-complained against her liability insurer. The Superior Court, Stanislaus County, David F. Bush, J., rendered judgment adverse to the insurer, and

it appealed. The District Court of Appeal, Peek, J., held that the evidence would sustain finding that the insurer's purported cancellation of policy had been result of a mistake; and held that cancellation by mistake is no cancellation at all.

Affirmed.

**1. Appeal and Error** ⇨219(2)

No objection having been made in trial court to findings, and no other or more definite findings having been proposed, any objection with regard thereto was waived.

**2. Appeal and Error** ⇨931(1)

On appeal, reviewing court will liberally construe findings in support of judgment and indulge in all reasonable inferences in support thereof.

**3. Insurance** ⇨235

In action on tort judgment, wherein judgment debtor cross-complained against her liability insurer, evidence would sustain implied finding that insurer's purported cancellation of policy had been result of a mistake.

**4. Insurance** ⇨233

A cancellation by mistake is no cancellation at all.

**5. Insurance** ⇨247

In action on tort judgment, wherein judgment debtor cross-complained against her liability insurer, evidence would sustain finding that insurer had waived its right to cancel policy for untimely and incomplete payment of premiums so long as payments made and accepted exceeded premium earned.

**6. Insurance** ⇨247

Where liability insurer, with full knowledge of insured's failure to perform in accordance with terms of contract, continued to recognize policy as being in full force and effect by accepting delinquent, as well as insufficient, payments thereon, such acts on part of insurer were wholly inconsistent with any intent to insist upon a forfeiture, and it therefore waived such ground as a basis for cancellation of policy.

**7. Insurance** ⇨247

Having waived strict compliance with deferred payment terms, insurer was bound to give insured a reasonable notice to thereafter comply strictly with schedule of premium payments before it could depart from its usual procedure and cancel policy for nonpayment of premium.

**8. Insurance** ⇨514

Liability insurer having breached its agreement, assured was no longer bound by policy terms relative to "actual trial" and could, if she acted in good faith, compromise tort claim against her.

**9. Insurance** ⇨514½

Where it is found that liability insurer has failed to defend an action on behalf of assured, while legally obligated to do so, a reasonable award of attorney fees in defending initial liability suit is appropriate.

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Leo J. Walcom, San Francisco, for appellant.

Ralph E. Kingston, Stockton, for plaintiffs-respondents.

Elmer L. Winger, Modesto, for cross-complainant-respondent.

PEEK, Justice.

This controversy arises out of an accident which occurred on May 20, 1954, when Jay Peterson, a minor, while riding his bicycle, was struck by an automobile owned and operated by the defendant, Mrs. Bailey. She reported the accident to her insurance company, the defendant, Allstate, and was informed that the company declined to defend upon the ground that her liability policy had been cancelled for nonpayment of premium. Thereafter an action was commenced against Mrs. Bailey by Ivan F. Peterson individually and as guardian ad litem for his son, Jay, which resulted in a judgment in favor of plaintiffs for damages growing out of the accident.

The present action was brought by plaintiffs against Mrs. Bailey and Allstate to



recover on the previous judgment. Mrs. Bailey cross-complained against Allstate, alleging that she had complied with all of the provisions of the policy and that the same was in full force and effect at the time of the accident. At the conclusion of the trial the court granted plaintiffs' motion to amend to conform to proof by adding the further allegation that Allstate, by its conduct, had waived its right to cancel the policy for nonpayment of premium and was thereby estopped from asserting such defense. Allstate, by its answer, admitted the issuance of the policy but denied that Mrs. Bailey had complied with all of its terms and asserted it had cancelled the policy for cause before the accident. The trial court found in accordance with the allegations of the complaint and cross-complaint and gave judgment against Allstate in the sum of \$5,000, the amount recovered against Mrs. Bailey in the first action, together with attorney fees incurred by her in defending the first action.

On appeal Allstate urges (1) that there was insufficient evidence to support the finding of a valid, uncanceled policy; (2) that the first action was not an "actual trial" as required by condition six of the policy; and (3) that there is no evidence to support the finding and judgment relating to Mrs. Bailey's right to attorney fees incurred by her in defending the first action.

The record discloses that on April 5, 1953, Allstate issued to Mrs. Bailey an automobile liability policy for the term ending April 5, 1954. It provided that the premium therefor should be paid in installments. Although the premium was ultimately paid in full, each deferred payment, as shown by the cost ledger sheet of her account which was placed in evidence by Allstate, was late for periods of a few days to more than a month.

On April 5, 1954, Allstate issued a certificate extending Mrs. Bailey's previous auto liability coverage to April 5, 1955, for a total premium of \$80.25 payable as follows: \$33.25 on delivery of the certificate;

\$24 three months after delivery of the certificate; and \$24 six months after delivery thereof.

On April 12, 1954, Mrs. Bailey paid \$16.58 to Allstate at its Modesto office. On April 13, 1954, Allstate mailed to her a cancellation notice for nonpayment of premium, giving her no credit for the partial payment made. On April 14, 1954, Allstate, having received the payment of \$16.58 at its Menlo Park office, mailed a notice of reinstatement to her notwithstanding that a portion of the amount due remained unpaid. On May 3, 1954, Allstate mailed a notice of cancellation for nonpayment of premium which stated that \$23.25 was past due on the first installment. This was erroneous since only \$16.67 was past due. Cancellation was declared to be effective May 15, 1954. Each notice of cancellation was in accordance with the provision of paragraph five of the contract allowing cancellation not less than 10 days after receipt of the notice by the assured. The accident in question occurred, as previously noted, on May 20, 1954.

The case was tried upon the theory that Allstate's purported cancellation was the result of a mistake or that by its actions it had waived its right to cancel the policy for nonpayment of premium, and hence in either event the policy was in full force and effect at the time of the accident. The memorandum opinion of the trial court treats the case in this same fashion.

[1,2] Allstate's first contention is that the evidence was insufficient to sustain the finding that the policy was in force on May 20. In this regard it attacks certain findings as being improper as well as unsupported by the evidence. Here it should be noted that no objections were made in the trial court to such findings, nor were other or more definite findings proposed. Hence any objection thereto was waived. *Kalmus v. Cedars of Lebanon Hospital*, 132 Cal.App.2d 243, 281 P.2d 872. It is the further rule that on appeal a reviewing court will liberally construe the findings in

support of the judgement (*Metcalf v. Hecker*, 127 Cal.App.2d 634, 274 P.2d 188) and indulge in all reasonable inferences in support thereof.

[3,4] Although it was established that Allstate mailed, and Mrs. Bailey received, the cancellation notice of May 3, there is ample evidence to support the trial court's finding that the policy was " \* \* \* on the 20th day of May, 1954, in full force and effect and was uncanceled and unrevoked" and the implied finding that Allstate's purported cancellation was the result of a mistake. The cancellation notice of May 3, stating that \$23.25 remained past due implied that only \$10 had been paid, when in fact she had paid \$16.58, indicates on its face that Allstate was mistaken regarding the amount paid by her. Moreover it may properly be inferred from the evidence and the cancellation notice that the policy was being cancelled because a portion (\$23.25) of the deferred premium payment was past due and unpaid; that if some amount less than that sum had been due, the cancellation notice would not have been sent when it was. This latter inference is supported by testimony elicited from one of Allstate's officers, James Mundell, the manager of its accounting division, who testified: " \* \* \* this is merely a situation where we attempted to cancel her [Mrs. Bailey] as soon as possible because the money had run out as far as we were concerned, \* \* \*" Mr. Mundell's statement reveals that Allstate attempted to cancel only because of its mistaken belief that Mrs. Bailey's payment covered her only to April 20, which in turn led to the mistaken belief that she was not covered on May 3, the date of the cancellation notice. As a matter of fact, her payment of \$16.58 covered her through May 12, 1954, and hence had not the 10-day notice been sent prematurely through mistake, she would have been covered on the day of the accident, May 20. Research has revealed no California case directly in point; however, we are impressed with the rule expressed in *Richmond Ins. Co. v. Zettwoch*, 216 Ky. 463, 287 S.W. 964, and *Fisher v. Globe & Rut-*

*gers' Fire Ins. Co.*, 147 La. 984, 86 So. 417, that a cancellation by mistake is no cancellation at all.

The record as summarized, when viewed in light of the cited rule, amply supports the conclusion of the trial court that had the insurer known the true state of affairs it would not have sent the notice of cancellation on May 3, and that since the cancellation notice was sent under a mistake of fact, it was consequently ineffective.

[5-7] Likewise without merit is the further contention of Allstate that there is no evidence to support the implied finding of the trial court that, by its conduct, it had waived its right to cancel the policy for untimely and incomplete payment of premium so long as the payments made and accepted exceeded the premium earned. As previously noted there can be no question that from the due date of the very first premium installment payment on the initial policy Mrs. Bailey had failed to perform in accordance with the terms of the contract. The record further shows that Allstate, with full knowledge of such facts, continued to recognize the policy as being in full force and effect by accepting delinquent, as well as insufficient, payments thereon. Such acts on the part of Allstate were wholly inconsistent with any intent to insist upon a forfeiture. It therefore waived such ground as a basis for cancellation of the policy. (See 16 *Appelman Ins. L. & P.* 812.) Having so waived strict compliance with the deferred payment terms, it was bound to give Mrs. Bailey a reasonable notice to thereafter comply strictly with scheduled premium payments before it could depart from its usual procedure and cancel the policy for nonpayment of premium. *Frad v. Columbian National Life Ins. Co.*, 2 Cir., 191 F. 2d 22, certiorari denied 342 U.S. 904, 72 S.Ct. 294, 96 L.Ed. 677.

[8] Allstate further contends that the judgment which formed the basis for the present action was not recovered after an "actual trial" as provided in condition six of the policy. It is not denied that Mrs.

Bailey, in accordance with the provisions of the policy, informed Allstate of the accident and that the company refused to defend. By its breach, Mrs. Bailey was thereby placed on her own and compelled to protect herself as best she could. The company having breached its agreement, she was entitled to proceed in whatever manner seemed to her to be proper under the circumstances. Accordingly, if it appeared that plaintiffs' claim should be compromised, and if in good faith it appeared to her that the proposed settlement was just, reasonable and prudent, her acceptance thereof cannot now be attacked. The contention of Allstate places it in the anomalous position of contending on the one hand that the contract was breached by defendant for failure to pay premiums and therefore was of no force and effect; and yet on the other hand of contending that Mrs. Bailey was bound by the terms of the breached contract relative to "actual trial." This is not the general rule (see 142 A.L.R. 812), nor is it the rule in California.

"The denial of liability on the part of the insuring company and its refusal to defend the suits constituted such a breach of the contract that the insured was released from his obligation to leave the management thereof to it, and was justified in proceeding to defend on his own account. [Citing cases.]" *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 630-631, 40 P.2d 311, 314; see also *Ritchie v. Anchor Casualty Co.*, 135 Cal.App.2d 245, 286 P.2d 1000.

[9] Allstate's final contention is likewise without merit. It is clear that where it is found that an insurance company has failed to defend an action on behalf of the assured, while legally obligated to do so, a reasonable award of attorney fees in defending the initial liability suit is appropriate. *O'Morrow v. Borad*, 27 Cal.2d 794, 167 P.2d 483, 163 A.L.R. 894; *Ritchie v. Anchor Casualty Co.*, supra. The finding of the trial court that \$350 was a rea-

sonable attorney fee is amply supported by the record.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



164 Cal.App.2d 559

**The WOOD BUILDING CORPORATION, a  
California corporation, Plaintiff and  
Respondent,**

**v.**

**Walter J. GRIFFITTS and Mary I. Griffiths,  
Defendants and Appellants.**

**Civ. 23220.**

**District Court of Appeal, Second District,  
Division 1, California.  
Oct. 27, 1958.**

Purchaser's action for specific performance of real estate agreement. The Superior Court of Los Angeles County, J. Howard Ziemann, J., entered judgment for purchaser and vendors appealed. The District Court of Appeal, Fourn, J., held that where real estate broker, negotiating for purchase of realty on behalf of corporate purchaser, opened escrow account at bank and both vendors signed escrow instructions which described realty, parties and purchase price, and broker deposited \$1,000 check in escrow on behalf of purchasers and the same was cashed, there was an irrevocable offer by vendors to sell realty.

Affirmed.

#### **1. Specific Performance — 121(8)**

In action for specific performance of escrow agreement respecting purchase of realty wherein vendors claimed misrepresentations by real estate broker negotiating for purchase of property on behalf of corporate purchaser, evidence sustained find-



ing that there was no misrepresentation by broker as to purchase price of building which vendors had shown some interest in purchasing with proceeds.

## 2. Vendor and Purchaser ⇨16(1)

Where real estate broker, negotiating for purchase of realty on behalf of corporation, opened escrow account at bank and both vendors signed escrow instructions which described realty, parties and purchase price, and broker deposited \$1,000 check in escrow on behalf of corporation and such check was cashed, there was an irrevocable offer to sell by vendors and portion of escrow instructions stating that purchaser would hand to vendors \$25,500, was sufficient consideration to make the signing of escrow instructions by vendors an irrevocable offer.

## 3. Escrows ⇨8(1)

Where real estate broker negotiating for purchase of realty on behalf of corporation opened escrow account by agreement which stated that purchaser would hand bank the sum of \$25,500 and authorized bank to accept the sum of \$1,000, bank at time of signing of escrow instructions was agent of vendors and was authorized to receive payments under instructions.

## 4. Principal and Agent ⇨92(1), 117(1)

An offer and acceptance may be transmitted by an agent between the offeror and the offeree and authority of such agent need not be in writing.

## 5. Principal and Agent ⇨143(2), 145(2)

Generally, an undisclosed principal can either sue or be sued on contract made by his agent.

## 6. Frauds, Statute of ⇨103(1), 106(2)

Escrow instructions signed by vendors of realty which contained a description of the property, names of the parties and the price, was sufficient to satisfy statute of frauds.

## 7. Frauds, Statute of ⇨115(4)

It was not necessary that purchaser sign escrow instructions respecting sale of realty in order to enable purchaser to enforce it against vendors who had signed

the same, since statute of frauds requires contract, note or memorandum thereof, to be in writing, subscribed only by party to be charged.

Perry & Bush, by Frank L. Perry, Redondo Beach, for appellants.

Darling, Shattuck & Edmonds, Los Angeles, by Thomas F. Call, Los Angeles, for respondent.

## FOURT, Justice.

This is an appeal from a judgment in an action for specific performance. The defendants were directed to execute and deliver a deed to certain real property to the plaintiff and to perform under an agreement made between the parties.

The following is a summary of the facts of the case. In 1956, the defendants, brother and sister, were the owners of certain real property in Redondo Beach, California, which was located between the United States post office building and a building owned by a telephone company. The telephone company desired to have a building constructed on the lot owned by the defendants according to its plans and specifications and to lease the same under a long-term lease agreement. It engaged Harold Von Rolf, a real estate agent, to work out the transaction. The defendants resided upon the property in question. In February or March of 1956, Von Rolf, the real estate agent, called at the Griffiths' home and asked Miss Griffiths whether they were willing to sell their property. He was told to communicate with Mr. Griffiths, who was not at home at that time.

Later Von Rolf called again and talked over the matter with Mr. Griffiths who stated that he would think about it. Von Rolf did not, at that time, tell the defendants that he was working for any particular company or concern. Some thirty days later Von Rolf called the Griffiths and was told by Mr. Griffiths that he and his sister had talked it over and would sell for \$25,000 net to themselves. The real estate

agent advised Mr. Griffiths that he would let him know whether a sale could be made at that price. The agent asked Mr. Griffiths if they would pay him a commission for the sale of the real estate and Mr. Griffiths replied that they would not pay any such commission.

Von Rolf obtained the plans and specifications from the telephone company for the construction of a proposed building upon the defendants' property, if the same could be purchased, and also secured construction costs for the building from a contractor. In May or June of 1956, Von Rolf contacted Hugh Darling, the secretary of the plaintiff corporation and told Mr. Darling of the price of defendants' property and the costs for the proposed building. Darling informed Von Rolf that the transaction was satisfactory to him and told Von Rolf to contact William Ehni, the president of the plaintiff corporation and explain the matter to him. The real estate agent did so and Ehni told Von Rolf that the transaction was satisfactory to him. In August of 1956, Darling and Ehni told Von Rolf to consummate the purchase of the defendants' property on behalf of the plaintiff corporation.

On September 12, 1956, Von Rolf telephoned Mr. Griffiths and told him that he was prepared to enter into an escrow and to consummate the sale of the real property. On September 19, 1956, at the Griffiths' suggestion the real estate agent drove defendants to the Bank of America, Redondo Beach branch, to open the escrow. A thirty-day escrow was opened and both defendants signed the escrow instructions on that date, as well as a grant deed with the corporation as the grantee, and placed the deed in the escrow. At the time of the signing of the escrow instructions the defendants were told for the first time that the plaintiff was the purchaser of the property. At this time Von Rolf unconditionally deposited a \$1,000 check in the escrow on behalf of the plaintiff, for which he received a receipt from the bank. The check was cashed. The escrow instructions contained the following statements by

the buyer: "I will hand you or cause to be handed you the sum of \$25,000," and immediately below, "and authorize you to accept for my account from Harold Von Rolf the sum of \$1000.00."

Von Rolf had received the \$1,000 check from Ehni on September 18, 1956, with instructions to deposit it in the escrow on behalf of the plaintiff. The defendants asked the real estate agent why the selling price was set forth in the escrow at \$26,500, instead of \$25,000, and further, made inquiries about the real estate agent's fee of \$1,500, which was set forth in the escrow instructions. Von Rolf explained that the fee was for services in putting together the entire transaction. The agent had previously secured the approval of Darling and Ehni as to his fee in this particular transaction. On September 20, 1956, the agent mailed to Darling the buyer's instructions. Darling signed the same on September 21, 1956, and on the same day mailed them to Ehni. Ehni signed the escrow instructions and on September 26, 1956, mailed them to the Bank of America, which received them on September 27, 1956.

On September 24, 1956, Miss Griffiths telephoned Mrs. Tolley, who was in charge of the escrow for the bank, and asked Mrs. Tolley if the defendants could withdraw from the escrow because of Miss Griffiths' health. Mrs. Tolley told Miss Griffiths to set forth the request in writing, and on the same day Miss Griffiths wrote a letter and personally delivered it to the Bank. The letter in question stated in the first paragraph thereof, "I should like to withdraw from my escrow 221-15022 dated September 19, 1956;" then followed several paragraphs concerning her sick leave from her work and her termination on permanent disability, about her doctor's advice, and her inability to sleep and her inability to move because of her ailment, and concluded, "I certainly hope I can withdraw and quit worrying. Had I known it would have affected me this way I would never have considered a move at this time."

Mrs. Tolley forwarded a copy of this letter to Ehni's office on September 24, 1956, and Ehni responded to the letter on September 28, 1956, in which he refused for the corporation to consent to Miss Griffiths' request to withdraw from the escrow. Ehni did not see Miss Griffiths' letter of September 24, 1956, until after he had signed and mailed the buyer's escrow instructions to the bank.

On October 17, 1956, Ehni mailed the plaintiff's check for \$25,500, and it was received by the bank the next day. On October 16, 1956, the defendants consulted their attorney who prepared a notice of rescission and a letter which was to the effect that the defendants rescinded the agreement upon the grounds that Von Rolf had made certain misrepresentations to the defendants in connection with the contemplated purchase of an apartment house located in Redondo Beach. This was the first time the defendants had set forth with particularity any such a contention.

Von Rolf testified that he and the defendants had first discussed the purchase of the apartment house on September 19, 1956, after the escrow instructions had been signed. The defendants made no independent inquiry regarding the price of the apartment house until after the instructions had been signed by them and after they had consulted an attorney. It was conceded by both defendants that the health of Miss Griffiths was a factor in their wanting to withdraw from the escrow. Miss Griffiths testified that at the time she wrote the first letter she knew she could not obtain the apartment on the terms purportedly represented to her by the real estate agent, yet she made no reference to that fact in her letter. Another real estate agent testified that about September 19, 1956, Miss Griffiths had indicated she was interested in income property and inquired about properties which the agent had for sale. About one week later she told that same agent that she had changed her mind about buying any

income property as she didn't think she would sell her own property.

The Griffiths thereafter refused to close the escrow and an action was filed by the plaintiff in specific performance to compel them to comply with their agreement. The Griffiths answered claiming first that they had cancelled and revoked the instructions prior to the signing of the instructions by the plaintiff, and that the plaintiff had been so advised; secondly that there was no consideration for the signing of the escrow instructions, and thirdly that they had rescinded such instructions upon the grounds that the same had been signed by mistake and because of fraudulent representations. The trial court found against the Griffiths on substantially all of their contentions.

The appellants now contend: (1) that the first letter of Miss Griffiths to the bank constituted a revocation of the escrow agreement; (2) that Miss Griffiths had a right to revoke the contract upon the ground that the plaintiff had not accepted their offer at the time of revocation, and that the contract was not the result of any prior oral agreement with the plaintiff; (3) that the deposit of \$1,000 by Von Rolf in the escrow was not the payment of a down payment under the escrow, and (4) that they had a right to rescind, as they did by their letter of October 16, 1956, because of their misunderstanding as to the price of the apartment house in which they had shown some interest as to purchasing.

[1] We believe that there is no merit to any of the contentions of appellants. It is true that there was some testimony which, had it been accepted as true by the trial court, might have sustained some of their assertions; however, there was substantial testimony and evidence adverse to their contentions which the trial court believed and upon which the trial court based its findings, conclusions and judgment.



Considering the contention that appellants could revoke the escrow instructions because no consideration was paid: Von Rolf deposited unconditionally a \$1,000 check (which was cashed) on behalf of the plaintiff in connection with the escrow. A reading of the instructions also convinces us that the \$1,000 was deposited and under the circumstances of this case made a binding escrow. The instructions provided that the buyer, "will hand you or cause to be handed you the sum of \$25,500.00," and below this it is stated, "and authorize you to accept for my account from Harold Von Rolf the sum of \$1000.00."

[2, 3] The words "will hand you" refer to the \$25,500, and not to the \$1,000 check. The check was delivered and cashed and the money therefrom stayed with the bank. We believe that under the circumstances this made a sufficient consideration to make the signing of the escrow instructions by the defendants an irrevocable offer. The bank, at the time of the signing of the escrow instructions, was the agent of the defendants and was authorized to receive payment under the instructions. It was said in *Gelber v. Cappeller*, 161 Cal.App.2d 113, 326 P.2d 521, 525:

"Under the instructions given by the parties the escrow holder became the common agent of both parties and held all monies and documents deposited with it for the benefit of both until either its powers under their instructions were terminated, or the conditions under which the escrow was to be closed by it had occurred in which latter event it became agent and trustee for the vendors as to the monies and documents deposited by the vendees and agent and trustee for the benefit of the vendees as to the instruments of conveyance of the other documents deposited by the grantor."

As we view it, the vendee made a partial payment, and when accompanied by

a writing such as was present in this case, there was then an irrevocable offer for the time set forth in the instruments. See, *Copple v. Aigeltinger*, 167 Cal. 706, 709, 140 P. 1073; *Boehle v. Benson*, 150 Cal.App.2d 696, 701, 310 P.2d 650; *Holland v. McCarthy*, 173 Cal. 597, 604, 160 P. 1069; *Benson v. Shotwell*, 87 Cal. 49, 54, 25 P. 249, 681.

[4] However, as asserted by the respondent, there was evidence to the effect that there was an oral agreement between the plaintiff, as an undisclosed principal, and the defendants with reference to the sale of the property prior to the execution of the instructions. The Griffiths said they would sell their property for \$25,000 net to them; the corporation told Von Rolf to go ahead and conclude the purchase at such price; Von Rolf told the Griffiths he was ready to conclude the purchase at the price asked. Arrangements were then made for the escrow with Von Rolf acting for the corporation. An offer and acceptance may be transmitted by an agent between the offeror and offeree and the authority of such agent need not be in writing. *Wright v. Lowe*, 140 Cal.App.2d 891, 896-897, 296 P.2d 34; *King v. Stanley*, 32 Cal.2d 584, 588, 197 P.2d 321.

[5] In *Cowan v. Tremble*, 111 Cal. App. 458, at page 462, 296 P. 91, at page 93, it was said:

"It is well settled as a general rule that an undisclosed principal can either sue or be sued on the contract made by his agent (1 Cal.Jur., Agency, § 131, p. 854; *Parker v. Otis*, 130 Cal. 322, 62 P. 571, 927, 92 Am.St.Rep. 56, (sic); *Schader v. White*, 173 Cal. 441, 160 P. 557); and the fact that plaintiff brought the action thereon was a sufficient ratification of the acts of Jacobson (2 Corp.Jur., Agency, § 132, p. 513; *Argenti v. Brannan*, 5 Cal. 351; *Thompson v. Spray*, 72 Cal. 528, 14 P. 182)." (See, *Purviance v. Shostak*, 90 Cal.App.2d 295, 297, 202 P.2d 755; 2 Cal.Jur.2d 873 (Agency).)

[6] The execution of the escrow instructions constituted a sufficient memorandum of the oral agreement for the sale of the property in that it did give the names of the parties, the price, a description of the property, and was subscribed by the owners or parties to be charged. It was appropriately said in *Boehle v. Benson*, supra, 150 Cal.App.2d 696, at page 701, 310 P.2d 650, at page 653:

"We do not agree with appellant's contention that the agreement does not satisfy the Statute of Frauds. In the case of *Cavanaugh v. Casselman*, 88 Cal. 543, 26 P. 515, 516, the court said:

[7] "It was not necessary that the plaintiff should himself sign the agreement \* \* \* in order to enable him to enforce it against the defendant. The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, but it need be subscribed only by the party to be charged [Citation.] \* \* \* The "writing" in question is sufficient to satisfy the statute. It sufficiently names the parties and the price, and gives a complete description of the property. It is also subscribed by the defendant, who is the party to be charged.'" See also, *Steel v. Duntley*, 115 Cal. App. 451, 453, 1 P.2d 999; *Cowan v. Tremble*, supra, 111 Cal.App. 458, 462-463, 296 P. 91; *Williams v. Rush*, 134 Cal.App. 554, 558, 25 P.2d 888; *Gelber v. Cappeller*, supra, 161 Cal.App.2d 113, 326 P. 2d 521; *Tuso v. Green*, 194 Cal. 574, 581, 229 P. 327.

The monies, in addition to the \$1,000 deposited by Von Rolf unconditionally in the escrow were deposited well within the limits provided. *Bullock v. McKeon*, 104 Cal.App. 72, 78, 285 P. 392; *Shreeves v. Pearson*, 194 Cal. 699, 707-708, 230 P. 448; *Quinn v. Dresbach*, 75 Cal. 159, 161, 16 P. 762; *Hoskins v. Swain*, 61 Cal. 338, 341; *Holland v. McCarthy*, supra, 173 Cal. 597, 604, 160 P. 1069.

As to fraudulent representations made by Von Rolf, the evidence was contra-

dictory. The judge had a right and a duty to determine the truth as it appeared to him, and apparently he believed Von Rolf. A reading of the transcript of the testimony would indicate that if Von Rolf was believed then there was no fraud or misrepresentation in any respect.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



164 Cal.App.2d 586

**Michael HALLECK, Mary Elizabeth Halleck and Sharon Halleck, Minors, by their Guardian ad litem, Samuel A. Halleck, Plaintiffs and Appellants,**

**v.**

**Norman Lewis BROWN, Defendant and Respondent.**

**Civ. 23020.**

District Court of Appeal, Second District,  
Division 3, California.

Oct. 28, 1958.

Rehearing Denied Nov. 13, 1958.

Hearing Denied Dec. 23, 1958.

Action for injuries sustained by plaintiffs when automobile in which they were passengers was struck, while in intersection not protected by signals or stop signs, by defendant's automobile, which approached from their left. The Superior Court of Los Angeles County, Brodie Ahlport, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that it was error to give instruction on unavoidable accident, and that such error would require reversal.

Reversed.

**I. Appeal and Error ☞1064(1)**

**Negligence ☞138(3)**

Giving of unavoidable accident instruction is prejudicial error where evi-

dence discloses no condition and no action or conduct apart from conduct of parties that could reasonably be sufficient to acquit them of negligence.

## 2. Appeal and Error Ⓒ1064(1)

### Automobiles Ⓒ246(22)

In action for injuries sustained by plaintiffs when automobile in which they were passengers was struck, while in intersection not protected by signals or stop signs, by defendant's automobile, which approached from their left, it was error to give instruction on unavoidable accident, and such error would require reversal of judgment for defendant.

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Brock, Easton, Fleishman & Rykoff, Hollywood, for appellants.

William W. Waters and Henry F. Walker, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiffs appeal from an adverse judgment after verdict in an action for personal injuries arising out of a collision of automobiles.

Fifth Avenue in Los Angeles extends north and south. It intersects 70th Street at right angles. There are no traffic signals or stop signs at the intersection. On June 16, 1955, plaintiffs Michael Halleck, Mary Elizabeth Halleck and Sharon Halleck, who are minors, were passengers in a Ford station wagon driven by their mother, Mrs. Margaret L. Halleck. Coming from the west on 70th Street it was struck in the intersection by an Oldsmobile car owned and driven by defendant Brown. The Oldsmobile had come up Fifth Avenue from the south, had entered onto 70th Street and came into collision with the Halleck station wagon in the southeast portion of the intersection. The children were injured; Michael was the most seriously hurt, suffering a long cut on his cheek which left a permanent scar. Plaintiffs being passengers in their mother's automobile, the factual question was whether Brown was guilty of negligence

that was a proximate cause of the collision; it was not contended that plaintiffs were guilty of contributory negligence.

70th Street is comparatively level. Commencing at Florence Avenue, one block south of 70th Street, Fifth Avenue rises abruptly, then slopes downward to its intersection at 70th Street, after which it becomes level. The downward slope begins about seven or eight houses south of 70th Street. Brown testified that before proceeding up Fifth Avenue, his car had been parked on the east side of the street just above Florence, facing north; as he reached a point seven or eight houses from 70th Street, he was traveling about 15 or 20 miles per hour; he increased his speed to 25 miles per hour as he descended the slope; another car, which had been going west on 70th Street, made a left turn onto Fifth Avenue and passed him at a point about six houses south of the corner; at that point, he could not see into 70th Street; he slowed down as he passed the other car and approached the intersection at approximately 15 to 20 miles per hour, looking in both directions; at a distance of about a car length from the intersection he saw the station wagon approaching from the west; it was likewise about a car length from the corner; he put on his brakes but was unable to stop in time to avoid a collision. It was established that his Oldsmobile laid down 9 feet of four wheel locked skidmarks leading to the point of impact. On cross-examination, Brown admitted stating in his deposition that he entered the intersection at between 20 and 25 miles per hour and that he might have been traveling at that speed.

Robert Wright, a witness for plaintiffs, was the driver whom Brown saw turning left onto Fifth Avenue. Robert was a high-school student, living with his parents in the fourth house to the south of the intersection on the west side of Fifth Avenue. He testified that he stopped at the intersection and saw Brown's car at the top of the incline. As he drove slowly past the second house from the corner, Brown's car passed him in the opposite



direction at a speed of between 25 and 35 miles per hour. After parking in front of his own house, Robert heard a crash, looked through his rear-view mirror, and saw the station wagon for the first time. The front of the Oldsmobile had struck it broadside between the front and second doors and caused it to swing completely around and come to rest facing west with its right wheels on the north curb of 70th Street.

Mrs. Halleck testified that after stopping for a traffic signal on Sixth Avenue, she proceeded normally along 70th Street; she could not recall her rate of speed. She slowed down on approaching the Fifth Avenue intersection, and as she did so, she saw the Oldsmobile at the top of the incline, about six or seven houses to the south; at that time, she was about one and a half car lengths west of the intersection. Mrs. Halleck then proceeded into Fifth Avenue. At no time did she see Wright's car. She again saw the Oldsmobile just before it collided with her station wagon; she did not attempt to swerve or apply her brakes. On cross-examination, Mrs. Halleck admitted stating in her deposition that when she first saw the Oldsmobile it was only about six or seven cars lengths from the corner but she added that she "always said" it was at the top of the incline when it came into view.

In urging a reversal of the judgment, plaintiffs contend that the court committed error in instructing the jury.

[1,2] The Hallecks first assign error to the giving of an instruction on the doctrine of unavoidable accident. We have set forth the instruction in the margin.<sup>1</sup> This cause was tried before the decision of the Supreme Court in *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500, in which it was

held, that with possible exceptions, it is error to instruct the jury as to unavoidable accident in cases involving negligence.

However, the court said in *Butigan*, supra, 49 Cal.2d at pages 660-661, 320 P.2d at page 505: "The determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error has been prejudicial so as to require a reversal depends on all the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn."

It was error to give the instruction on unavoidable accident. The question on the appeal is whether the error was prejudicial. We believe it was.

Each driver could have seen the other in time to slow down or stop and thus avoid a collision. The accident could not have happened if neither driver had been negligent. It is sheer nonsense to say that both drivers could be found free of negligence. If it was a common practice to drive into intersections blindly, taking a chance that they would be found clear, there would be thousands of collisions at intersections, where now there is but one.

It is well settled that the giving of the unavoidable accident instruction is prejudicial where the evidence discloses no condition and no action or conduct apart from the conduct of the parties that could reasonably have been found sufficient to acquit them of negligence. *Martz v. Ruiz*, 158 Cal.App.2d 590, 322 P.2d 981; *Britton v. Gunderson*, 160 Cal.App.2d 66, 324 P.2d 938; *Brenner v. Beardsley*, 159 Cal.App.2d 304, 323 P.2d 841; *Emerton v. Acres*, 160 Cal.App.2d 742, 325 P.2d 685; *Grant v. Mueller*, 160 Cal.App.2d 804, 325 P.2d 680. These cases, applying the doctrine declared by the Supreme Court in the *Butigan* case,

1. "In law we recognize what is termed an unavoidable or inevitable accident. These terms do no mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. No one may be held liable for injury result-

ing from an unavoidable accident. Whether or not the accident in question in this case was unavoidable is, of course, a question of fact for you to determine; and in giving the foregoing instruction I do not imply any opinion or suggestion as to what your finding should be."

are controlling upon the facts of the present case. This will appear clearly from a reading of the cases and a comparison of the facts upon which the several courts held the instruction to be prejudicial. We, therefore, refrain from encumbering our opinion with an extended analysis of the facts of those cases or with quotations from the cogent and forceful reasoning of the courts' opinions.

Defendant relies upon *Rayner v. Ramirez*, 159 Cal.App.2d 372, 324 P.2d 83, in which the court did not hold that the instruction was properly given, but only that under the evidence the error was not prejudicial. We are in agreement with that holding. The testimony was that the vehicles of the defendants momentarily entered the wrong side of the highway upon the sudden appearance from a side road of a boy on a bicycle, and that the drivers quickly endeavored to return to the right side. Although it had been held prior to the decision of the Supreme Court in the *Butigan* case that it was proper to give the questioned instruction in such circumstances, such is no longer the law. In cases such as the present one, where the issue is whether negligence is attributable to one participant or the other, or to both, the question is not whether it was error to instruct on unavoidable accident, but whether the error was prejudicial. And the question in every case is whether, upon the facts of the case, the party complaining of the error was deprived of a fair trial.

Since the collision would not have occurred if both drivers had been exercising due care, and contributory negligence was not in issue, the question with respect to the liability of the defendant was whether Mrs. Halleck was guilty of negligence which was the sole proximate cause of the accident. The children who are the plaintiffs here had a right to have the jury determine that issue, uninfluenced by the instruction that introduced the false theory of unavoidability. It was an issue of fact that could reasonably have been decided in their favor. We are convinced that it was

not tried fairly. The error, therefore, requires a reversal of the judgment.

In view of the foregoing, it is unnecessary to discuss other points urged by appellants.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,  
concur.



164 Cal.App.2d 607

**HAYWARD BUILDING MATERIAL COMPANY**, a corporation, Plaintiff  
and Respondent,

v.

**STATE BOARD OF EQUALIZATION** of the  
State of California, Defendant  
and Appellant.

Civ. 9320.

District Court of Appeal, Third District,  
California.

Oct. 28, 1958.

Action by seller of concrete and asphalt against state board of equalization to recover taxes assessed under sales and use tax law. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered judgment for seller and board appealed. The District Court of Appeal, Peek, J., held that where corporation purchased dry ingredients of concrete and asphalt, paid sales tax on raw materials, and compounded them at its plant, and, upon receiving order, combined raw ingredients of cement with water according to specifications, transported cement and asphalt from plant to building site and discharged mixed wet cement or asphalt in accordance with contractor's instructions, corporation was not construction contractor, within statute exempting such from sales and use tax, but retailer subject to sales and use tax.

Reversed.

## Licenses — 15.1(8)

Where corporation purchased dry ingredients of concrete and asphalt, paid sales tax on raw materials, and compounded them at its plant and, upon receiving order, combined raw ingredients of cement with water according to specifications, transported cement and asphalt from plant to building site and discharged mixed wet cement or asphalt in accordance with contractor's instructions, corporation was not "construction contractor", but "retailer" subject to sales and use tax. West's Ann. Rev. & Tax. Code, §§ 6001 et seq., 6051.

See publication Words and Phrases, for other judicial constructions and definitions of "Construction Contractor" and "Retailer".

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Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., for appellant.

Nathan G. Gray, Berkeley, Cooley, Crowley, Gaither, Godward, Castro & Hudleson, San Francisco, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff in an action brought by it to recover taxes alleged to have been improperly assessed under the Sales and Use Tax Law (section 6001 et seq. of the Revenue and Taxation Code).

There is no dispute as to the essential facts, which appear by stipulation of the parties. Additional facts in amplification of the stipulation appear from the testimony of the one witness called by plaintiff, its president. The record so presented shows without conflict that plaintiff was in the business of furnishing wet-mix concrete and asphalt to construction contractors. Its method of operation was to purchase the dry ingredients of the concrete, such as cement, rock, sand, gravel and other additives, which it would compound at its plant. Upon receiving an order for concrete, the raw ingredients, according to specifications, were combined with water in a rotating

drum attached to a truck and transported from the plant to the building site. By the time of arrival the mixture had become wet-mix concrete, ready to be discharged from the mixing drum on the truck into forms at the job site. Plaintiff did not in any way participate in the building of the forms, their location at the job site, or their removal after the concrete had hardened. All tamping, troweling, leveling, finishing of the concrete, or other handling when required, was done by the contractor. The only employee of plaintiff customarily at the job site was the truck driver whose sole duty was to spot the truck and pour the concrete into the forms as directed by the contractor.

The procedure followed as regards the asphalt sold by plaintiff was substantially the same. The total mixing operation, however, took place in plaintiff's plant, and thereafter the asphalt was transported by dump truck to the job site. In accordance with the contractor's instructions, the asphalt was dumped either on the ground or in front of a paving machine which did the spreading. Any spreading, leveling or compacting was done by the contractor and not by the plaintiff.

During the period from July, 1946, to September, 1949, plaintiff furnished various construction firms with \$902,302.29 worth of wet-mix concrete and asphalt. Plaintiff paid a sales tax on the raw materials at the time they were purchased. No sales tax was collected on the subsequent sale of the prepared product to various construction firms. Defendant State Board of Equalization, upon a redetermination under the Sales and Use Tax Law, characterized the latter transactions as retail sales under the Revenue and Taxation Code, section 6051, and assessed additional taxes on the gross receipts of the 1946-49 period amounting to \$27,904.73. Pursuant to the redetermination, plaintiff paid the additional tax assessed and subsequently filed a claim for refund with the defendant board. The claim was denied and this action was filed in the superior court where judgment was entered in favor of the



plaintiff and against the defendant board for the amount paid under the redetermination plus interest.

Sales and Use Tax Ruling No. 11 (Calif. Administrative Code, Title 18, section 1921) provides in part as follows:

"Definitions: The term 'contractor' as used herein includes both general contractors and subcontractors and includes contractors engaged in such building trades as carpentry, brick-laying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

"The term 'construction contract' as used herein means a contract for erecting, remodeling, or repairing a building or other structures on land and includes lump-sum, cost-plus, and time-and-material contracts. The term 'construction contract' does not include a contract for the sale and installation of machinery or equipment.

"The term 'materials' as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure.

\* \* \* \* \*

"Materials Used by Contractors: Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors \* \* \*."

We are constrained to view the question presented as much less complex than would appear from plaintiff's brief. In this we must agree with the defendant board that the uncomplicated issue is whether or not plaintiff was a construction contractor with respect to its sales of wet-mix concrete and asphalt. If it was, then it could be taxed only as a consumer and hence is entitled to a refund of the taxes paid. If not, then it should be taxed as a retailer and hence is entitled to no refund.

In accordance with its statement of the case, it is the primary contention of the board that plaintiff is simply selling at retail two products which it manufactures—wet-mix concrete and asphalt—and that the only service which it performs is the delivery of the product to the job site; that the consumer of these products is the contractor who renders the service involved in preparing the forms, tamping, troweling, finishing, spreading and leveling the concrete or asphalt as the case may be; and that therefore plaintiff is not a contractor within the meaning of Ruling No. 11.

The record shows without conflict that plaintiff renders two distinct services. The first involves the compounding of raw materials in transit or at its plant. The second is the transportation and discharge of the finished product at the construction site. Although it appears that the trial court considered the service rendered sufficient to constitute engaging in the actual building construction and erection of structures on land, thus bringing the plaintiff within the provisions of Ruling No. 11, we cannot agree that the evidence, which is undisputed, was sufficient to warrant such finding by the court.

In support of the judgment plaintiff contends that it was rendering a service within the meaning of Ruling No. 11. At the outset of this argument it indulges in an unwarranted assumption that it was a subcontractor performing a service for the general contractor by obtaining the ingredients, apportioning and mixing them, having them ready at the proper time and ultimately pouring the concrete into the forms or the asphalt onto the road bed, something which the general contractor could have done for himself, and hence the only transaction to which the tax could apply would be the sale of the ingredients. The obvious answer to such argument is that the contractor, rather than doing those things for himself, chose to purchase the finished product from plaintiff. The illustration used by the Attorney General in

answer to plaintiff's argument is most apt. "Thus, if one were to purchase lumber to make a ping-pong table, obviously the tax would be measured by the cost of the lumber. On the other hand, if one were to purchase a completed ping-pong table, clearly the tax would be measured by the price of the table without deduction for '\* \* \* labor or service cost \* \* \*' as provided in section 6012." This is the difference which always exists where a customer purchases raw materials rather than a finished product.

Furthermore from an examination of the transactions between plaintiff and its customers, it is apparent no construction contracts were either intended or negotiated. The sole document offered in evidence, a purchase order from one of plaintiff's customers, is conceded to be typical of the orders received. It is apparent therefrom that plaintiff's customers simply ordered material for their construction projects and nothing more. Nothing contained in the purchase order can be construed to evidence an intent to engage plaintiff as a construction contractor. The testimony of the plaintiff's president was that most of the concrete was delivered without any document; that most orders were received orally or by telephone and thereafter some, but not all, were confirmed; that many times the job was finished before plaintiff received a purchase order; and that such purchase orders were issued for the convenience of the issuer and not for the convenience of the seller. In other words, plaintiff was not performing work pursuant to construction contracts, but was merely selling a product—wet-mix cement or asphalt.

It necessarily follows that plaintiff is not a contractor and hence not a consumer within the provisions of Ruling No. 11, and therefore the tax would apply to it as a retailer of the products which it manufactures and sells.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

164 Cal.App.2d 591

The PEOPLE of the State of California acting by and through the Department of Public Works, Plaintiff and Respondent,  
v.

Frank O. NOGARR, Jessie A. Nogarr, George A. Foote, Lena H. Foote, Title Insurance & Trust Company, a corporation, as Trustee, J. C. Bannister, as Trustee under will of Fern W. Bannister, deceased; Elaine R. Wilson, County of Los Angeles, a body politic and corporate, Frank H. Wilson, Alice B. Wilson, C. E. Gustafson, Romer, O'Connor & Co., Inc., a corporation, Retail Credit Bureau of Los Angeles, a corporation, Robert C. Kirkwood, State Controller, John Doe Machenhaimer, Ethel B. Machenhaimer, Everett L. Burroughs, Mabel G. Burroughs; Sun Valley National Bank of Los Angeles, a corporation, Doe One to Doe One Hundred, Defendants.

Elaine R. WILSON, Defendant and Appellant,

v.

Frank H. WILSON and Alice B. Wilson, Defendants and Respondents.

Civ. 23190.

District Court of Appeal, Second District, Division 3, California.

Oct. 28, 1958.

Hearing Denied Dec. 23, 1958.

Action involving the distribution of a condemnation award. From a judgment of the Superior Court of Los Angeles County, J. H. Ziemann, J., the defendant wife appeals. The District Court of Appeal, Nourse, J. pro tem., held that where spouses owned realty in joint tenancy and husband without wife's knowledge executed a mortgage thereon, such execution did not terminate the joint tenancy in favor of the husband's interest from that of the wife, and hence upon his death wife was entitled to distribution of the entire condemnation award of the property.

Judgment reversed.

#### 1. Joint Tenancy $\S$ 1, 6

In order that a joint tenancy may exist, unity of interest, of title, time and of possession are required, and so long as such

unities exist, the right of survivorship is an incident of the tenancy, and upon death of one joint tenant, the survivor becomes the sole owner in fee by right of survivorship and no interest in the property passes to the heirs, devisees or personal representatives of the joint tenant first to die.

## 2. Mortgages ⇨1, 137, 187

A "mortgage" is but a hypothecation of the property mortgaged and it creates but a charge or lien upon the property hypothecated without the necessity of a change of possession and without any right of possession in the mortgagee and does not pass the legal title to the mortgagee. West's Ann.Civ.Code, § 2920.

See publication Words and Phrases, for other judicial constructions and definitions of "Mortgage".

## 3. Husband and Wife ⇨14(3, 10)

Where joint tenancy in fee simple existed between spouses at time of execution of mortgage, mortgage executed by the husband without knowledge of wife was but a lien upon husband's interest and did not transfer title to the mortgagee, or entitle the mortgagee to possession and hence estate in joint tenancy was not severed and spouses did not become tenants in common and as mortgage lien attached only to such interest as husband had in the property, when his interest ceased to exist, the lien of the mortgage expired with it.

## 4. Joint Tenancy ⇨6

The right of survivorship is chief characteristic that distinguishes a "joint tenancy" from other interests in property, and while both joint tenants are alive each has a specialized form of life estate, with what amounts to a contingent remainder in the fee; such contingency being dependent upon which joint tenant survives.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Tenancy".

## 5. Joint Tenancy ⇨12

The only distinction between a judgment lien and a lien of a mortgage executed by one joint tenant is that the mortgage lien is a lien upon specific property, while

a judgment lien is a general lien upon all the real property of the judgment debtor.

## 6. Eminent Domain ⇨152(1)

### Husband and Wife ⇨14(10)

Where spouses owned realty in joint tenancy and husband without wife's knowledge executed a mortgage thereon, such execution did not terminate the joint tenancy in favor of the husband's interest from that of the wife, but the mortgage was a lien upon the husband's interest as a joint tenancy only, and hence upon his death his interest having ceased to exist the lien and mortgage terminated and the wife was entitled to distribution of the entire condemnation award of the property exclusive of the sums distributed to other lienholders. West's Ann.Civ.Code, § 2920.

Benjamin P. Riskin, Los Angeles, for defendant and appellant.

Ward Sullivan and D. C. C. Kembitskey, Los Angeles, for defendants and respondents.

NOURSE, Justice pro tem.

This appeal presents but one question: Is a mortgage upon real property executed by one of two joint tenants enforceable after the death of that joint tenant?

The facts are not in dispute. The appellant, Elaine R. Wilson, hereinafter called "Elaine," and Calvert S. Wilson, hereinafter called "Calvert," were husband and wife. On April 10, 1950, they acquired the real property in question as joint tenants and the record title remained in them as joint tenants until the death of Calvert. In July 1954 Elaine and Calvert separated. On October 11, 1954, Calvert executed his promissory note to his parents, the respondents, Frank H. and Alice B. Wilson, hereinafter called "respondents." This note was in the sum of \$6,440. At the same time he executed and delivered to respondents a mortgage upon the real property in question. Elaine did not have knowledge of or give her consent to the execution of this mortgage. On June 23, 1955, Calvert



died. On May 8, 1956, the People of the State of California commenced an action to condemn the subject real property. By its complaint the condemner alleged that Elaine R. Wilson was the owner of the subject real property and that respondents were mortgagees thereof. By her answer Elaine alleged that she was the owner of the property, that respondents had no right, title or interest therein. Respondents by their answer alleged that they were the owners and holders of the mortgage executed by Calvert and prayed that the mortgage be satisfied from the proceeds of the condemnation award. By agreement the fair market value of the property was fixed at \$13,800 and that amount together with interest was paid into court by the condemner. Thereafter trial was had as to the rights and interests of Elaine and the respondents. No formal findings were made by the court but by a memorandum ruling the court found that there was owing to respondents the sum of \$6,440 upon the promissory note executed by Calvert and secured by the aforesaid mortgage and ordered that sum plus interest disbursed to respondents out of 50 per cent of the funds remaining in the hands of the trustee (the county clerk) after the payment of certain liens which were concededly a charge upon the joint estate. Judgment was entered accordingly. As a practical matter this resulted in distribution of 50 per cent of said balance to respondents as the amount found due them was in excess of one-half of the balance remaining after the payment of other liens.

It is appellant's contention that execution of the mortgage by Calvert did not operate to terminate the joint tenancy and sever his interest from that of Elaine but that the mortgage was a charge or lien upon his interest as a joint tenant only and that therefore upon his death his interest having ceased to exist the lien of the mortgage terminated and that Elaine was entitled to the distribution of the entire award exclusive of the sums distributed to other lienholders.

[1] We have reached the conclusion that appellant's contention must be sustained. In order that a joint tenancy may exist four unities are required; unity of interest, unity of title, unity of time and unity of possession. *Hammond v. McArthur*, 30 Cal.2d 512, 514, 183 P.2d 1 and authorities there cited. So long as these unities exist the right of survivorship is an incident of the tenancy and upon the death of one joint tenant the survivor becomes the sole owner in fee by right of survivorship and no interest in the property passes to the heirs, devisees or personal representatives of the joint tenant first to die. *King v. King*, 107 Cal.App.2d 257, 236 P.2d 912; *In re Estate of Zaring*, 93 Cal.App.2d 577, 579-580, 209 P.2d 642.

It is undisputed in the present case that a joint tenancy in fee simple existed between Elaine and Calvert at the time of the execution of the mortgage, that at that time there existed all of the four unities, that consequently Elaine upon the death of Calvert became the sole owner of the property in question and under the doctrine of equitable conversion to the entire award in condemnation, unless the execution by Calvert of the mortgage destroyed one of the unities and thus severed the joint tenancy and destroyed the right of survivorship.

[2] Under the law of this state a mortgage is but a hypothecation of the property mortgaged. It creates but a charge or lien upon the property hypothecated without the necessity of a change of possession and without any right of possession in the mortgagee and does not operate to pass the legal title to the mortgagee. Civ.Code, § 2920; *McMillan v. Richards*, 9 Cal. 365, 406, 411; *Dutton v. Warschauer*, 21 Cal. 609, 621; 33 Cal.Jur.2d 423-424.

[3] Inasmuch as the mortgage was but a lien or charge upon Calvert's interest and as it did not operate to transfer the legal title or any title to the mortgagees or entitle the mortgagees to possession it did not destroy any of the unities and therefore the

estate in joint tenancy was not severed and Elaine and Calvert did not become tenants in common. It necessarily follows that as the mortgage lien attached only to such interest as Calvert had in the real property when his interest ceased to exist the lien of the mortgage expired with it. Application of *Gau*, 230 Minn. 235, 41 N.W.2d 444; *Power v. Grace*, 1 D.L.R. 801; *Zeigler v. Bonnell*, 52 Cal.App.2d 217, 219-221, 126 P.2d 118, cited with approval in *Hammond v. McArthur*, supra, 30 Cal.2d 512, 183 P.2d 1.

[4] In *Zeigler v. Bonnell*, supra, it was directly held that a judgment lien upon the interest of a joint tenant terminated on the death of the judgment debtor joint tenant. In so holding the court said (52 Cal.App.2d at page 219, 126 P.2d at page 119): "The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. (Citation.) While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the interest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon. Although the title of the execution purchaser dates back to the date of his lien, that doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights. \* \* \* This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and

thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien."

[5] We are unable to distinguish between the effect of a judgment lien and of a lien of a mortgage executed by one joint tenant only. The only distinction between the two liens is that the mortgage lien is a lien upon specific property while the judgment lien is a general lien upon all real property of the judgment debtor. *McMillan v. Richards*, supra, 9 Cal. 365, 409.

In *Hammond v. McArthur*, supra, in discussing the operation of a mortgage as a severance of joint tenancy, the Supreme Court, in what is undoubtedly dictum, as a mortgage was not there involved, said (30 Cal.2d at page 515, 183 P.2d at page 3): "In jurisdictions where a mortgage ordinarily operates to transfer the legal title, a mortgage by a joint tenant causes a severance of the joint tenancy. (Citation.) Also, in some states where a mortgage is regarded as mere security, a mortgage by a joint tenant brings the tenancy to an end. (Citation.) However, that conclusion is not in accord with the common-law authorities to the effect that the creation by a joint tenant of a mere charge upon the land is a nullity as against the right of survivorship of the other joint tenant. (Citation.)"

Respondents have directed our attention to decisions of other jurisdictions which they assert support their contention that a joint tenant has a right to mortgage his interest and that this operates to sever the joint tenancy. Examination of each of the cases relied upon by respondents discloses that all except one of them were rendered in jurisdictions where a mortgage operated not merely as a lien or charge upon the mortgagor's interest but as a transfer or

conveyance of his interest, the conveyance being subject to defeasance upon the payment of the mortgage debt. It is evident that in those jurisdictions where a mortgage operates to convey title to the mortgagee the unity of title is destroyed and in those jurisdictions where it operates not only to transfer title but the right of possession to the mortgagee both the unity of title and of possession are destroyed and that in either case there is a severance of the joint tenancy.

Respondents place their main reliance upon *Wilken v. Young*, 144 Ind. 1, 41 N.E. 68, 590, decided by the Supreme Court of the State of Indiana. At the time this decision was rendered Indiana adhered to the lien theory of mortgages and the case undoubtedly strongly tends to support respondents' position. We do not, however, feel bound by it.

In the first place the Supreme Court of Indiana based its holding that a joint tenant might mortgage his interest and that the lien of the mortgage survived his death upon two cases; *York v. Stone*, 1 Salk 158 and *Simpson's Lessee v. Ammons*, 1 Bin. Pa., 175. We will comment further on these opinions later in this opinion, but direct attention here to the fact that both of them were rendered in jurisdictions where a mortgage operated as a conveyance of the mortgagor's interest.

In the second place the Supreme Court of Indiana did not hold that the execution of the mortgage operated as a severance of the joint estate so as to destroy the right of survivorship but expressly held that there was no severance and that upon the death of the mortgagor life tenant the surviving joint tenant took by virtue of the tenancy but as to one-half of the property she took only the right of redemption from the mortgage created by the deceased joint tenant.

The decision seems to us entirely illogical and the result of it unjust for under it one joint tenant might, as in the case at bar, mortgage and obtain the full value of an undivided one-half of the joint ten-

ancy property and yet retain his right to the entire property as the surviving joint tenant should his cotenant be the first to die; while that cotenant, if the survivor, would take but the right to acquire from the mortgagee the one-half interest to which she had the right as the survivor. Further, the mortgagee would by the mortgage obtain a lien upon an undivided one-half interest which would not be defeated by the death of the mortgagor but also be a lien upon the whole property were the mortgagor to be the survivor.

*York v. Stone*, supra, was decided by the chancery court in England and in that jurisdiction the mortgage operated to transfer the legal title to the mortgagee and gave the mortgagee the right to immediate possession.

In *Simpson's Lessee v. Ammon*, supra, 1 Bin. 175, decided by the Supreme Court of Pennsylvania in 1806, the court without citation of authority for the statement or the statement of any reason therefor stated (at page 177): "\* \* \* the court are of the opinion that the mortgage was a severance of the joint tenancy. The interest of Baynton and Morgan passed by it, but the interest of Wharton was not affected." While there is some conflict in the decisions of the Pennsylvania courts as to whether a mortgage operates merely as a charge or lien upon the property mortgaged or as a transfer of the title of the mortgagor, undoubtedly, the Supreme Court of Pennsylvania in rendering its decision in the *Simpson* case considered a mortgage as vesting title in the mortgagee for in *Moliere's Lessee v. Noe*, 4 Dall. 450, 1 L.Ed. 450, which was decided by the Supreme Court of Pennsylvania in the same year that it decided the *Simpson* case, Mr. Justice Tilghman who was the author of the opinion in the *Simpson* case said: "Before I dismiss this subject, I will give my opinion concerning debts due by mortgage, which were mentioned in the course of the argument. I conceive them to stand on a different footing from judgments, because the mort-



gagee is strictly speaking, the owner of the land, and may recover it in an ejectment. The mortgagor has no more than an equity of redemption \* \* \*." See also *Martin v. Jackson*, 1856, 27 Pa. 504, 67 Am.Dec. 489.

Counsel have also directed our attention to *Wolf v. Johnson*, 157 Md. 112, 145 A. 363, 366. This case was decided by the Supreme Court of Maryland. In the opinion, the question as to whether the execution of a mortgage by a joint tenant terminated the joint tenancy is not discussed but is assumed. The entire question discussed by the court was whether the estate there in question was one "by the entireties" or one of joint tenancy. We assume that the reason the question as to severance was not argued or discussed is that under the law of Maryland a mortgage operates to transfer the legal title to the mortgagee and in the absence of contract gives him the right to possession and would therefore necessarily destroy the unities of both title and possession. *Kramer v. United States*, 4 Cir., 190 F.2d 712; *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 175 A. 331, 333.

Respondents also rely upon the decision of the Supreme Court of Wisconsin in *Goff v. Yauman*, 237 Wis. 643, 298 N.W. 179, 134 A.L.R. 952. There the court held that a statutory lien upon the interest of a joint tenant of real property created under the old age assistance statutes of Wisconsin survived the death of the joint tenant. The decision of the court was based entirely upon the construction of the statute and the court expressly stated that it was not determining as to whether or not a severance would be created by the execution by a joint tenant of a mortgage. It may be pointed out that under a similar statute and in a much better reasoned decision the Supreme Court of Minnesota reached the opposite conclusion to that reached by the Supreme Court of Wisconsin and held that a statutory lien upon the interest of a joint tenant terminated with the death of that tenant. Ap-

plication of *Gau*, 230 Minn. 235, 41 N.W. 2d 444.

[6] There is nothing inequitable in holding that the lien of respondents' mortgage did not survive the death of the mortgagor. Their note was payable upon demand and they could have enforced the lien and mortgage by foreclosure and sale prior to the death of the mortgagor and thus have severed the joint tenancy. If they chose not to do so but to await the contingency of which joint tenant died first they did so at their own risk. Under that event the lien that they had expired. If the event had been otherwise and the mortgagor had been the survivor the security of their lien would have been doubled.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



**Masaka GOTO, Plaintiff and Appellant,**  
v.

**James GOTO, Defendant and Respondent.\***  
Civ. 23089, 23090.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 17, 1958.

Rehearing Denied Nov. 5, 1958.

Hearing Granted Dec. 10, 1958.

Child custody case. From that part of an order entered by Elmer D. Doyle, J., and modifying decrees of the Superior Court of Los Angeles County, and from an order regarding costs and attorney's fees, an appeal was taken. The District Court of Appeal, Vallée, J., held that mere fact that one of children of parties had reached age of discretion and chose to live with other parent did not constitute such change of circumstances as would warrant a change in

\* Opinion vacated 338 P.2d 450.

custody of other child of tender years; and held that because of disparity in ages between 6 year old boy and his 14 year old sister and evidence bearing on subject of welfare of younger child, it was an abuse of discretion to modify custody provisions as to younger child when older child expressed a preference to live with her father.

Part of order modifying decrees reversed; order regarding costs and attorney's fees affirmed in part and reversed in part with direction.

#### 1. Divorce ⚭303(2, 3)

That one of children of parties had reached age of discretion and chose to live with other parent was not such a change of circumstances as would warrant a change in custody of other child of tender years; and because of disparity in ages between 6 year old boy and his 14 year old sister and evidence bearing on subject of welfare of younger child, it was an abuse of discretion to modify custody provisions as to younger child when older child expressed a preference to live with her father.

#### 2. Divorce ⚭303(3)

To warrant modification of custodial order, general rule is that there must be substantial evidence of a change of circumstances after entry of original decree, except in a case where, despite fact that there is no change of circumstances, welfare of child nevertheless requires or justifies change in previous order of custody.

#### 3. Divorce ⚭303(3)

One seeking modification of prior custodial order has burden of proof to show facts warranting change in custody and that it is for child's best interests. West's Ann. Civ.Code, § 138(2).

#### 4. Parent and Child ⚭2(3.2)

There is no fixed and certain age of minority which can be said to constitute a child of "tender years" for purposes of Civil Code section providing that mother should have custody of child of "tender years". West's Ann.Civ.Code, § 138(2).

#### 5. Divorce ⚭303(2)

That mother had sold family home and moved with children to another part of state was not such change in circumstances as would warrant modification of child custody order.

#### 6. Divorce ⚭182, 194

Wife should have been allowed costs and attorney's fees on appeal which was meritorious and taken in good faith in child custody case.

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MacBeth & Ford, Los Angeles, Malcolm S. Millard, Carmel, James E. Fagan, Long Beach, and Scot Raymond, for appellant.

Wm. H. Neblett, Los Angeles, for respondent.

#### VALLÉE, Justice

Appeal by plaintiff-mother from that part of a custody order modifying interlocutory and final decrees of divorce, and from an order awarding \$100 attorney's fees for past services and denying attorney's fees and cost on appeal.

The parties were married February 12, 1942 and separated November 3, 1953. Plaintiff was awarded an interlocutory judgment of divorce on February 18, 1955. Custody of the two children of the parties, Denise and Hans, then aged 12 and 4, respectively, was awarded to plaintiff, with the right of reasonable visitation in defendant, and defendant ordered to pay plaintiff \$300 a month for the support of each child. The interlocutory decree provided, among other things, that "the defendant may visit and have the possession of the children between the hours of 12:00 noon and 7:00 p. m. on alternate Sundays and alternate national holidays; and that the defendant shall have the duty of calling for and returning said children to their home." The decree is silent concerning the place where the children are to live, and there was no injunction with respect to where plaintiff could reside. The final decree was entered April 19, 1956, incorporating the provisions

of the interlocutory decree respecting the custody and support of the children.

In July 1955 plaintiff moved to Oakland, California, with the children. She resigned her position as a physician with the Los Angeles City Schools and went to work as a civilian physician for the Army in Oakland. In June 1956 plaintiff remarried and has been living in Carmel, California, where the children also lived until the orders were entered in this proceeding.

In September 1956, on application of defendant, an order was made requiring plaintiff to show cause why custody of the children should not be awarded to defendant, or that plaintiff be required to return the children to Los Angeles county so that he could exercise his visitation rights as granted by the decree. On October 29, 1956, the matter was referred to a commissioner who postponed hearing to January 16, 1957, pending an investigation and report by a court investigator. An interim order was made on October 29 that "during the period of continuance the defendant shall be entitled to physical possession of the minor children on the week-end of Friday the 16th to November 18 and from December 19 to December 27 providing the defendant pays for and provides airplane transportation for the minor children from Carmel to Los Angeles and return."

1. The recommendation of the court investigator was: "That the care, custody and control of the minor children, Denise and Hans Goto, be retained by the mother at this time; that the father be allowed rights of liberal visitation and that, because of the distance between the two homes, the father have physical custody on one weekend each month, as well as one week of the Christmas vacation, one-half of the Easter vacation, and one-half of the summer vacation.

"That neither parent say anything derogatory concerning the other in the presence of the minor children, and that the children not be taken out of the State of California without further order of Court."

The investigator said: "The mother is employed on a half day basis at a nearby Army base and has a net income of \$250. per month. The stepfather is em-

At the hearing on January 16, 1957, the judge heard the testimony of the parties and the court investigator, and received the report of the investigator in evidence.<sup>1</sup> The court then made the following order:

"Custody of the minor children is to remain with plaintiff until the end of the school term, in June, with right of reasonable visitation to the defendant, as heretofore ordered; defendant may have physical custody of the children one-half of the Easter vacation and during the summer vacation, with the exception of the first week in August, when plaintiff may have the children. Further hearing on custody is to be had at a date prior to next September, to be agreed upon by the parties. Plaintiff is ordered to pay her own attorney's fees and costs, on the ground that she was responsible for taking the children to Oakland, and by reason of that fact it was necessary for defendant to bring this modification."

The matter was again heard on August 28, 1957. After testimony of the parties and with approval of both parents the children were privately interviewed by the court in chambers. On August 29, 1957 the court made the following order:

"After talking with the two minor children of the parties in chambers, the

employed as a field man with the Chester Packer and Wheeler Nurseries in Watsonville, California, 30 miles distant from the home, and has an average income of \$10,000. per year. \* \* \* The father has not remarried and care of the children during their visits with him is by the paternal aunt or the paternal grandmother. \* \* \*

"Since her [the mother's] remarriage she has a good home for the children and she is doing everything possible to provide the proper atmosphere for their growth and development. \* \* \*

"There appears to be no reason to believe that the mother is not a fit or proper person to provide for the care of her children, and it is also believed that the father is equally fit and proper and that he should be allowed rights of liberal visitation."



Court makes the following order and findings: The Court finds that both parents are fit and proper persons to have custody of the minor children. The Court further finds that the daughter being over the age of 14 years has expressed a preference to live with the defendant and that both children should remain together under the custody of the same parent. It is therefore ordered that custody of the minor children is awarded to the defendant; the plaintiff may have physical custody of the minor children during the months of July and August of each year, at which time the defendant shall have rights of reasonable visitation. The order for support of the minor children is vacated except for the months of July and August when the children are with the plaintiff at which time the defendant shall pay support to the plaintiff in the same amounts he has been paying. Plaintiff is to have physical custody of the minor children for one-half of the Christmas vacation and one-half of the Easter vacation to alternate each year so that the children will actually be with her on Christmas Day of one year and on Easter of the following year."

Plaintiff appeals (1) from the order of August 29, 1957, insofar as it awards the custody of Hans to defendant and insofar as it modifies the final decree that defendant support Hans, and (2) from an order directing defendant to pay \$100 attorney's fees for services performed and denying plaintiff's motion for attorney's fees and costs on appeal.

#### Appeal from Modification of Custody Order

The issue is whether the court abused its discretion in the order of August 29, 1957 modifying the decrees.

[1] Plaintiff contends the decrees awarding her custody of the young boy cannot be modified in the absence of evidence establishing a change of conditions detri-

mental to the welfare of the child. In this connection she argues that evidence one of the children of the parties has reached the age of discretion sufficient to choose to live with the other parent is not such a change of circumstances as would warrant a change in custody of the other child of tender age. We agree. Because of the disparity in ages between Hans, the 6-year-old boy, and his 14-year-old sister and the evidence bearing on the subject of the welfare of this child under such change in custody, we must conclude that it was an abuse of the court's discretion to modify the custody provision of the decrees as to Hans.

[2, 3] To warrant modification of a custodial order the general rule is said to be there must be substantial evidence of a change of circumstances after the entry of the original decree (*Davis v. Davis*, 41 Cal.2d 563, 565, 261 P.2d 729), except in a case where, despite the fact that there was no change of circumstances, nevertheless the welfare of the child requires or justifies the change in the previous order of custody. *Gantner v. Gantner*, 39 Cal.2d 272, 276, 246 P.2d 923; *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719; *Juri v. Juri*, 69 Cal.App.2d 773, 778, 160 P.2d 73. The one seeking modification has the burden of proof to show facts warranting the change in custody and that it is for the child's best interests. *Johnson v. Johnson*, 72 Cal.App.2d 721, 724, 165 P.2d 552; *Stagliano v. Stagliano*, 125 Cal.App.2d 343, 348, 270 P.2d 91.

Civil Code, section 138, states the considerations which should guide a court in the exercise of its discretion in determining the custody of children. Subdivision (2) provides:

"As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother \* \* \*."

[4] There is no fixed and certain age of minority which can be said to constitute a child of "tender years." *Russell v. Russell*,

20 Cal.App. 457, 461, 129 P. 467. In *Taber v. Taber*, 209 Cal. 755, 290 P. 36, a child of six was held to be a child of tender years. The court pointed out that the sex of the child is to be considered as well as its physical development in determining whether it is a child of tender years. In *Bemis v. Bemis*, 89 Cal.App.2d 80, 200 P.2d 84, this court reversed an order of a trial judge who had refused to award two children, aged 5½ and 7, to their mother who was a fit person. We stated (89 Cal.App.2d at page 83, 200 P.2d at page 86):

"The 'other things' [referred to in Civ.Code, § 138] that are to be weighed and considered are a good home, congenial surroundings, intelligent attention and direction in matters affecting the health, growth and development of the children—these are the principal advantages that must be looked for. The court has a broad discretion in determining whether such advantages are offered by the respective parents, and whether they are equal, but *if the evidence clearly establishes that the children will have equal advantages in the home of the mother and that the mother has demonstrated her ability and willingness to perform her maternal duties properly, the law requires that young children be placed with her.* \* \* \*

"[89 Cal.App.2d at page 90, 200 P.2d at page 90.] Upon the undisputed evidence in the case, section 138 of the Civil Code is controlling. When facts are established which clearly make applicable the quoted provision of the section that custody should be awarded to the mother, it is not within the discretion of the court to ignore it. There is no more sound or universally recognized rule of law to be found in the books. Where the court finds that 'other things' are equal, young children are invariably given into the custody of their mother. We say 'invariably' because we have not found in our reported cases a single instance in which the custody of young children has been

awarded to their father upon evidence that the mother was a fit and proper person to have their custody and was able to give them *advantages equal* to those that they would enjoy in the home of the father. We need not elaborate upon the reasons which underlie this sound policy of the law. They are stated with great clarity and completeness in many cases, and we shall therefore refer only to *Juri v. Juri*, 69 Cal.App.2d 773, 160 P.2d 73, and cases therein cited." (Emphasis added. Also see *Ex parte Elliott*, 115 Cal.App.2d 536, 254 P.2d 135; *Sorrels v. Sorrels*, 105 Cal.App.2d 465, 468, 234 P.2d 103.)

In the divorce action the parties waived findings. Inferentially, the court found that other things were equal; that plaintiff was a fit and proper custodian; that the welfare of the children required she have their custody. It awarded custody of Denise and Hans, then 12 and 4 years of age, respectively, to plaintiff with the right of reasonable visitation to defendant, including possession of the children on alternate Sundays and holidays. At the hearing of August 1957, the court specifically found that both parents were fit and proper persons to have custody of the children. There has never been any question as to the fitness of either parent. Nevertheless, having found the mother to be a fit and proper person, the court changed the custody award of this 6-year-old boy, taking him away from his mother and giving him to his father, stating as its only reason that since the boy's 14-year-old sister had expressed a preference to live with the father it was for the best interests of both children that they remain together under the custody of the same parent, chosen by the older child. The court did not say in what way the interests of this young child would be benefited by removing him from the loving care of his mother in order that he might be with his teen-age sister in the home of the father where he would have no maternal care. We do not think a teen-ager's influence is superior to that of the natural mother in guiding a child

through its formative years. Defendant testified he has a four-bedroom home; Denise has a private bedroom, and he sleeps with Hans; he has no housekeeper to care for the children; on Mondays he is with both children all day; on most other days Denise goes to the hospital and to his office with him, and Hans is picked up by his (defendant's) sister and taken to her home.

In *Ashwell v. Ashwell*, 135 Cal.App.2d 211, 286 P.2d 983, the interlocutory decree awarded the custody of four children between the ages of 2 and 6 to the mother. During the interlocutory period the trial court changed the custody to the father. Reversing, the court stated (135 Cal.App.2d at page 213, 286 P.2d at page 984):

"If the order is to be supported upon the ground alleged in the notice of motion it can only be because, if such findings had been made, they would have been sustained by the evidence, for, unless that be so, then it seems clear to us that the change in custody constituted an abuse of discretion in view of the previous and recent adjudication that Norma was a fit and proper custodian and that the welfare of the children required that she have their custody and control; that is, there must be sufficient evidence that a change had taken place after the granting of the interlocutory decree and that thereby the welfare of the children was endangered. *Munson v. Munson*, 27 Cal.2d 659, 166 P.2d 268; *Prouty v. Prouty*, 16 Cal.2d 190, 193, 105 P.2d 295, 297—there the court said: 'It must be borne in mind that in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification.' [Citations]—'until some change of circumstance arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will re-

fuse to make any modification of such order.'"

"In the case of a child of tender years, experience has taught that in the vast majority of cases there is no one who will give such complete and selfless devotion, and so unhesitatingly and unstintingly make the sacrifices which the welfare of the child demands, as the child's own mother. The record herein abounds in evidence showing the anxious desires of a mother to care for her child. Under such circumstances fairness alone requires that she and not a third person be allowed the opportunity to carry out the trust she as a mother owes her child. *Juri v. Juri*, 69 Cal.App.2d 773, 778, 779, 160 P.2d 73; *In re Estate of Lindner*, 13 Cal. App. 208, 212, 109 P. 101." *Robertson v. Robertson*, 72 Cal.App.2d 129, 135, 164 P.2d 52, 56. Reversing an order awarding the custody of two children, 4 and 5 years of age, to the father, the court in *Juri v. Juri*, 69 Cal.App.2d 773, at page 780, 160 P.2d 73, at page 76, stated:

"[W]here the ability, willingness and eminent fitness of a mother to take custody of her infant offspring are unquestioned, as is the case before us, we believe that in denying these children an opportunity to know, to learn to respect and to receive the care and affection of their mother for at least a part of each year, the trial court abused its discretion."

In *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96, the divorce decree gave custody of a girl 9 and a boy 15 to the mother. A modification order was made giving custody to the father. On appeal the order was reversed. The court said (49 Cal. App.2d at page 586, 122 P.2d at page 99):

"So far as the evidence goes there is not one iota to indicate that the children did not have the best of care from their mother \* \* \*. The father is active in this business and employs a housekeeper \* \* \* and so if the children were to reside in his home they would be largely under the immediate care of



a housekeeper or of a governess if he employed one, as he stated he would if awarded the custody."

Here, the boy is of an age which imperatively requires that he have the care and attention of his mother rather than that of a teen-age sister or third persons, and this is a compelling reason for separating him from his sister with whom he has few, if any, interests in common.

[5] Defendant contends the evidence supports a change in circumstances warranting the modification of the custody order by reason of plaintiff's sale of the family home, in which she and the children were living at the time of the interlocutory decree, and moving with the children to Oakland. He argues the move was made for the purpose of depriving him of his visitation rights and in order to be near the man whom she subsequently married. There was no injunction in the decree which purported to govern where the mother and children should reside. Simply because plaintiff moved her residence, remarried, and practiced her profession half-time while Hans was in school does not warrant an inference that she has neglected Hans. A parent to whom custody has been awarded has the right to select any reasonable place in which the child shall reside with him. 17A Am. Jur. 23, § 831. Defendant is a man of means and the distance to Carmel is not so great as to work a hardship on him in arranging transportation in order to have Hans with him during visitation periods.

The court in effect held that a 14-year-old child can determine not only where she is going to live and with which parent but that she also can determine who shall have the custody of her 6-year-old brother, thus pre-empting the statutory and natural right of a fit mother to rear her child. As counsel for plaintiff states, "This determination flies in the face of common sense and the natural law."

There is no evidence of a change in circumstances as to Hans to warrant the modification order and it can only be sustained,

therefore, on proof of facts from which it can be inferred that his welfare requires that he be removed from plaintiff's custody. The only other evidence offered by defendant bearing on Hans' welfare was his testimony concerning the material advantages he is able to offer the child. This is not sufficient to warrant modification of the order. Plaintiff is able to offer equal advantages. She has remarried and her husband has indicated an interest in the welfare of both children. Their home is in a good residential area in Carmel. Hans was settled in school there and apparently doing well. He attended the local Japanese Presbyterian Church. Plaintiff now practices her profession only half days and is able to be home with Hans all during the time he is not in school. There is no evidence of the possibility that Hans will develop a hostile attitude toward his father if allowed to remain in the home of his mother. The record reveals Hans evidences a normal, natural love for both parents. There is nothing in the record showing any relationship between the 14-year-old girl and the young boy, 8 years her junior, that would justify an inference that her companionship would be better for Hans than the constant love, devotion, daily care, and companionship of his mother. Nor is there anything which justifies depriving the mother of the love, comfort, and rearing of Hans.

Defendant's home conditions have not greatly changed since the interlocutory decree. Besides his own practice as a physician he works at a Japanese hospital. He does not employ a housekeeper. He would be with Hans very little of the time. He is dependent upon his relatives, who have homes and children of their own, and the older girl to assist in the care of Hans. There is nothing in the record indicating that the welfare of Hans requires or justifies a change in the previous order awarding his custody to plaintiff. It was an abuse of discretion to take this 6-year-old boy from the custody of his mother and place him in the custody of his father solely so that he might be with his 14-year-old sister.

Appeal from Order  
re Attorney's Fees and Costs

[6] On September 24, 1957, plaintiff applied for an allowance of attorney's fees for services performed in connection with the application of defendant for an order giving him custody of the children and for an allowance of costs and attorney's fees for services on her appeal from the order of August 29, 1957. The application for attorney's fees for past services performed was submitted on affidavits of plaintiff and defendant. On November 6, 1957, the court ordered defendant to pay \$100 attorney's fees to counsel for plaintiff for services rendered to the date of the order and denied the application for costs and attorney's fees on plaintiff's appeal on "the grounds that the appeal has not been taken in good faith." Plaintiff appeals from this order.

While the allowance of \$100 appears to be extremely meager, we cannot say the court abused its discretion in not allowing a greater sum. The court erred in denying plaintiff's application for an allowance of costs and attorney's fees on the appeal from the order of August 29, 1957. From what has been said, it appears that the appeal was meritorious and taken in good faith. It is plain that the refusal to make plaintiff a reasonable allowance to prosecute the appeal on the ground it had not been taken in good faith was an abuse of discretion. *Kyne v. Kyne*, 74 Cal.App.2d 563, 568-569, 169 P.2d 272.

The parts of the order of August 29, 1957, appealed from are reversed. The order of November 6, 1957, insofar as it allows \$100 attorney's fees, is affirmed; insofar as it denies plaintiff's application for costs and attorney's fees on appeal, it is reversed with directions to allow plaintiff a reasonable sum therefor. Appellant shall recover her costs on appeal.

SHINN, P. J., and PARKER WOOD, J.,  
concur.

164 Cal.App.2d 671

Edward Maxwell JASPER, Ray N. Irwin, William Moran, Art Freeman, Gerald B. Engler, Charley S. Bottemiller, Ray B. Hunter, Ralph W. Emerson, George F. Baker, Plaintiffs and Appellants,

v.

Alfred N. DAVIS, as Treasurer of the County of Tuolumne; James C. White, as Auditor of the County of Tuolumne; M. C. Merrell, Frank J. Dondero, A. Nichols, Carl K. Williams and Clarence A. Kerr, constituting the Board of Supervisors of the County of Tuolumne; The County of Tuolumne; Donald Gallagher, Walter C. Kennedy, Stanley B. Fowler, Robert D. Gray, John M. Peirce, Roy C. Ploss, Harold H. Robinson, and Thomas A. Stead, constituting the Board of Administration of California State Employees' Retirement System; California State Employees' Retirement System; the State of California, Defendants and Respondents.

Civ. 9404.

District Court of Appeal, Third District,  
California.

Oct. 29, 1958.

Taxpayers' actions against county officials and others to obtain a decree that a certain contract was invalid. From a judgment of the Superior Court, Tuolumne County, Ralph McGee, J., the plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held, *inter alia*, that in taxpayers' action to obtain a court decree adjudging that contract between county and board of administration of state retirement system was void because of certain alleged irregularities in the proceedings based upon theory that resolution summary was not sufficiently complete and detailed and that confusion resulted because of it, evidence supported trial court's findings that asserted confusion did not exist and that in all essential matters proceedings taken by the county measured up to requirements of the statutes, that election was fairly conducted and that ensuing contract was valid.

Affirmed.

**1. Counties** ⇐69(3)

A summary of county's intention to participate in state retirement system, which appeared in resolution of intention, adequately met statutory requirements where, though summary was brief, within approximations necessitated by statutory scheme, it told county employees essential features of the plan, including how much the plan would cost them, how much they would receive, and when they would receive it. West's Ann.Gov.Code, §§ 20450, 20457.

**2. Counties** ⇐69(3)

A paragraph of summary of county's intention to participate in state retirement system was properly omitted from summary which appeared upon ballots given to miscellaneous employees, where paragraph had to do solely with contributions required of police officers who voted separately as a group and was of no concern to the miscellaneous employees who were entitled to separate ballots to be used by members of that group. West's Ann.Gov.Code, §§ 20450, 20457.

**3. Counties** ⇐69(3)

The so-called "contract" which a public agency, such as a county, enters into with board of administration of state retirement system when its employees are blanketed into the system is not the type of contract which is the subject of rule that where a statute prescribes procedure by which a public agency may enter into a contract, procedure must be strictly followed. West's Ann.Gov.Code, §§ 20450, 20457.

**4. Counties** ⇐69(3)

Under statute providing that a public agency, such as a county, may participate in and make all or part of its employees members of state retirement system, by proceedings leading to a contract between its governing body and board of administration of the system, substantial compliance with statutory requirement is sufficient. West's Ann.Gov.Code, §§ 20450, 20457.

**5. Counties** ⇐69(3)

There was no inconsistency between summary in resolution of intention of coun-

ty to participate in state retirement system and ballot summary on ground that two different base periods for computing final compensation were designated in the two summaries, where anyone reading the resolution of intention would recognize paragraph of contract form exhibit thereto as a proviso or exception to the more general language found in the resolution, and a reading of resolution and of exhibit showed that county proposed to use three-year period rather than the five-year period as a base. West's Ann.Gov.Code, §§ 20024.01, 20025, 20450, 20457, 20804.5, 21250, 21251, 21252.

**6. Counties** ⇐69(3)

A county resolution of intention to participate in state retirement system was not invalid because a paragraph of resolution stated that 10 years of service was required to be eligible for such benefit where paragraph also made reference to another paragraph which provided that a member who had \$500 on deposit was eligible for disability benefits. West's Ann.Gov.Code, §§ 20450, 20457.

**7. Counties** ⇐69(3)

In action to obtain decree adjudging that contract between county and board of administration of state retirement system was void because of certain alleged irregularities in the proceedings based upon theory that resolution summary was not sufficiently complete and detailed and that confusion resulted because of it, evidence supported trial court's findings that asserted confusion did not exist and that in all essential matters proceedings taken by the county measured up to requirements of the statutes, that election was fairly conducted and that ensuing contract was valid. West's Ann.Gov.Code, §§ 20450, 20457.

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Bryant & Moltzen, San Francisco, and John A. Gorfinkel, San Francisco, of counsel, for appellants.

Scott K. Carter, Dist. Atty., Sonora, for respondent County of Tuolumne.



Edmund L. Gorgas, Sonora, for respondent Bd. of Supervisors.

Edmund G. Brown, Atty. Gen., by Wm. J. Power, Deputy Atty. Gen., for respondent Retirement System.

VAN DYKE, Presiding Justice.

The County of Tuolumne took proceedings to participate in, and to make its employees members of, the State Retirement System, hereinafter called "system". When the statutory proceedings had been completed, the county entered into the statutory "contract" with the Board of Administration of the system, hereinafter called "board". This action was brought by certain taxpayers of the county to obtain a court decree adjudging that the contract was void because of certain alleged irregularities in the proceedings. Section 20450 of the Government Code provides that any public agency, such as a county, may participate in and make all or part of its employees members of the system by proceedings leading to a contract between its governing body and the board. The following sections provide that when the governing body of a public agency desires to consider the participation of the agency in the system it shall ask the board for a quotation of approximate contribution to the system which would be required of the agency for such participation. When the agency has received this information and if it then desires to participate its governing body is required to adopt a resolution giving notice of such intention. This resolution is required to contain a summary of the major provisions of the proposed retirement plan. The agency must then hold an election to permit its employees proposed to be included in the system to express by secret ballot their approval or disapproval of the retirement proposal. Sec. 20457, Gov.Code. Prior to the election the agency must receive and make available to its employees a schedule of the rates of contribution of members. The ballot used at the election must include the summary of the retirement plan as set

forth in the resolution and the election must be conducted by the agency in such manner as it prescribes, which shall be such as to permit the firemen, the policemen, the county peace officers, and the other employees proposed to be included in the system, to express separately their approval or disapproval. Sec. 20457, Gov.Code. The agency may not include in the system any of the said four groups, the majority of whose members vote to disapprove the proposed plan.

The trial court entered a judgment, upholding the validity of the statutory contract, the execution of which followed the statutory proceedings, and the plaintiffs appealed.

Although in their pleadings the appellants asserted a number of irregularities had occurred in the proceedings, most of these claims were either expressly abandoned in open court or were impliedly abandoned by the failure of appellants to introduce any evidence in support thereof. The issues tried revolved around appellants' contentions that the ballots used at the election did not include the summary of the retirement plan as set forth in the resolution of intention and that the election was not conducted in such manner as to permit each employee proposed to be included in the system to express by secret ballot his approval or disapproval of the proposed plan.

There were two groups of county employees proposed to be included. Of the first group made up of county peace officers there were five. Of the second group made up of all other county employees, hereinafter called "miscellaneous employees", there were one hundred and thirty-eight. Only two of the peace officers appeared and voted. By the miscellaneous employees there were cast 92 votes in favor of the plan and 26 votes in disapproval thereof.

[1] Both the resolution of intention and the two ballot forms used by the two groups of employees contained summaries. Appellants do not complain that the summary

of the proposed plan contained in the resolution of intention was not sufficient in itself to meet the requirements of the statute. Our examination of that summary convinces us that it was adequate. It cannot be expected that in summarizing the 1,500 or so sections of the Government Code whereby the legislature has provided for the retirement of state employees, which statutory plan for retirement necessarily furnishes the basis for the retirement proposal to be voted on by the electors when a public agency desires to participate in the state plan, the summary could be anything other than a most abbreviated one. That of necessity it must be much abbreviated is also shown by the requirement that the summary be printed on the ballot forms. Only the barest outline of the retirement plan would be intelligible to the voting employees. The summary appearing in the resolution of intention adequately met the statutory requirements and served their purpose. It was brief, but within the approximations necessitated by the statutory scheme it told the employees the essential features of the plan, including how much the plan would cost them, how much they would receive, and when they would receive it.

[2-4] While not challenging the adequacy of the summary appearing in the resolution, appellants do say that the summary appearing on the ballot forms differed in material points from the summary appearing in the resolution and, therefore, the statutory requirements were not met. There were some differences, but we agree with the trial court which found that these differences were neither substantial nor apt to confuse the voters. We cannot agree with appellants in their argument that the statutory requirements must be followed to the letter else the resulting statutory "contract" will be void. We will first discuss the major variations which do appear. Paragraph 11 of the resolution summary was omitted from the summary that appeared upon the ballots given to miscellaneous employees. This omission was

proper since the paragraph had to do solely with the contributions required of safety members, and was of no concern to the miscellaneous employees. There were in effect under the statutes as many separate elections to be held as there were groups of employees proposed to be included. In this case there were two groups and it was proper to give to each group ballots to be used by members of that group. This was done. The paragraph having to do with contributions to be made by peace officers was included in the summary that appeared upon ballots prepared for them. It was omitted and should have been omitted from the ballots of the miscellaneous employees, for to have included it in those ballots would only have been confusing. It is true that the summary which thus appeared on the ballots of the miscellaneous employees was not "the summary" appearing in the resolution of intention in so far as it thus omitted the paragraph pertinent to peace officer participation. The statutory requirement that the summary contained in the resolution of intention must also appear on the ballots was substantially complied with and that was enough. This was not, as appellants contend, a situation calling for the application of the rule that where a statute prescribes the procedure by which a public agency may enter into a contract the procedure must be strictly followed, since in such cases the mode is the measure of the power to contract. The so-called "contract" which a public agency enters into with the board when its employees are blanketed into the system is not at all the type of contract which is the subject of the stated rule. The statutory "contract" here involved possesses few of the essentials of a commercial contract. The system is one whereby contributions by the employees and by the state (or, as here, by the participating agency) purchase certain benefits determined, and periodically redetermined as to cost, by actuarial computations. The employee gets what the employee and the state or the agency pay for. The public contributions become a part of employee compen-

sation for services. When a public agency blankets its employees into the system, the so-called "contract" which it executes is nothing more than its undertaking to collect the required contributions from its employees and, adding thereto the requisite amount of its own funds, pay the money to the board. The amount it must turn over to the board is initially computed and from time to time recomputed by the same actuarial methods used in computing and re-computing the contributions of the state's employees and of the state. The amount of contributions required for agency participation may differ from, may even exceed, the contributions of the state's employees and of the state, because the actuaries must, in computing the cost of the benefits to be derived, consider the smaller number of employees involved and the differing risks of their environment. We think that these considerations make it clear that we have not here the type of contract wherein the statutory procedure must be literally complied with, but, on the other hand, have a situation where substantial compliance is sufficient. So we say as to the variance or irregularity we are now discussing that the omission from the miscellaneous ballot forms of the paragraph of the resolution of intention which concerned only peace officers amounted to no material irregularity and, in fact, in our view, its omission was proper in order that the purpose of the statutory requirement that the ballots contain the resolution summary could be achieved, which purpose, of course, was to give information to be considered by the electors in casting their ballots.

[5] Appellants' second claim of irregularity again has to do with a supposed inconsistency between the resolution summary and the ballot summary. They charge that two different base periods for computing final compensation were designated in the two summaries. As originally enacted, the retirement law provided only what is known as the  $\frac{1}{60}$ th at 65 money value formula which was designed to provide the employee who retires at age 65

with 35 years of service a retirement allowance that in theory should approximate one-half of the average salary earned by him during his last five years of service. There was no guarantee that the allowance would equal one-half the salary, but rather the amount was dependent upon the employee's contributions. Through the years the law was liberalized until at the present time the most advantageous plan provides a guaranteed retirement allowance at age 60 after 30 years of service of one-half of the average salary of the three highest consecutive years paid to the employee. These more liberal provisions were added to the law not in place of the earlier provisions but in addition thereto. The result is that a contracting agency may choose one of several plans which will vary slightly in the amount of contributions required to obtain the varying benefits being purchased. There are also optional provisions which may be included in the plan adopted. These statutory provisions allow, (1) the use of a three-year base period rather than a five-year period (Gov.Code, § 20024.01), (2) the inclusion of all of the employees' compensation in computing retirement benefits rather than limiting benefits to the first \$416.66 per month (Gov. Code, § 20025), and (3) the granting to employees of the right to receive retirement credit for time spent in service prior to becoming a member of the system (Gov.Code, § 20804.5). All three of these optional features were adopted by Tuolumne County. The nonguarantee  $\frac{1}{60}$ th at 65 formula remains as the basic plan and a local agency whose agreement with the system did not specify otherwise would be afforded coverage on this basis. Gov.Code, §§ 21250, 21251 and 21252. The resolution summary, apparently attempting to give as much information as possible, was designed to fit the basic plan, while noting that certain other features were available on an optional basis. The summary appears to be a standardized form of summary furnished public agencies by the board, and it seems to have been the practice to use this standardized summary in all cases and



to note the optional provisions proposed to be adopted by the contracting agency in each case in a copy of the proposed contract attached as an exhibit to the resolution of intention.

In paragraph 3 of the resolution summary the following appears: "3. The monthly retirement allowance payable upon retirement for service is dependent upon such factors as age, sex, salary, and years of service. For Local Safety Members retiring at age 55 in paragraph 2, or at a higher age with 20 years of service, the monthly allowance is approximately one-half the average monthly salary (salary over \$416.66 being excluded unless agency elects otherwise) during the five years immediately preceding retirement, unless the Public Agency elects to provide prior service benefits at less than the full amount. For other Agency employees, the monthly allowance, upon retirement at age 65 if the Agency elects 60 as the lowest optional service retirement age, is  $\frac{1}{10}$ th of the average monthly salary during the five years immediately preceding retirement, for each year of service after the effective date of participation, plus approximately  $\frac{1}{10}$ th, or less as may be provided in said contract by the Public Agency for its employees, of 'Final Compensation' or the average monthly salary during the three years immediately preceding the effective date of participation, for each year of service prior to that date. Upon retirement at age 60, if the Agency elects 55 as the lowest optional service retirement age, the fraction is approximately  $\frac{1}{10}$ th instead of  $\frac{1}{10}$ th, or exactly  $\frac{1}{10}$ th, if the guaranteed fraction also is elected. The fractions are reduced for both current and prior service if retirement is below 60, and increased only for current service, if retirement is above 60."

Paragraph 14 of the contract form reads as follows: "14. The provisions of Section 20024.01 of the State Employees' Retirement Law, which provide that 'final compensation' shall mean the highest average annual compensation earnable by a

member during any period of three consecutive years during his membership in the System, Shall Apply to employees of Public Agency who become members of said Retirement System."

Government Code, § 20024.01, which allows the use of a three-year base period, is, as has been mentioned, an optional provision in the retirement law and the county adopted it rather than the standard five-year period. Anyone reading the resolution of intention would recognize paragraph 14 of the contract form exhibit thereto as a proviso or exception to the more general language that is found in paragraph 3 of the resolution. A reading of the resolution and of the exhibit shows that the county proposed to use the three-year period and the contract executed does so. There is thus no discrepancy between the summary and the ballot for miscellaneous employees. What has been said also applies to appellants' contention that there is no indication as to whether salary over \$416.66 should be excluded for retirement purposes. The contract form showed that a part of the proposed plan was the adoption of, and the county did adopt, the provisions of Government Code, § 20025, providing that where the contracting agency so elects the entire salary of the employee shall be considered for retirement purposes.

[6] Appellants' third specification of irregularity is designated as "eligibility for disability retirement." Under this point it is argued that paragraph 5 of the resolution of intention states that 10 years of service is required to be eligible for this benefit. Paragraph 5 of the resolution does so state, but it also makes reference to paragraph 10 thereof, which provides that a member who has \$500 on deposit is eligible for disability benefits. This and other designations of alleged irregularity are really attacks upon the resolution summary as not being sufficiently complete and detailed. A sufficient answer has already been made herein. The statute requires

only a summary. The entire statutory scheme for retirement is far too extensive and far too complicated to permit all details to be given in an intelligible summary.

[7] As noted, the statute requires that the resolution of intention contain a summary, that the summary be repeated in the ballot forms, and that there be made available to the electors a schedule of contribution of members. These requirements were met. The statute also provides that the election shall be held in such manner as the agency shall decide. It appears in evidence that prior to the election all of the employees of the county were required to attend a meeting at which they were addressed by a speaker familiar with the state retirement system. Most of the employees attended this meeting. Other information in the form of brochures and pamphlets were distributed prior to the election. There appears to have been an effort on the part of the county and of those interested in the proceedings to procure and make available to the county employees all information necessary to enable them to vote intelligently. Seizing upon various minor discrepancies in the brochures and pamphlets, when compared with the summaries, appellants argue that the result was the utter confusion of the employees who were to vote. Strangely enough, however, if such confusion did exist no one who voted was sworn to testify as to its existence. The trial court found that the asserted confusion did not exist. We think it unnecessary to follow appellants further in their arguments based upon these matters. The trial court found that in all essential matters the proceedings taken by the county measured up to the requirements of the statutes, that the election was fairly conducted and that the ensuing contract was valid. From the record presented we hold that these findings of the trial court are amply supported.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

The PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

Ralph Charles MENDOZA, Defendant and  
Appellant.\*

Cr. 1391.

District Court of Appeal, Fourth District,  
California.

Oct. 31, 1958.

Rehearing Granted Nov. 17, 1958.

For Opinion on Rehearing see 332 P.2d 117.

Prosecution for robbery. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction and denied a motion for new trial, and defendant appealed. The District Court of Appeal, Mussell, J., held that where jury was properly admonished and instructed by court that testimony consisting of statements of co-defendants made to a police officer to the effect that the defendant was with them at the time of the robbery could be considered only as against the co-defendants making the statements, there was no error in admitting such statements in evidence.

Judgment and order denying new trial affirmed.

#### 1. Criminal Law ☞673(4)

In prosecution for robbery, where jury was properly admonished and instructed by court that testimony consisting of statements of codefendants made to a police officer to the effect that the defendant was with them at the time of the robbery could be considered only as against the codefendants making the statements, there was no error in admitting such statements in evidence.

#### 2. Criminal Law ☞1170½(6)

In prosecution for robbery, although question asked a witness who identified defendant as a former classmate in high school, in regard to whether he remembered defendant because he "got kicked out of school", was improper, in view of fact that an objection to the question was sus-

\* Opinion vacated 332 P.2d 117.

tained by the trial court, and court instructed the jury that it must not draw any inference from the question, asking of such question would not be deemed prejudicial error.

### 3. Criminal Law §338(1)

In criminal prosecution, trial court did not err in permitting prosecution to introduce evidence that counsel for defendant at one time represented another individual, in view of fact counsel for defendant, in cross-examining a witness who identified defendant, was asked if he knew such other individual and if he might have confused defendant with such other individual.

### 4. Criminal Law §755½

A judge may restrict his comments to portions of the evidence or to the credibility of a single witness, and need not sum up all the testimony, both favorable and unfavorable, although he may not withdraw material evidence from the jury's consideration or distort the testimony, and his comments should be temperately and fairly made, rather than being argumentative or contentious to a degree amounting to partisan advocacy.

### 5. Criminal Law §755½, 757(1)

The jury, as required by the constitution must remain the exclusive arbiter of questions of fact and the credibility of witnesses, and the judge should make clear that his views are not binding, but advisory only.

### 6. Criminal Law §823(1)

In robbery prosecution, instructions would not be deemed prejudicial on theory that court singled out particular evidence for comment and gave undue prominence to particular issues, especially in view of instruction that jury was to be the exclusive judge of the credibility of the witnesses, and of all questions of fact submitted.

MUSSELL, Justice.

Defendant Ralph Charles Mendoza was charged with two counts of Robbery (Pen. Code, Sec. 211) and with two prior felony convictions. In a separate information his co-defendants, Joe Lloyd Goessman and Richard Brown, were also charged with two counts of robbery based on the same facts alleged in the information against Mendoza. It was also alleged in the latter information that at the time of the commission of the offense the defendant Goessman was armed with a deadly weapon. A motion for a new trial was denied and the three defendants were sentenced to imprisonment in the state prison. Defendant Mendoza appeals from the judgment of conviction and the order denying his motion for a new trial.

During the early morning hours on February 12, 1958, David Miramontes and Edwin Austin, students at the San Diego State College, were working part time at the P & R Liquor Store in San Diego. As was their custom, they removed all money in the cash register in excess of \$100 and placed it in the safe, leaving \$15 or \$20 in silver and the rest in currency in the cash register for the next day. Fifteen or twenty minutes later appellant and defendant Goessman entered the store. Austin asked them if he could help them. Austin and appellant went to the wine section of the store and appellant picked out a bottle of wine. When Austin reached for the bottle, appellant told him to stand still and then told him to lie down on the floor behind the counter with his hands stretched out. Goessman then told Miramontes not to move and pulled an automatic pistol from his jacket pocket and told Miramontes to open the cash register. After Miramontes had complied with this order, he was ordered to go over and lie down next to Austin and stretch his arms out. Appellant then took wrist watches from Austin and Miramontes and Miramontes heard some one taking money from the cash register. Appellant and Goessman then left the store and the police were

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Edgar G. Langford and J. Perry Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Joe J. Yasaki, Deputy Atty. Gen., for respondent.



called. All of the bills and 50¢ pieces were taken from the cash register.

On March 11, 1958, defendant Goessman was arrested and when questioned by a police officer, stated that he knew nothing about the robbery. He was asked "who he was with" and stated that he was with Mendoza and Brown; that he had received some money and that he had thrown the robbery gun in the bay approximately two days before his arrest.

On March 11, 1958, defendant Brown, when questioned by a police officer relative to his participation in the robbery, stated he was the driver of the car and did not go into the store; that he had received money for his part in the robbery but did not remember the exact amount. When asked "who he was with" he stated that he was with appellant and Goessman.

[1] Appellant first contends that the court erred in admitting into evidence the statements of Goessman and Brown made to the police officer to the effect that appellant was with them at the time of the robbery. There is no merit to this contention. Where, as here, the jury were properly admonished and instructed by the court that such testimony could be considered only as against the defendant making the statement and the statements implicated the defendant, Goessman and Brown in the commission of the robbery, there was no error in admitting the questioned statements in evidence. *People v. Mullins*, 145 Cal.App.2d 667, 671, 303 P.2d 58; *People v. Matthew*, 194 Cal. 273, 279, 228 P. 424; *People v. Gidney*, 10 Cal.2d 138, 144, 73 P.2d 1186; *People v. Koenig*, 29 Cal.2d 87, 94, 173 P.2d 1.

[2] It is next contended that the trial court erred in permitting the prosecution to introduce evidence of appellant's bad conduct in school. The record shows in this connection that the witness Miramontes identified appellant as one of the two men who entered the store and committed the robbery. He also testified that he recognized the appellant when he entered the store and that he saw him at Kearny High

School in about 1948 or 1949 when he (Miramontes) was a student there. Counsel for appellant cross-examined Miramontes extensively as to the nature of his acquaintance with appellant at the Kearny High School and his reasons for identifying him. On redirect examination the deputy district attorney asked Miramontes if there was something about Mendoza when he was in the high school with appellant that would enable him to remember him better than the average classmate and Miramontes replied that he (appellant) was always in trouble. The deputy district attorney then asked the following question: "As a matter of fact, he got kicked out of school?" An objection to this question was sustained by the trial court and it was not answered. Moreover, the court instructed the jury as follows:

"\* \* \* and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. \* \* \*"

While the question was improper, no reversible error resulted therefrom.

[3] Appellant next argues that the court erred in permitting the prosecution to introduce evidence that counsel for appellant at one time represented one Rudolph Mendoza. This argument is likewise without merit. Counsel for appellant in cross-examining Miramontes was asked if he knew a Rudy Mendoza at the Kearny High School and if he felt that it was Rudy Mendoza that he knew at the school. The prosecution then introduced evidence that Rudy Mendoza was in jail at the time the robbery was committed and that he had requested the services of appellant's counsel. There was positive identification of the appellant and the error, if any, did not result in prejudice to him. *People v. Watson*, 35 Cal.App.2d 587, 590, 96 P.2d 374; *People v. James*, 40 Cal.App.2d 740, 746, 105 P.2d 947.

Finally, appellant claims that the court erred in its instructions to the jury. He

contends in this connection that the court singled out particular evidence for comment and gave undue prominence to particular issues. However, we have examined all the instructions given and are not in accord with this claim. The jury was told that

"If it has appeared to you that any remark of mine has expressed an opinion concerning the testimony or credibility of any witness, or the significance or effect of any of the evidence, I would caution you that it is your right and duty to exercise the same independence of judgment in weighing the judge's comment on the evidence, as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict."

"If, during the course of the trial, I have said or done anything which may have suggested to you that I am inclined in favor of the claims or positions of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intended to intimate any opinion as to which witnesses are, or are not worthy of belief, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to wholly disregard it."

[4, 5] In *People v. Friend*, 50 Cal.2d 570, 327 P.2d 97, it is held that a judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the

testimony, both favorable and unfavorable; that he may not withdraw material evidence from the jury's consideration or distort the testimony, and his comments should be temperately and fairly made, rather than being argumentative or contentious to a degree amounting to partisan advocacy. The jury, as required by the constitutional provision, must remain as the exclusive arbiter of questions of fact and the credibility of witnesses, and the judge should make clear that his views are not binding but advisory only.

[6] The instructions in the instant case and the comments of the trial judge did not violate the rules announced in *People v. Friend*, supra, and no reversible error appears in this connection.

Judgment and order denying new trial affirmed.

GRIFFIN, P. J., and SHEPARD, J.,  
concur.



164 Cal.App.2d 480

**Joab VIRTUE, Plaintiff and Appellant,**

**v.**

**Olivia FLYNT, Individually, Olivia Flynt, as administratrix of the Estate of Emmon Drake, deceased, Defendant and Respondent.**

**Civ. 23006.**

District Court of Appeal, Second District,  
Division 1, California.

Oct. 22, 1958.

Hearing Denied Dec. 17, 1958.

Action to establish resulting trust in proceeds of sale of real property, which plaintiff claimed to have actually purchased and owned but which had been partly held in name of defendant's intestate. The Superior Court of Los Angeles County, Thomas P. O'Donnell, J., rendered judgment for defendant, and plaintiff appealed.

The District Court of Appeal, Lillie, J., held that even if trial court, ruling on defendant's motion for nonsuit at close of plaintiff's case and taking all of evidence as true, had concluded that agreement had existed but that there had been nothing illegal about it, such court could nevertheless find on merits, after hearing and considering all of evidence, that no agreement had in fact existed that property allegedly paid for by plaintiff was to be taken in decedent's name so that plaintiff might claim veteran's tax exemption through decedent.

Affirmed.

#### 1. Appeal and Error ⇨1071(6)

##### Trial ⇨391

Findings are required on all material issues raised by pleadings and evidence, unless they are waived, and if court renders judgment without making findings on all material issues, case must be reversed.

#### 2. Appeal and Error ⇨1071(6)

If findings are made upon issues which determine cause, other issues become immaterial and failure to find thereon does not constitute prejudicial error.

#### 3. Trial ⇨384

On motion for nonsuit, court is bound to disregard conflicting evidence, to give plaintiff's evidence all of value to which it is legally entitled, and to indulge every legitimate inference which may be drawn from evidence in plaintiff's favor.

#### 4. Trial ⇨384

Even if trial court, ruling on defendant's motion for nonsuit at close of plaintiff's case, in action to establish resulting trust, and taking all of evidence as true, had concluded that agreement had existed but that there had been nothing illegal about it, such court could nevertheless find on merits, after hearing and considering all of evidence, that no agreement had in fact existed that property allegedly paid for by plaintiff was to be taken in defendant's intestate's name so that plaintiff might claim veteran's tax exemption through such decedent.

#### 5. Trial ⇨391

Even if legality of consideration for agreement once existed as an "issue", on motion for nonsuit at close of plaintiff's case in action to establish resulting trust such "issue", not having been raised by pleadings or pursued further on defendant's case, disappeared at end of trial and no longer existed when case was decided on its merits; and it was not a material issue on which trial court, finding that no agreement in fact existed, was required to make a finding in making determination on merits.

#### 6. Appeal and Error ⇨931(1)

In reviewing conflicting evidence, reviewing court will presume that evidence in support of finding is true and will construe it and resolve every substantial conflict as favorably as possible in support thereof.

#### 7. Trusts ⇨86, 89(2)

In action to establish resulting trust in proceeds of sale of real property, which plaintiff claimed to have actually purchased and owned but which had been partly held in name of defendant's intestate, burden was on plaintiff to prove that he had in fact paid consideration for property, and, on record presented, trial court was fully justified in finding that such burden had not been sustained. West's Ann.Civ.Code, § 853.

#### 8. Trial ⇨66

A motion to reopen case in chief after both sides have rested and matter has been submitted is directed to sound discretion of trial court. West's Ann.Code Civ.Proc. § 662.

#### 9. Trial ⇨66

It was not an abuse of trial court's discretion to refuse, after submission, to reopen case to permit plaintiff to introduce additional cumulative evidence.

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Freda B. Walbrecht, Los Angeles, for appellant.



Crispus A. Wright, Los Angeles, for respondent.

LILLIE, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action to establish a resulting trust in the proceeds of the sale of real property.

The following facts are undisputed. Plaintiff Joab Virtue, his wife Patience and her brother, Emmon Drake, both now deceased, moved onto certain real property on June 5, 1937. It was purchased from the Orange Savings & Loan Association on that date for \$1,700 and title thereto was taken in the name of Emmon Drake. Plaintiff worked for the city as a common laborer and earned approximately \$125 per month. During this time Emmon operated a shoe shine stand. Patience died in August, 1943. After final payment on the property, and on June 7, 1945, Emmon executed to plaintiff a "joint tenancy" deed conveying to him a one-half interest in the property, the other one-half remaining in Emmon's name. Both parties continued to live thereon until Emmon died August 5, 1950. Defendant Olivia Flynt, his niece, was appointed administratrix of Emmon's estate. She inventoried as part of the estate the one-half interest in the property standing in Emmon's name and on July 8, 1952, sold it for \$2,500, the court confirming the sale on July 29, 1952. Two months later, on September 24, 1952, the purchaser thereof filed a partition suit naming plaintiff herein as owner of the other one-half interest, and the entire property was sold. The plaintiff received and cashed a check for \$900 for his one-half interest.

On February 19, 1954, plaintiff filed this action against defendant individually, and as administratrix of the estate of Emmon Drake, to establish a resulting trust in the proceeds of the sale of Emmon's one-half interest, claiming that although he agreed to permit the record title to be held in Emmon's name, plaintiff actually paid the consideration for the entire property. The trial court held that plaintiff's evidence

fell short "of the clear and convincing proof that the law demands"; made findings that substantially all of the allegations of plaintiff's complaint were not true; and directed judgment for defendant.

[1-5] As his first ground for reversal, appellant urges that the trial court erred in failing to make a finding "that the contract was legal" on the theory that although not raised by the pleadings, an issue relating thereto was raised at the trial.

Plaintiff's amended complaint alleged in substance that in June, 1937, he requested Emmon to purchase the real property in his name for plaintiff's benefit and delivered \$200 to him for that purpose, that Emmon did so, plaintiff paid the balance due, and although held in Emmon's name the property actually belonged to plaintiff and was held by Emmon in trust for him. In her answer defendant denied the allegations of the complaint, in effect denying any such transaction took place. The defendant maintained throughout the trial that the interest held by Emmon was his own.

However, after plaintiff testified that he had made all of the payments on the property, defendant on recross-examination asked him why, if he paid the full consideration therefor, he permitted the property to be held in Emmon's name. It was then for the first time that there was any suggestion by plaintiff that he might have wished to claim a veteran's tax exemption through Emmon. No issue concerning the matter was raised by the pleadings. Several questions on recross-examination were asked plaintiff concerning this, but his answers were for the most part vague, incoherent and contradictory. Defendant did not pursue the subject further. At the close of plaintiff's case defendant moved for a nonsuit mainly on the ground that there was no evidence to sustain a trust. The trial judge then raised the question of an illegal consideration. To permit him to read the authorities on the point the court deferred the ruling on the motion for nonsuit to the end of the trial.

Defendant on her case offered no evidence of any kind on the matter of tax exemption but proceeded on the single theory that the half interest in the property standing in the name of the deceased belonged to him alone and no such transaction alleged by plaintiff ever existed. At the close of the trial the judge in a memorandum opinion stated, "*plaintiff's* contention that the evidence in this case does not disclose an illegal transaction seems well founded." (Emphasis added.) There is in the record no further mention of this matter, and no finding relative to the "legality of the contract" was made.

Appellant in his opening brief made the sweeping statement that "it is reversible error not to make a finding on an issue raised at the trial," for which he cited several cases. They are no authority for any such proposition but do hold, in accordance with the well-established law of this state, that findings are required on all *material* issues raised by the pleadings and evidence unless they are waived and "if the court renders judgment without making findings on all material issues, the case must be reversed." *Sharove v. Middleman*, 146 Cal.App.2d 199, 201, 303 P.2d 900, 901, citing *James v. Haley*, 212 Cal. 142, 147, 297 P. 920, and *Fairchild v. Raines*, 24 Cal.2d 818, 830, 151 P.2d 260. It is well settled that if findings are made upon issues which determine the cause, other issues become immaterial and failure to find thereon does not constitute prejudicial error. *Devers v. Greenwood*, 139 Cal.App.2d 345, 293 P.2d 834; *Metcalf v. Hecker*, 127 Cal.App.2d 634, 274 P.2d 188; *Vidler v. De Bell*, 125 Cal.App.2d 326, 270 P.2d 120.

It is clear from the record that, although briefly mentioned by defendant in her opening statement to the court, the "issue" of legality arose primarily upon the motion for nonsuit as the result of the belated recross-examination of plaintiff. After plaintiff rested his case no further evidence on the subject of veteran's tax exemption was offered or received and no further

point was made concerning it, the defendant at all times contending that deceased in his own right owned one-half of the property and that no transaction of any kind which could create a trust existed between him and plaintiff. Plaintiff argues that in holding, on the motion for nonsuit, that the evidence did not disclose an "illegal transaction" the court in effect found that a "contract" between plaintiff and deceased in fact existed contrary to its later written findings. We find no merit in this contention for when the court considered the matter of illegal consideration it was on the motion for nonsuit, even though the court's ruling thereon was deferred to the end of the trial. On such a motion the court is bound to disregard conflicting evidence and give to plaintiff's evidence all the value to which it is legally entitled and indulge every legitimate inference which may be drawn from the evidence in plaintiff's favor. *Golceff v. Sugarman*, 36 Cal.2d 152, 222 P.2d 665; *Lehman v. Richfield Oil Corp.*, 121 Cal.App.2d 261, 263 P.2d 13; *Imperial-Yuma Production Credit Ass'n v. Shields*, 88 Cal.App.2d 328, 198 P.2d 951; *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94. In following this rule the trial court then could, and did, properly conclude that a transaction concerning the property existed between plaintiff and the deceased and that there was nothing illegal about it. Even then the trial court did not use the term "contract" or "agreement." The use of the term "contract" is exclusively appellant's. This however did not preclude the court, after hearing and considering all the evidence, from later holding against the plaintiff on the merits and finding that he did not prove any transaction existed between him and the deceased. In the case of *Price v. Mason-McDuffie Co.*, 50 Cal.App.2d 320, 122 P.2d 971, the plaintiff urged that since defendant's motion for nonsuit was denied, and defendant thereafter offered no evidence, plaintiff was entitled to judgment. The court in holding otherwise said, 50 Cal.App.2d at pages 326-327, 122 P.2d at page 975: "But in making this point plain-

tiff apparently overlooks the fact that in ruling on a motion for nonsuit all testimony introduced by the plaintiff must be taken as true; whereas in deciding the case on the merits, no such rule prevails." In deciding the instant case on its merits the lower court then, as it was unable to do on the motion for nonsuit, could weigh the evidence and determine the credibility of the witnesses, and from the evidence found that plaintiff had not proved the existence of any "contract" or "transaction" from which a trust resulted. If the legality of consideration once existed as an "issue" on the motion for nonsuit, it not having been raised by the pleadings or pursued further on defendant's case, disappeared at the end of the trial and no longer existed when the case was decided on its merits. Under these circumstances it could not constitute a material issue on which the trial court was required to make a finding in a determination on the merits, the court having found from the entire evidence that no transaction existed between plaintiff and decedent.

[6,7] As his second point, appellant contends the evidence shows a resulting trust in his favor, he having actually purchased and owned the property, although partly held in the name of decedent. The court below held against plaintiff on the basis that he had failed to sustain his burden of proof. The findings declared that the allegations of his complaint were not true. In reviewing conflicting evidence this court will presume that the evidence in support of the findings is true and will construe it and resolve every substantial conflict as favorably as possible in support thereof. *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *De La Motte v. Rucker*, 55 Cal.App.2d 226, 130 P.2d 444.

At the outset, to prevail in the lower court, the plaintiff had the burden of proving that he paid the consideration for the real property held by Emmon Drake. (Section 853, Civil Code.) After hearing all of the witnesses, observing their demeanor, determining their credibility and weighing

the evidence, the trial judge concluded that plaintiff's proof (particularly the "testimony of plaintiff himself") fell "short of the clear and convincing proof that the law demands of one endeavoring to establish such a trust," and made findings of fact accordingly—in effect finding that Emmon Drake owned the property held in his name.

The rule relating to the "uncontradicted testimony of a witness" alluded to by appellant has no application in a situation such as this in which contradictions occurred in plaintiff's own testimony and in the testimony of defense witnesses. The record before us discloses that although plaintiff without difficulty testified that he paid for the property in question; as to material details and matters surrounding the payments, execution of the two deeds and the sale of the property he was vague and indefinite, contradictory and failed to remember, frequently resorting to the answer: "I don't know nothing about it."

Although claiming to have made all payments on the property, plaintiff could not give the court the amount of the monthly payments nor had he any receipts therefor. At first he said his counsel had them, then later admitted he had none. He gave a variety of reasons why he permitted the property to be placed in Emmon's name, finally listing as one of the main ones that "he was living with us and wasn't paying rent like he should." As to his relationship with Emmon, plaintiff said he was to pay plaintiff \$5 a week, but that he did not pay it regularly. The evidence shows Emmon was steadily engaged at his shoe shine stand, working every day as a bootblack, and made the real property his home from 1937 to the day he died. The court may well have inferred that Emmon paid the taxes and/or payments on the property in lieu of rent. Beulah Thomas, plaintiff's niece and his own witness, who lived with plaintiff, Patience and Emmon, testified that Emmon told her, "(T)his is my brother's and sister's home; our home," and that she had a home with them as long as she wanted one; and that she heard Emmon once say concerning the property that "they had



to make some payment" on it and that "(B)rother and I have got to see somebody" about it.

Plaintiff testified he could not remember having had any conversation with Emmon when he executed to plaintiff the deed to the one-half interest in 1945, and denied going to a lawyer with Emmon, discussing the matter and having the deed prepared; yet, under oath plaintiff alleged in his original complaint that on June 7, 1945, he asked Emmon to execute and deliver a deed to him, Emmon retained a lawyer to prepare it, and before doing so the attorney told plaintiff that because Emmon paid the taxes he should be entitled to an interest in the land, and that he would draft a joint tenancy deed, to which plaintiff agreed.

Plaintiff also had no memory of talking to defendant after Emmon's death about buying Emmon's half of the property, and then denied having talked to her about it at all; nor did he remember talking to James Gannon, attorney for the estate, about buying Emmon's half interest. Questioned further about it and other matters along that line plaintiff said: "I don't know nothing about it." When asked if he received \$900 as a result of the partition sale his counsel stipulated he had and when he denied cashing the check, she stipulated further that it had been cashed.

Of significance is evidence that on occasions when Mr. Gannon, defendant and the buyer of the estate's interest discussed with plaintiff Emmon's ownership of the one-half interest he remained silent and at no time asserted a claim to it, from which the trial court was free to infer that plaintiff, fully aware of the circumstances, willingly accepted the deed from Emmon in 1945, never actually believed the entire property belonged to plaintiff or that he had a right to believe it did, and that up to the filing of his complaint recognized Emmon's interest and conceded ownership of the one-half interest in the deceased.

Contrary to plaintiff's testimony James Gannon, attorney for Emmon's estate, testified that in 1951 or 1952 before the es-

tate sold Emmon's one-half interest, he wrote to plaintiff asking him to sell his one-half interest along with the estate's interest so that the entire property could be sold at a better advantage, to which plaintiff replied he did not want to sell his interest; that thereafter he talked to plaintiff and tried to persuade him to sell his interest with Emmon's, but he again refused; that after the estate sold it, he again talked to plaintiff and asked him if the buyer had been around to collect rent from him and, upon being told he had not, he advised plaintiff to contact the buyer and either sell his interest to him or make a deal with him, to which plaintiff replied he did not want to sell. At no time did plaintiff ever assert ownership to the entire fee, nor did he claim Emmon's interest as his own.

Along this same line and contrary to the testimony of plaintiff, Olivia Flynt, defendant, testified that in 1951 she frequently visited plaintiff "nearly every day" and asked him what he wanted to do about the property and whether he wanted to buy the one-half interest in the estate, to which inquiries she either received no answer or a negative reply. At no time did plaintiff ever tell her he owned or claimed Emmon's one-half interest.

About two months after the estate sold its interest, the buyer in September, 1952, brought a partition suit against plaintiff which resulted in a sale. \$900 of the proceeds thereof went to and were accepted by plaintiff as his share. The record is silent that at any time during this suit plaintiff ever questioned the ownership of the other half of the property or claimed it as his own. Nor did plaintiff do anything about his alleged claim, but instead accepted the benefits of the partition sale; and it is obvious that he had legal advice during this period because his present counsel stipulated at the trial herein that the \$900 check plaintiff received from the partition sale "was cashed through the attorney that he had gone to at that time."

It is entirely reasonable to believe that plaintiff's conduct in connection with the

ownership of the property may well have been the natural result of his full knowledge and understanding of the circumstances, his satisfaction with the deed and his recognition of Emmon's interest in the property when he accepted the deed from him in 1945 giving him only the one-half interest therein. It is obvious that the defense presented quite another side of plaintiff's story—plaintiff's silence as to his alleged ownership of the property at critical times; his adverse claim to Emmon's half interest asserted for the first time in 1954, almost ten years after the joint tenancy deed was executed and two years after the sale of Emmon's one-half interest by the estate; his failure to claim the property in the partition suit and his acceptance of the \$900 for his interest in the property.

Of course, all of this served to create a factual question which the trial judge, after hearing all of the evidence, had to resolve. He had little or no confidence in the plaintiff's story for he held that his evidence, particularly his testimony, did not measure up to the clear and convincing proof he needed to prevail. Considering the entire record the trial court was fully justified in holding there were not sufficient facts to sustain a resulting trust.

[8,9] Appellant urges that the trial court erred in denying his motion to reopen the case to present further evidence. After trial and after the lower court filed its memorandum opinion, but before judgment was entered, plaintiff moved to reopen his case in chief for the purpose of offering in evidence a copy of a bank draft and photostat of a cashier's check in the sum of \$289.58 to show he made the final payment on the property.

A motion to reopen a case in chief after both sides have rested and the matter is once submitted is directed to the sound discretion of the trial court. Section 662, Code of Civil Procedure; *Willett & Crane v. City of Palos Verdes Estates*, 96 Cal. App.2d 757, 216 P.2d 85; *Badover v. Guaranty Trust & Savings Bank*, 186 Cal. 775, 200 P. 638; *Axe v. County of Los Angeles*,

98 Cal.App.2d 578, 220 P.2d 781; *Gelberg v. Consolo*, 51 Cal.App.2d 516, 125 P.2d 74. No abuse of discretion is here apparent. Plaintiff testified on direct examination that he transmitted final payment on the property by way of certified check in the sum of \$287.08, purchased with his own funds. No one testified to the contrary. The proposed evidence was merely cumulative adding nothing to plaintiff's case. It is not an abuse of the trial court's discretion to refuse to reopen the case after submission to permit a party to introduce additional cumulative evidence. *Kataoka v. Hanselman*, 150 Cal. 673, 89 P. 1082; *In re Estate of Walker*, 148 Cal. 162, 82 P. 770; *Nulty v. Price*, 202 Cal. 279, 260 P. 291.

In view of our disposition of appellant's contentions, we deem it unnecessary to discuss his final point relating to the duty of a trustee to reconvey property to the true owner.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



164 Cal.App.2d 680

**The PEOPLE of the State of California,  
Plaintiff and Respondent,**

**v.**

**Adolph GUIDI and John Danko, Defendants,  
John Danko, Appellant.**

**Cr. 2859.**

District Court of Appeal, Third District,  
California.

Oct. 29, 1958.

Defendant was convicted of robbery in first degree. The Superior Court, Sacramento County, Raymond T. Coughlin, J., rendered judgment and defendant appealed.

The District Court of Appeal, Schottky, J., held that evidence sustained conviction, even though no one could identify defendant as participant, especially where defendant did not take witness stand.

Affirmed.

#### Robbery $\S$ 24(3)

Evidence sustained conviction of robbery in first degree even though no one could identify defendant as a participant, especially where defendant did not take witness stand.

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Richard F. Barbeau, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and William O. Minor, Deputy Attys. Gen., for respondent.

#### SCHOTTKY, Justice.

Appellant, John Danko, and one Adolph Guidi were charged by information with the crime of robbery, it being alleged that on October 27, 1957, they did wilfully, unlawfully, feloniously and forcibly take \$351 in money from Al Gonsalves, and that they were at the time armed with a 45-calibre Colt revolver. Both Danko and Guidi pleaded not guilty, but prior to the date set for the trial Guidi withdrew his plea of not guilty and entered a plea of guilty. Appellant Danko was tried alone, and the jury returned a verdict of guilty of robbery in the first degree. Judgment was pronounced, and Danko has appealed from the judgment.

The only contention made upon this appeal is that the evidence is insufficient to support the judgment. Before discussing this contention, we shall summarize briefly the evidence as shown by the record.

Alfred M. Gonsalves, a part owner of a tavern located at 2333 S Street in the City of Sacramento, was in his office about 10:30 a. m., October 27, 1957, when he was confronted by a man whose face was covered with a handkerchief. The man,

who had a gun, demanded money. Gonsalves gave the man a cigar box which contained checks stamped for deposit, a lady's wristwatch, currency and coin. The robber threw the checks on the floor, retained the other items, and forced Gonsalves out of the office. The robber took some surplus change out of another cigar box and then compelled Gonsalves to empty the cash register. He then forced Gonsalves and two other men into a storeroom where he made them lie down on the floor. The robber then fled.

About this time a Mrs. Verna Murphy was driving west on S Street, near 24th Street. She saw a man running down S Street and saw him jump into a bluish-grey sedan. The car was then driven away. She became suspicious and memorized the license number and stopped her car. Soon two other men came running down the street and she asked them if they were looking for a car and she gave them the license number of the bluish-grey sedan.

Two friends of Gonsalves entered the bar on the morning of October 27, 1957. Before they entered they noticed a 1949 Hudson parked on the street. The motor was running, and there was someone in the vehicle. As they entered the bar a man came out. They entered the bar, learned of the robbery, rushed out, and observed the man who had come out of the bar jump into the Hudson. They got into their car, obtained the license number of the car from a woman, and pursued the Hudson. The Hudson was kept in sight most of the time except at the very end of the chase when they lost it, but after circling the block they saw the Hudson parked in an alley. They drove down the alley, parked their car, and then one of them called the police.

Appellant and one Guidi were seen leaving the car by three witnesses. One testified that Guidi was driving the car. Two testified that the two men entered the home of a Clyde Mead.



The police found appellant and Guidi in a bedroom of Mead's home. Appellant was on the bed, and Guidi was lying on the floor under it. The police searched the room and found money in the bed, under the mattress, and under a blanket on the bed. They also found money and a lady's wristwatch in a cigar box on a chair which was covered with clothes. Sixty dollars were found in appellant's pocket. A loaded gun was also found in another room. The total amount of money found was \$383.37; the total taken from the bar was \$385.84. The watch was identified by its owner as the one she had left at the bar.

Guidi, who was the sole witness called by the defense, testified that he had committed the robbery by himself. He also testified that appellant entered his car just before he entered the alley. No one was able to identify appellant as the man in the Hudson when it was parked near the tavern.

Appellant contends that there is such a dearth of evidence connecting appellant to the commission of the offense as to make his conviction an injustice. Appellant argues that of all the witnesses who testified for the prosecution, not one identified appellant as the man who robbed the tavern owner. Appellant argues also that the jury was not entitled to disregard the uncontradicted testimony of Guidi that appellant was in no way connected with the robbery.

We are unable to agree with appellant that the evidence is insufficient to support the conviction. Gonsalves' testimony establishes an armed robbery. If the evidence is sufficient to connect appellant with it he would be subject to the same punishment as the actual robber. Conceding that no one could identify appellant as a parti-

cipant, the question is whether there was sufficient evidence from which the jury could infer that he was. There was ample testimony that there was a person in the Hudson automobile before Guidi entered it after the robbery. The Hudson was followed immediately after it was driven away, and the pursuers did not lose sight of it for any appreciable length of time. There was evidence that after the Hudson was parked in the alley two men got out of it and entered Mead's home. Mead testified that Guidi and appellant entered his home together. Appellant and Guidi were found in a room together where the watch and the approximate amount of money taken in the robbery were found. Considering that at least one item was definitely identified as coming from the place of the robbery, the time factor, and the fact that one man was waiting in the car which was used in the robbery and the fact that Guidi and appellant were together when the Hudson arrived in the alley, the jury could conclude that appellant was a participant. Guidi's testimony that appellant had no part in the robbery was refuted by the testimony of the other witnesses, and the jury was not required to believe Guidi's testimony in the face of the other testimony from which the jury could well conclude that appellant was the man who was in the get-a-way car and drove it away after Guidi got into it. Furthermore, it is to be noted that appellant did not take the witness stand.

We are satisfied from a review of the entire record that the appellant received a fair and impartial trial and that the evidence is ample to support his conviction of robbery in the first degree.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, Justice pro tem., concur.

164 Cal.App.2d 253

**The CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent,**

**v.**

**The PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,**  
**Defendant and Appellant.**

Civ. 23211.

District Court of Appeal, Second District,  
 Division 1, California.

Oct. 16, 1958.

Action by city against telephone and telegraph company to recover value of street occupancy. From an order of the Superior Court, Los Angeles County, Kenneth N. Chantry, J., denying defendant's motion for change of venue the defendant appealed. The District Court of Appeal, Lillie, J., held, inter alia, that under statute allowing either party in action brought by city against a resident of another county, city and county, or city, or a corporation "doing business in the latter" to move for change of venue, a corporate defendant doing business in county in which an action is brought against it by city located therein, regardless of where else in the state it is also doing business, is not entitled to change of venue.

Affirmed.

#### 1. Statutes $\Leftrightarrow$ 184

Statutory words must be given such interpretation as will promote rather than defeat the general purpose and policy of the law.

#### 2. Statutes $\Leftrightarrow$ 184

Where language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

#### 3. Venue $\Leftrightarrow$ 50

The purpose of statute allowing either party in action brought by city against a

nonresident to move for change of venue is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without and to secure to both parties to a suit a trial upon a neutral ground. West's Ann. Code Civ.Proc. § 394.

#### 4. Venue $\Leftrightarrow$ 40

An interpretation of venue statute imparting a right to corporation which it denies to an individual is not, in absence of good reason, justifiable. West's Ann. Code Civ.Proc. § 394.

#### 5. Venue $\Leftrightarrow$ 50

Under statute allowing either party in action or proceeding brought by city against resident of another county, city and county, or city, or a corporation doing business in the latter to move for change of venue, it is not the "resident" individual or the corporation "doing business" in county of the forum that the statute seeks to protect against "local" bias or prejudice, but the person residing in, or a corporation doing business in, another county than that in which defendant has been sued, since purpose of statute is to provide a change of place of trial where local bias may be presumed to arise because defendant is wholly from "without the county" and a corporate defendant can be wholly from "without the county" only if it is not doing business therein. West's Ann.Code Civ.Proc. § 394.

See publication Words and Phrases, for other judicial constructions and definitions of "Without the County".

#### 6. Venue $\Leftrightarrow$ 40

Under statute allowing either party in action brought by city against a resident of another county, city and county, or city, or a corporation "doing business in the latter" to move for change of venue, a corporate defendant doing business in county in which an action is brought against it by city located therein, regardless of where else in the state it is also doing business, is not entitled to change

of venue. West's Ann.Code Civ.Proc. § 394.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business in the Latter".

#### 7. Venue ⇨68

The burden of proof justifying a change of venue rests on the moving party. West's Ann.Code Civ.Proc. § 394.

#### 8. Appeal and Error ⇨965

Upon issue of change of venue the averments of affidavit of prevailing party may be deemed to be the findings of the court below, and such findings will not be disturbed on appeal unless it is clear that the order was the result of arbitrary action. West's Ann.Code Civ.Proc. § 394.

#### 9. Venue ⇨75

In action by city of Los Angeles against telephone and telegraph company to recover value of street occupancy wherein company moved for change of venue to one of two counties in state on ground that the company did not do business in such counties and city's counteraffidavit showed that company itself in prior litigation claimed and successfully established certain activities tending to show its business operations throughout the state, order denying company's motion for change of venue which implied a finding that there was no county in state in which company did not do business was not arbitrary. West's Ann.Code Civ.Proc. § 394.

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John A. Sutro, Francis N. Marshall, Noble K. Gregory, Pillsbury, Madison & Sutro, San Francisco, Leslie C. Tupper, Lawler, Felix & Hall, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Ralph J. Eubank, Deputy City Atty., Los Angeles, for respondent.

LILLIE, Justice.

Plaintiff, city of Los Angeles, filed an action in the Superior Court of Los An-

geles County against defendant, The Pacific Telephone and Telegraph Company, a corporation, to recover the value of street occupancy. Its answer was filed and after plaintiff's demand for a jury defendant noticed its motion for a change of place of trial under section 394, Code of Civil Procedure. Defendant sought a change of venue to either Alpine or Mono County where it claimed it does not do business. From the minute order denying the motion, defendant appeals.

Section 394, Code of Civil Procedure, reads in pertinent part as follows: "Whenever an action or proceeding is brought by a \* \* \* city, against a resident of another county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county \* \* \* other than that in which the plaintiff is situated \* \* \* and other than that in which the defendant resides, or is doing business, or is situated."

The factual situation controlling the issue whether The Pacific Telephone and Telegraph Company is entitled to the benefit of a change of venue under this section is a simple one. It is conceded that the corporate defendant does business in the county of Los Angeles as well as in other counties of the state. Its principal place of business is the city and county of San Francisco. The city of Los Angeles has sued the defendant in the Superior Court of Los Angeles County, a proper forum.

Appellant contends that since it is doing business in more than one county, and section 394 is silent concerning the corporate defendant also doing business in the county in which it is sued, it is entitled to a literal interpretation of the section to invoke a mandatory application requiring a change of place of trial from the county of Los Angeles. On the other hand, respondent claims that under the section a corporate defendant doing business in a county other than that in which the action is brought by a municipality situated



therein is not entitled to the benefit of the change of venue therein provided if it is also doing business in the county in which the action is brought.

It is apparent from the phraseology employed in the controlling portion of section 394 that an ambiguity arises because of the nature of a corporate entity and its business operations, which if literally applied would be neither reasonable nor in keeping with the purpose and intent of the statute. This situation is the result of the difference in factors determining the mandatory application of the section. In the case of an individual the determining factor is his "residence"; in the case of a corporation it is the fact of "doing business." When an individual defendant is a "resident of another county" (other than that in which the action is brought), it is clear from the statutory language that he may invoke the benefit of the change of venue—because legally he has only one county of residence. But since a corporate entity may do business in more than one county of the state, the use of the phrase "doing business in the latter" creates an indeterminate meaning, particularly when the corporate defendant is also doing business in the county in which the action has been properly brought. The meaning and language of this section is not as "clear-cut" as appellant would have us believe. Does the terminology employed, "doing business in the latter," mean that, if a corporation is doing business in more than one county, it is entitled to a change of venue regardless of whether it also does business in the county in which it is sued by a city located therein, as contended by appellant; or does it mean, as urged by respondent, that a corporate defendant doing business in a county in which an action is brought against it by a city located therein, regardless of where else in the state it is also doing business, is not entitled to a change of venue?

[1, 2] " \* \* \* (I)t is a cardinal rule of construction that words must be given such interpretation as will promote rather

than defeat the general purpose and policy of the law \* \* \*." *Department of Motor Vehicles of California v. Industrial Accident Commission*, 14 Cal.2d 189, 195, 93 P.2d 131, 134; *People v. Centr-O-Mart*, 34 Cal.2d 702, 214 P.2d 378; *In re Lynwood Herald American*, 152 Cal.App.2d 901, 313 P.2d 584. It is well settled that "where the language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." *Department of Motor Vehicles of California v. Industrial Accident Commission*, 14 Cal.2d 189, at page 195, 93 P.2d 131, at page 134.

[3] For many years our courts have freely acknowledged the purpose of the legislature in passing section 394. In *City of Stockton v. Wilson*, 79 Cal.App. 422, 249 P. 835, in interpreting the second sentence of section 394 in its application to an individual defendant, the court stated at page 424, of 79 Cal.App., at page 836 of 249 P.: "The question to be determined is whether it (request for transfer) comes within the spirit and intent of that section. The evident purpose is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without and to secure to both parties to a suit a trial upon a neutral ground." The statute as applied to an individual defendant is clear in its meaning and although the court therein did not transfer the cause because it was pending in a neutral county, it pointed up the purpose of the statute—to protect against local bias which might exist in favor of litigants within a county "as against those from without." Obviously, if both parties, whether defendant be an individual or corporation, are "within" the same county either as a resident or doing business therein "local prejudice" or bias is not likely to exist; and if in a given case there is probability that a disadvantage will result, defendant is entitled to invoke the remedy under section 397, Code of Civil

Procedure, which provides for a change of venue upon the ground of inability to obtain a fair trial.

The Supreme Court in *Finance and Construction Co. of California v. City of Sacramento*, 204 Cal. 491, 269 P. 167, 168, voiced its approval of *City of Stockton v. Wilson*, 79 Cal.App. 422, at page 493, 249 P. 835, at page 836: "It is apparent from the terms of this section of the Code that the Legislature was of the opinion that a *person* doing business in a county would have an unfair advantage over a city situated without said county, in the trial of an action in which such person and such city were arrayed against each other." (Emphasis added.) The opinion discloses that the plaintiff therein designated as a "person" actually was a corporation. From this it appears entirely reasonable that if a corporation, doing business in a county in which a city is located, brings suit against it in that county, that no "unfair advantage" would result. The converse would also seem to be true.

Of interest also is *City of Oakland v. Darbee*, 102 Cal.App.2d 493, at page 498, 227 P.2d 909, at page 912: "The purpose of the statute is that of protecting either party from local bias," and *Nevada County v. Phillips*, 111 Cal.App.2d 428, 244 P. 2d 495, in which an individual was sued. The court therein said at page 429 of 111 Cal.App.2d, at page 496 of 244 P.2d: "We construe the foregoing section (394) as providing that an action such as this, brought by a county against defendants who, for aught that appears, are residents of the same county, is properly triable in that county, and that it is only when the defendants or one of them is a resident of another county that the court is obligated to change the place of trial \* \* \*"; and again at page 430 of 111 Cal. App.2d, at page 496 of 244 P.2d: "The intent of the foregoing statute is, apparently, to permit the trial of an action brought by a county to be tried in that county when the defendants reside therein, on the assumption that where all parties are

in effect residents therein no disadvantage to either would result."

[4, 5] We believe that this reasoning applies as well to a corporate defendant also doing business in the county in which an action is brought against it by a city located therein. An interpretation of the statute imparting a right to a corporation which it denies to an individual is not, in the absence of good reason, justifiable. Common sense dictates that it is not the "resident" individual or the corporation "doing business" in the county of the forum that the section seeks to protect against "local" bias or prejudice, but the person residing in, or a corporation doing business in, another county than that in which the defendant has been sued. The purpose of the section is to provide a change of place of trial where local bias may be presumed to arise because the defendant is wholly from "without the county." A corporate defendant can be wholly from "without the county" only if it is not doing business therein. In the instant case defendant is doing business in Los Angeles County.

Appellant has cited *Yuba County v. North America Consol. Gold Min. Co.*, 1909, 12 Cal.App. 223, 107 P. 139, 140, in support of its position. At the outset, it is interesting to note in the instant case that nowhere in the motion, affidavit, or appellant's briefs does it *directly* advise the court that it is actually doing business in the county of Los Angeles. In its attempt to take advantage of the literal wording of section 394 and bring it technically within the exact language of the *Yuba County* case, appellant has been careful to couch its motion, and affidavit in support thereof, in the very terms of the statute itself and those used by the court in the opinion, without any factual elaboration. Actually *Yuba County v. North America Consol. Gold Min. Co.*, *supra*, lends little aid to appellant. It does not appear in the court's opinion that the corporate defendant was also doing business in *Yuba County*, the county in which the action was

brought against it. Yuba County filed an action against defendant corporation which the court stated was "doing business in another county." The court followed the exact language of the statute and a careful reading of the opinion discloses that in doing so, it actually meant "doing business in a county other than Yuba County." The court at no time declared the corporation was also doing business in Yuba County. One of the major points decided by the court was the county's contention that if section 394 permitted a corporation not doing business in Yuba County to transfer the trial while a corporation doing business in Yuba County was denied such right, then the statute was in violation of the constitutional provisions prohibiting special legislation. The court recognizing this effect theorized as follows: "This discrimination is found in other sections where the right to have the place of trial changed is placed upon the distinct ground that the defendant resides in a county other than the county in which the action is commenced, and this although, had the defendant been a resident of the latter county he could not have the venue changed." It seems apparent that had the court determined the corporation was also doing business in Yuba County, the county could not have properly raised this contention, nor would the court have considered it. We do not deem this case to be persuasive here.

[6] We have been directed to no case deciding the precise question here involved, but considering the obvious purpose and intent of the statute, the protection it seeks to impart, and previous judicial construction of its language, we believe that the legislature did not ever intend that a corporate defendant doing business in a county in which it is sued by a municipality located therein, as well as without the county, should have the benefit of the change of venue provided in section 394, Code of Civil Procedure. We conclude that the venue provisions under this section may not be invoked by a corporation defendant doing

business in a county in which an action is brought against it by a city situated therein.

This conclusion justifies only brief mention of appellant's other contention that the affidavit supporting its motion, alleging it is not doing business in Alpine and Mono Counties, establishes a neutral area in which the action should be tried.

The applicable part of section 394 provides that "the action or proceeding must be, on motion of either party, transferred for trial to a county \* \* \* other than that in which the plaintiff is situated \* \* \* and other than that in which the defendant resides, or is doing business, or is situated."

Defendant's affidavit alleged the following conclusion: "Said corporation at all said times has been and now is doing business within each of the counties located within the State of California except Alpine County and Mono County. Said corporation has not during said times done and does not now do any business within said Alpine and Mono Counties." Nothing further was alleged in support of this conclusion. Plaintiff on the other hand filed a lengthy counteraffidavit alleging among other things that defendant possesses a "franchise to construct, maintain and operate telephone and telegraph lines on the public roads, highways and other public places throughout the State of California," and that defendant had represented and successfully established in prior litigation before the State Public Utilities Commission that "we (The Pacific Telephone and Telegraph Company) are offering public mobile radio telephone service in effect throughout the state where anyone applies for it to us." It described in detail the manner in which defendant holds itself out as engaged in the selling of those services.

[7-9] The burden of proof justifying a change of venue rests on the moving party. *Clapp v. Kramer*, 162 Cal.App.2d 237, 328 P.2d 510; *Lakeside Ditch Co. v. Packwood Canal Co.*, 50 Cal.App. 296, 195 P. 284; *Ward Mfg. Co. v. Miley*, 131 Cal.App.2d 603, 281 P.2d 343. Plaintiff's counteraffi-



davit relates numerous facts showing, among other things, that defendant itself in prior litigation claimed and successfully established certain activities tending to show its business operations throughout the state. Implicit in the lower court's minute order is the finding that there is no county in California in which defendant does not do business. In view of the bare conclusion contained in defendant's affidavit, the trial court may well have believed no factual conflict existed and made its determination solely from the averments of the counteraffidavit. However, if in the mind of the trial judge the affidavits raised a factual conflict, it is obvious that he resolved it adverse to the defendant. Upon the issue of change of venue the averments of the affidavit of the prevailing party may be deemed to be the findings of the court below (*Swartz v. California Olive Growers' Packing Corp.*, 56 Cal.App.2d 168, 133 P.2d 20; *Gordon v. Perkins*, 203 Cal. 183, 263 P. 231; *Parker Co., Inc., v. Exeter Refining Co.*, 26 Cal.App.2d 610, 79 P.2d 1114); and such findings will not be disturbed on appeal unless it is clear that the order was the result of arbitrary action. *Clapp v. Kramer*, 162 Cal.App.2d 237, 328 P.2d 510; *Miller v. Collins*, 8 Cal.App.2d 10, 47 P.2d 334; *Hubbard v. Mt. Raymond Mining Co.*, 33 Cal.App.2d 474, 92 P.2d 411, 93 P.2d 95. In consideration of the record before us, the acknowledged intent of section 394 and the authorities, we are unable to say that the order was the result of arbitrary action.

Application of section 394 to a corporate defendant doing business in every county is discussed by the court in *City of Oakland v. Darbee*, 102 Cal.App.2d 493, at pages 501-502, 227 P.2d 909, at page 914: "There is implicit in appellant's argument the view that if the record showed that the Bank of America was doing business in every county of this state \* \* \* there would be no county to which the court could transfer

the proceeding in response to respondents' (an individual defendant) motion. That would not necessarily follow. It might mean merely that the bank could not invoke the statute, \* \* \* simply because there would be no county, or other county, in which the bank was not doing business." It would appear from this that if defendant is doing business in every county in the state the denial of its motion, on this ground alone, was proper.

In determining what constitutes "doing business" as that term is used in section 394, a broad construction was permitted by the Supreme Court in *Finance and Construction Co. of California v. City of Sacramento*, 204 Cal. 491, at page 494, 269 P. 167, at page 169: "We think it is more in keeping with the remedial purpose of section 394 to give the words this broader and more liberal meaning than to restrict them, as contended for by the appellant, to the narrow meaning of signifying those only who are engaged in trade or commerce." Appellant has cited several authorities dealing primarily with foreign corporations and service of process which we deem not controlling here. In line with the broad construction permitted by the court in the *Finance and Construction Co. of California v. City of Sacramento*, supra, case we are inclined toward the definition of the court in *Helvering v. Highland*, 4 Cir., 1942, 124 F.2d 556, at page 561: "\* \* \* 'carrying on any trade or business' is now said to mean 'holding one's self out to others as engaged in the selling of goods or services'. See *Deputy v. Du Pont*, 308 U.S. 488, 499, 60 S.Ct. 363, 369, 84 L.Ed. 416, quoted with approval in *Helvering v. Wilmington Trust Co.*, 3 Cir., 124 F.2d 156; cf. *Higgins v. Commissioner*, 312 U.S. 212, 61 S.Ct. 475, 85 L.Ed. 783."

For the foregoing reasons, the order is affirmed.

WHITE, P. J., and FOURT, J., concur.

164 Cal.App.2d 470

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

v.

**Daniel Wesley JOHNSON, Defendant and**  
**Appellant.**  
**Cr. 3391.**

**District Court of Appeal, First District,**  
**Division 1, California.**

Oct. 22, 1958.

Defendant was convicted of drawing and uttering checks knowing that he had insufficient funds for their payment upon presentation and from a judgment of the Superior Court, County of Alameda, Marvin Sherwin, J., the defendant appealed. The District Court of Appeal, St. Clair, J. pro tem., held that the evidence did not establish that the defendant was not adequately represented by counsel and that other alleged errors were without merit.

Judgment affirmed.

### 1. Criminal Law ⚖️27

Under the statute penalizing the willful intent to defraud by drawing or uttering a check for payment of money knowing at the time that the maker has not sufficient funds in the bank for the payment thereof, and providing that if the total amount of all such checks does not exceed \$50 the offense is punishable only by imprisonment in the county jail for not more than one year, each violation of the statute may be a "felony" regardless of the amount of the individual check but the offense is not punishable as a felony unless the aggregate of the bad checks involved in the offenses is more than \$50. West's Ann.Pen.Code, § 476a.

See publication Words and Phrases, for other judicial constructions and definitions of "Felony".

### 2. Criminal Law ⚖️27

Where an offense is punishable either as a felony by imprisonment in the state prison or as a misdemeanor by fine or im-

prisonment in a jail, the offense is a "felony" up to the time the sentence is imposed. West's Ann.Pen.Code, §§ 16, 17.

### 3. Criminal Law ⚖️1166½(1)

In prosecution for uttering checks knowing that the defendant had insufficient funds for their payment upon presentation wherein defendant pleaded guilty, evidence did not justify setting aside judgment on the plea on the ground that defendant was allegedly represented by incompetent counsel in the trial court. West's Ann.Pen.Code, § 476a.

### 4. Criminal Law ⚖️1166½(1)

Bad judgment by counsel concerning possible sentence for the offense for which defendant is prosecuted is not ground for a reversal of a judgment.

### 5. Criminal Law ⚖️245

Contention that defendant was committed without reasonable or probable cause was waived by failure of defendant to move to set aside the information on such grounds. West's Ann.Pen.Code, §§ 995, 996.

### 6. Criminal Law ⚖️176

In prosecution in three counts for uttering checks knowing that defendant had insufficient funds for their payment, defendant was not placed in double jeopardy because he had been charged with counts one and three but not committed on those offenses because of a defect of proof at the preliminary examination. West's Ann.Pen.Code, § 999.

### 7. Jury ⚖️29(6)

The requirement that defendant must personally waive trial by jury and cannot do so through counsel alone is not applicable to a plea of guilty.

### 8. Criminal Law ⚖️662(8)

Defendant who pleaded guilty was not denied the right to confront witnesses against him because no witnesses appeared in the Superior Court since there were no issues to be tried. West's Ann.Pen.Code, § 686.

**9. Criminal Law** Ⓒ576(5)

The defendant was not entitled to complain of a denial of a speedy trial where he waived such right.

**10. Criminal Law** Ⓒ245

An illegal commitment is waived by failure to move to set aside the information. West's Ann.Pen.Code, §§ 995, 996.

**11. Criminal Law** Ⓒ982.3(3)

When defendant is eligible, the granting of probation is a matter of discretion with the trial court. West's Ann.Pen.Code, § 1203.

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Marvin Stender, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

ST. CLAIR, Justice pro tem.

Defendant was charged in an information with three violations of Penal Code, section 476a, drawing and uttering checks in the amount of \$20, \$20, and \$12.50, knowing that he had insufficient funds for the payment of the checks upon their presentation. After first pleading not guilty to all three counts, defendant withdrew this plea and pleaded guilty to the three counts. Defendant appeals from the judgment entered on the guilty pleas.

Counsel has been appointed for this appeal whose sole contention is that the face of the record shows that defendant was represented by incompetent counsel in the trial court. Defendant has also filed two briefs in this matter, urging this ground and others. The Attorney General has filed two briefs, one responsive to the defendant's opening brief, and one responsive to counsel's opening brief.

I.

Was defendant denied effective aid of counsel because of incompetence of his chosen counsel?

Defendant was first arraigned on the information involved in this appeal on No-

vember 2, 1956. Mr. Nunes, of the Public Defender's Office, appeared with him. Defendant pleaded not guilty to all three counts, and the trial was continued to November 13. At that time another continuance was granted at the request of Mr. Nunes to permit defendant to employ private counsel.

The next hearing was held on November 23. An attorney named Robert P. Brorby of the firm of Dodge and Evans appeared, and stated that "arrangements have practically been completed for this firm to represent Mr. Johnson." The matter was continued to November 30. On that date defendant was represented by Mr. Nunes, who stated that he had been informed that Mr. Dodge would take the case. The clerk said that he had received a telephone call that "the man's coming in from out of town and that he'll be here by eleven o'clock." The matter was continued.

On December 3, 1956, the case was set for trial. Defendant was present at this hearing but his counsel, a Mr. White, did not make a personal appearance. During this hearing, White telephoned the clerk, who repeated his statements to the judge. White was substituted in as defendant's attorney.

On December 19, the date set for trial, White arrived before court convened. He advised the clerk that he had another trial scheduled for that day and they agreed on a date for continuance. White also advised the clerk that defendant would waive time. Defendant, when questioned by the Court, stated that his attorney's statement was correct, i. e., he would and did waive time of trial.

On January 21, 1957, White appeared and stated that he had had a conference with his client the previous day and that the defendant intended to change his plea.

The defendant did not appear on February 4 and a bench warrant issued. When the defendant surrendered on March 7, White was not present but the defendant stated that he had consulted with him by phone the previous Monday.



On March 11, in the presence of the defendant, White represented that the defendant had consulted with him, and that he had advised him before defendant's rearrest on the bench warrant. White stated that the defendant had "indicated now he's perfectly willing to change his plea" and asked permission to withdraw the previous plea. The defendant thereupon pleaded guilty to the first count of the information, which was described as "a felony." Then the following colloquy took place. This is the passage relied upon to show incompetence as a matter of law:

"The Clerk: Daniel Wesley Johnson, to the crime of a felony, to-wit, a—

"Mr. White: Before we proceed any further, Mr. Merrill is at a disadvantage, but the commitment is such, as to one count, the usual—

"Mr. Merrill: Well, the problem is, I think, on the amount here, Clint. If I'm not mistaken, that is the problem, with the amount, to keep the jurisdiction in this Court, because they're all—they're all small checks.

"Mr. White: What is the problem, then?

"Mr. Merrill: Well, to keep it within the jurisdiction of this Court there would have to be a plea to the three, because they total—they just total over fifty, I think, or a hundred, whatever the code section reads, since the code section's been amended this last year. Actually they are such small checks I don't think it would make much difference.

"Mr. White: That is true, but in each instance they are a felony.

"Mr. Merrill: No, that is not true, not unless—

"Mr. White: Well, educate me, because I only assumed that he would plead to one, as so often is the case.

"The Court: Well, I don't assume there would be any consecutive sentence involved.

"Mr. White: All right.

"Mr. Merrill: Here is the point, under the code, the way it is, a plea to one would be a

misdemeanor and take it out of the jurisdiction of the Court." The defendant thereupon pleaded guilty to the other two counts of the information.

[1] Penal Code, section 476a, provides that any person who "wilfully, with intent to defraud, makes or draws or utters or delivers any check \* \* \* upon any bank \* \* \* for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker \* \* \* has not sufficient funds in, or credit with said bank or depository \* \* \* for the payment of such check \* \* \* in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than 14 years." The second paragraph contains a proviso that "if the total amount of all such checks \* \* \* that the defendant is charged with and convicted of making, drawing, or uttering does not exceed fifty dollars (\$50), the offense is punishable only by imprisonment in the county jail for not more than one year," except when the defendant has certain previous convictions not applicable here. Thus Mr. White was correct in stating that each violation of 476a may be a felony, regardless of the amount of the individual check, but the District Attorney was correct in stating that the offense is not punishable as a felony unless the aggregate of the bad checks involved in the offenses for which defendant is convicted is more than \$50.

Counsel on appeal argues that the above quoted colloquy demonstrates that "counsel had not read and was not familiar with the contents of the statute which his client was accused of violating," that "he was unfamiliar with the mechanics of that fundamental distinction in the criminal law between misdemeanor and felony," and therefore that White was incompetent. The first inference might be drawn, although it is not the only possible inference in the context of the discussion, but there is no evidence of the second contention.

White suggested that the defendant plead only to one count. Mr. Merrill objected because of the "problem, with the amount." White's question, "What is the problem then?" could indicate an unfamiliarity with section 476a, but it could also be a rhetorical question asking for a clarification of the prior statement from Mr. Merrill, which was somewhat disjointed. After Mr. Merrill's reference to the \$50 qualification of the code section, White said, "That is true, but in each instance they are a felony." This statement was correct, but Mr. Merrill disagreed with it. White's answer, "Well, educate me, because I only assumed that he would plead to one, as so often is the case," could be interpreted as an admission of ignorance, but in context, it also could be interpreted as an explanation of White's disagreement with Merrill's prior statement, and as an expression of concern over protection of his client against consecutive sentences. The trial court adopted this latter interpretation, as evidenced by the court's response that "I don't assume there would be any consecutive sentence involved."

As support for the contention that White was unfamiliar with the felony-misdemeanor distinction counsel cites White's construction of the statute. ("That is true, but in each instance they are a felony.") White's interpretation is correct as the statute expressly says the uttering of *any* "bad" check is punishable by "imprisonment in the county jail for not more than one year, or in the state prison for not more than 14 years."

Penal Code, section 16, reads:

"Crimes, How Defined. Crimes are divided into:

- "1. Felonies; and,
- "2. Misdemeanors."

The first three sentences of Penal Code, section 17, read:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a mis-

demeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority."

[2] Where an offense is punishable either as a felony by imprisonment in the state prison or as a misdemeanor by fine or by imprisonment in a jail the offense is a felony up to the time the *sentence* is imposed. See Fricke, California Criminal Law (5th Ed.), pages 5-6.

Subsection (b), Penal Code, section 476a is a peculiar statute; it reads:

"However, if the total amount of all such checks, drafts, or orders that the defendant is charged with and convicted of making, knowing, or uttering does not exceed fifty dollars (\$50), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Sections 470, 475, or 476 of this code, or of this section of this code, or of the crime of petty theft in a case in which defendant's offense was a violation also of Sections 470, 475, or 476 of this code or of this section. \* \* \*

At the oral argument, counsel for defendant conceded, as indeed he must, that the defendant was *charged* with three felonies. If he was convicted (or pleaded guilty) to one or two of the charges, he would be pleading guilty to felonies but, at the time of *sentence*, the court bound by subsection (b) of section 476a could do nothing but convert it into a misdemeanor.

At the time of the colloquy in question, the defendant had pleaded guilty to count one, i. e., to a felony. The Assistant District Attorney was in error when he said that it was not true that each

count was a felony. It was to his incorrect statement of the law that Mr. White made the statement that defendant seizes upon, "Well, educate me, \* \* \*" It would appear that Mr. White was more familiar with the statute in question than the Assistant District Attorney.

All that happened was that the District Attorney refused to accept a plea that would tie the court's hand; he would only accept a plea that would permit the court to decide at the time of sentence whether it would be a felony or misdemeanor.

[3] Counsel also makes much of the fact that "at no time during this proceeding did counsel confer with his client to inform him of the import of a felony plea; \* \* \* nor is there any indication that appellant understood this." There is nothing in the record to indicate that the defendant and his counsel did not confer fully on the case before the proceeding, or that defendant did *not* understand what he was doing. On the contrary, the record indicates that White and the defendant conferred several times and that defendant intended to plead guilty to a felony, but did not want consecutive sentences imposed. This is exactly what happened. Even if appeal counsel's contention is accepted that White was ignorant of the terms of the statute, only by assuming further that White was incapable of understanding what the District Attorney had told him, and had inadequately consulted with the defendant upon his possible defenses to all three counts, can the conclusion urged by appeal counsel be reached.

[4] Defendant, speaking for himself in his brief and not through his attorney, has an additional complaint: that he "was told by his attorney to admit to the court and to him of such violation of the charges by the D.A. Office at Berkeley and that if I did he would promise probation or a fine for any such action." Even if this were the case, which is not supported by the record, bad judgment by counsel concerning the possi-

ble sentence is not a ground for reversal of the judgment. "[W]here an accused is represented by counsel and the basis of his claim is that he received poor advice, indicative of poor judgment on the part of his attorney, and acted thereon to his detriment, those facts, even if substantiated, do not amount to a denial of the right of representation. *People v. Miller*, 114 Cal. 10, 45 P. 986; *People v. Lennox*, 67 Cal. 113, 7 P. 260; *People v. Kirk*, 98 Cal.App.2d 687, 220 P.2d 976; *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657; *People v. Ynostroza*, 105 Cal.App.2d 332, 232 P.2d 913; *People v. Morton*, 100 Cal.App.2d 269, 223 P.2d 259." *People v. Logan*, 137 Cal.App. 2d 331, 335, 290 P.2d 11, 13.

In *People v. Miller*, 114 Cal. 10, 45 P. 986, the court affirmed an order denying leave to change a plea from guilty to not guilty where the affidavit in support of the motion stated that defendant pleaded guilty "without due deliberation, and without fully realizing his position, and in the hope that by so doing the punishment to which he would be exposed, were he tried before a jury, would thereby be mitigated." 114 Cal. at page 14, 45 P. at page 987. The court said at page 16 that a hope or belief of a lesser punishment, or being led by counsel to such a belief, would be an insufficient reason to require withdrawal of a plea. *People v. Lennox*, 67 Cal. 113, 7 P. 260, was a similar case where the defendant was induced to plead guilty by advice of his father and his attorney that he would receive a lesser punishment.

*People v. Gilbert*, 25 Cal.2d 422, 443, 154 P.2d 657, 668, approved of such cases as *People v. Miller*, *supra*, but added an exception: "The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But



if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." See also *People v. Odium*, 91 Cal.App.2d 761, 205 P.2d 1106, following *People v. Gilbert*, supra, 25 Cal.2d 422, 154 P.2d 657; *People v. Kirk*, 98 Cal.App.2d 687, 693, 220 P.2d 976, holding the defendant did not bring himself within the Gilbert exception in a coram nobis proceeding; *People v. Ynostroza*, 105 Cal.App.2d 332, 333, 232 P.2d 913, same, where the alleged inducements were by the attorney and uncorroborated by any acts of state officials; *People v. Morton*, 100 Cal.App.2d 269, 270, 223 P.2d 259 (same); *People v. Croft*, 134 Cal.App.2d 800, 803, 286 P.2d 479 (same); *People v. Loeber*, 158 Cal.App.2d 730, 323 P.2d 136, "deal" not proved, appeal from judgment of conviction. There is no contention that this case comes within the Gilbert exception, inasmuch as the Deputy District Attorney made it clear in open court that he would only accept a felony plea.

## II.

Defendant, in his own briefs, alleges the occurrence of numerous errors. His contentions, none of which are meritorious, will be summarized below.

### A. Dismissal of the Information.

[5] Defendant states that counts one and three of the information should have been dismissed because of certain testimony at the preliminary examination. His contention would appear to be that he was committed without reasonable or probable cause on these counts, a contention that has been waived by a failure to move to set aside the information on these grounds. Penal Code, sections 996, 995.

### B. Double Jeopardy.

[6] Defendant feels that he has been twice in jeopardy because he had been charged with counts one and three, but not committed on those offenses because of a defect of proof at the preliminary examination. Dismissal of an information is not a bar to a subsequent prosecution for the same offense. Penal Code, section 999.

### C. Denial of Due Process.

The first part of this argument is somewhat obscure. Defendant cites *People v. Lenore*, 139 Cal.App. 40, 33 P.2d 892, wherein it was held that a portion of Penal Code, section 476a, concerning presumptions attaching to notice of protest, and which has since been deleted, was constitutional.

[7] Defendant also cites *People v. Spinato*, 100 Cal.App. 600, 280 P. 691, holding that defendant must personally waive trial by jury and cannot do so through counsel alone. This requirement is not applicable to a plea of guilty. In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12; *Dale v. City Court of City of Marced*, 105 Cal. App.2d 602, 607, 234 P.2d 110; *People v. Keeton*, 130 Cal.App.2d 334, 335, 278 P.2d 961.

### D. Confrontation of Witnesses.

[8] Defendant is apparently arguing that he was denied the right to confront witnesses against him, because no witnesses appeared in the superior court. See Penal Code, section 686. Inasmuch as there were no issues to be tried after the plea of guilty, there was no necessity for confrontation of witnesses.

Defendant also sets forth some quotations from McKinney's Digest, Criminal Law, section 1340, concerning harmless and reversible error. There being no error, these sections are inapplicable.

### E. Miscellaneous Contentions.

[9] The Attorney General also gleans from the defendant's briefs the following complaints:

1. Denial of a speedy trial. The record shows a waiver of this right.

[10] 2. Denial of a second preliminary hearing. An illegal commitment is waived by failure to move to set aside the information. Penal Code, sections 996, 995.

[11] 3. Improper denial of probation. When the defendant is eligible, the granting of probation is a matter of discretion with the trial court. Penal Code, section 1203.

The record does not establish that White was incompetent or failed to adequately represent defendant. Even if it did, to say that this is sufficient to require reversal would be a significant extension of prior California cases. The other errors urged by defendant have no merit.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



164 Cal.App.2d 312

Charles ROBERTS, Plaintiff,

v.

George ADAMS, an Individual; Thomas Merino, as Special Administrator of the Estate of Laura Adams Merino, deceased, Defendants.

Charles ROBERTS, Plaintiff and Appellant,  
and

Harry J. Grella (as an aggrieved party under C.C.P. § 938), Appellant,

v.

George ADAMS, Defendant and Respondent.  
Civ. 23273.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 17, 1958.

Action for specific performance, damages, declaratory judgment and other relief with respect to provision in a lease providing for an option to purchase for a sum

certain payable "as mutually agreed by both parties". From an adverse judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., the plaintiff and another appealed. The District Court of Appeal, Ashburn, J., held that the agreement was void for uncertainty and could not be enforced.

Judgment affirmed.

#### 1. Appeal and Error ⇨846(5)

Where the parties waived findings, it must be presumed on appeal that the trial judge found in favor of the prevailing party every fact necessary to sustain the judgment.

#### 2. Landlord and Tenant ⇨92(1)

Where lease contained option for purchase of premises for a sum certain payable "as mutually agreed by both parties", a later agreement upon terms of payment and security therefor would have cured the defect in the writing.

#### 3. Contracts ⇨25

An agreement to make an agreement is nugatory and this is true of material terms of any contract.

#### 4. Contracts ⇨9(1)

The law does not favor the destruction of contracts because of uncertainty and it will if feasible so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.

#### 5. Vendor and Purchaser ⇨21

Failure to specify or furnish a standard for determination of terms of payment and of securing the unpaid balance of the purchase price of property is fatal to enforceability of contract.

#### 6. Landlord and Tenant ⇨92(1)

Where lease contained option to purchase premises for a sum certain payable as mutually agreed by both parties, fact that lessee was prepared and offered to pay cash upon exercise of the option did not cure any uncertainty about the terms of payment.

**7. Specific Performance** ⇨28(2)

Specific performance of an option provision contained in a lease to purchase the premises for a sum certain "payable as mutually agreed by both parties" would not lie since the agreement as to terms of payment was void for uncertainty.

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Cooney & Cooney, Matt D. Cooney, Sherman Oaks, for appellants.

Earl J. Opsahl, Studio City, for respondent.

ASHBURN, Justice.

Action for specific performance, damages, declaratory judgment and other relief. From a judgment in favor of defendant Adams, plaintiff appeals.

A lease from Adams, as lessor, to plaintiff Roberts, as lessee, covering certain real property in Van Nuys, California, and for a term of five years from March 23, 1954, contains an option reading as follows: "It shall be a condition of this tenancy that the lessee Charles Roberts shall have the option to purchase the said property as per map reported in Book 19, pages 1 to 34 for the total sum of \$85,000.00, payable as mutually agreed by both parties." Emphasis has been added to the words which engendered this controversy.

[1] Plaintiff swore that this paragraph was in the lease when signed; defendant was equally positive that it was not there and that he at no time gave plaintiff an option to buy the property. After the court had ruled in defendant's favor the parties waived findings, with the result that it must be presumed upon appeal that the judge found in favor of the prevailing party every fact necessary to sustain the judgment. *Gray v. Gray*, 185 Cal. 598, 599, 197 P. 945; *Bekins Van Lines, Inc., v. Johnson*, 21 Cal. 2d 135, 137, 130 P.2d 421. Application of this rule would imply a finding that the option paragraph was not in the lease and there was never an option of any sort. But the trial judge's oral ruling was placed

squarely upon the unenforcibility of the option paragraph, assuming it to be a part of the lease. The attorneys have presented that as the controlling issue upon this appeal and we prefer to decide the cause upon that basis. We therefore proceed upon the assumption that the option was at all times a part of the lease,—an option to purchase for the total sum of \$85,000 "payable as mutually agreed by both parties."

[2] Of course a later agreement upon terms of payment and security therefor would have cured the defect in the writing. *Laughlin v. Haberfelde*, 72 Cal.App.2d 780, 785, 165 P.2d 544; 6 Cal.Jur.2d § 150, p. 227. But there was no subsequent oral or written agreement. Defendant at all times repudiated the alleged obligation.

Plaintiff-appellant testified that there were certain conversations about terms of payment, defendant insisting that he wanted part of the purchase price "under the table" and he would specify the details when the time for payment arrived. But the evidence shows that these conversations (if they occurred) were merged into the writing when at defendant's request plaintiff placed in the agreement the phrase, "payable as mutually agreed by both parties."

[3-5] It is Hornbook law that an agreement to make an agreement is nugatory, and that this is true of material terms of any contract. But the law has progressed to the point that it "'does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.'" *California Lettuce Growers v. Union Sugar Co.*, 45 Cal.2d 474, 481, 289 P.2d 785, 790, 49 A.L.R.2d 496. This softening of the original concept of *nudum pactum* has extended to a failure to state the price of a purchase. "Unexpressed provisions of a contract may be inferred from the writing or external facts. Thus it is well settled that a contract need not specify price if it



can be objectively determined." *Id.*, 45 Cal. 2d at page 482, 289 P.2d at page 790. But, in the absence of internal or external indicia of what the parties would have agreed upon, the court cannot supply the omitted provision, for that would amount to making a contract for the parties. It is firmly established as the law of California that failure to specify or furnish a standard for determination of terms of payment and method of securing the unpaid balance of the purchase price of real or other property is fatal to its enforceability notwithstanding any desire of the courts to be liberal and helpful.

*Ablett v. Clauson*, 43 Cal.2d 280, 272 P. 2d 753, 755, an action for declaratory relief, trespass and injunction, dealt with an option for a renewal lease for a period of five years "upon terms to be then agreed upon." Holding the option to be unenforceable the court said, 43 Cal.2d at page 284, 272 P.2d at page 756: "The general rule regarding contracts to agree in the future is stated to be as follows: 'Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.' 1 Williston, on Contracts (Rev. Ed. 1936) 131, § 45. The rule is well established in this state [citations], and, in conformity with the weight of authority in other states [citation], it has been held that an option agreement which leaves an essential term to future agreement is not enforceable. [Citations.]"

*Klein v. Markarian*, 175 Cal. 37, 165 P. 3, was an action for specific performance of an option to buy land for \$45,000, payable \$11,000 within ten days after notice of acceptance and the balance "in quarterly yearly payments with interest at 6 per cent.

annually." 175 Cal. at page 39, 165 P. at page 4. It was held that the quoted clause was too vague and ambiguous to support that form of action as it failed to indicate the number of such payments or the amount of each; also, that failure to provide how the obligation for deferred payments was to be evidenced or secured was equally fatal to specific performance. It appears, however, from the *Ablett* case, *supra*, and authorities hereinafter cited, that an agreement to agree upon a material term of a contract, as distinguished from mere silence on the particular subject, renders the instrument unenforceable in any form of action because it is a mere nullity.

Five cases decided by this court affirm and apply the principle announced in the *Ablett* decision. They are *Bonk v. Boyajian*, 128 Cal.App.2d 153, 274 P.2d 948; *Burgess v. Rodom*, 121 Cal.App.2d 71, 262 P.2d 335; *Kline v. Rogerson*, 80 Cal.App.2d 158, 181 P.2d 385; *Avalon Products, Inc., v. Lentini*, 98 Cal.App.2d 177, 219 P.2d 485; and *Vangel v. Vangel*, 116 Cal.App. 2d 615, 254 P.2d 919.

*Bonk*, though a specific performance action, announces rules which preclude any form of relief based upon a mere agreement to make an agreement. That case involved an option to purchase property for \$7,000 with a down payment of \$3,000 or more and "monthly payments on the balance due to be agreed upon at the time of purchase." [128 Cal.App.2d 153, 274 P.2d 949.] At page 155 of 128 Cal.App.2d, at page 950 of 274 P.2d the court said: "'Uncertainty, as to the terms and conditions of deferred payments is fatal to a claim for specific performance.' [Citations.] Where, in a business transaction, an important item is reserved for future determination no enforceable obligation is thereby created for 'neither law nor equity provides a remedy for a breach of an agreement to agree in the future.' [Citations.] In the *Ablett* case, \* \* \* the court points out that 'an option agreement which leaves an essential term to future agreement is not enforceable.' The court may not imply or

speculate upon what the parties will agree. [Citations.] A statement of the rule and the reason therefor is to be found in 1 Williston, Contracts (1936), sec. 45, p. 131, where the author says: '\* \* \* if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree on anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.'"

Burgess was an action for damages for breach of a contract to purchase realty. The document provided for a deposit of \$200 and a balance of \$5,000 to be paid within 30 days from date, to wit: "Terms to be made as soon as new purchaser arranges for new mortgage now held by \* \* \* Bank to Burgess (the seller)." 121 Cal. App.2d at page 73, 262 P.2d at page 335. This instrument was held to be fatally uncertain, the court saying at page 73 of 121 Cal.App.2d, at page 336 of 262 P.2d: "An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parol evidence of the intention of the contracting parties. [Citations.] The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree." Referring to the language of the particular agreement it was further said, 121 Cal.App.2d at page 74, 262 P.2d at page 336: "How this balance would be paid, whether in monthly, quarterly, semi-annual or annual installments, or at the end of a specified term of years does not appear. Likewise, absent is the rate of interest. The security, if any, to be provided for this balance, whatever it might be, is not specified. These are all important items, yet agreement with respect to each of them was 'left open for future settlement.' It is therefore estab-

lished from the language which the parties painstakingly wrote into the blank space in the deposit receipt that their minds had not met upon these essential and material terms of the deal. They had simply agreed to agree upon terms in the future. In such circumstances there was no binding obligation upon the buyer to accept and pay for the land."

Kline v. Rogerson, supra, was an action at law. A deposit receipt provided for payment of the balance of the purchase price "at \$5,000 or more per year, plus interest at 5% or terms *to mutual satisfaction*." This was held to be no agreement, the court saying: "The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid 'at \$5,000 or more per year, plus interest at 5% or terms *to mutual satisfaction*'. Since the parties never agreed upon terms which were mutually satisfactory, there was never an agreement of purchase and sale. Hence the plaintiff was not entitled to any portion of the purchase price." 80 Cal.App.2d at page 160, 181 P.2d at page 387.

Avalon Products, Inc., v. Lentini, supra, was an action for damages. It considered a contract for purchase of ice cream freezer equipment. The purchase order contained a description of the goods, the delivery date, the purchase price less the down payment, and further said: "Method of payment to be agreed upon before delivery." 98 Cal. App.2d at page 179, 219 P.2d at page 486. Recognizing that "[t]he law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained," the court nevertheless said: "Where, however, there has been no agreement upon an essential element and the contract provides no means for the determination thereof but leaves it to the future negotiation and agreement of the parties, the contract is void. McIlmoil v. Frawley Motor Co., supra [190 Cal. 546, 213 P. 971].

Thus it is true generally that if no price is fixed in the contract the law, upon delivery and acceptance of the commodity sold, implies an understanding between the parties that a reasonable price is to be paid; but where the price of the commodity called for but not delivered is to be subsequently ascertained by the agreement of the parties, the contract of sale is incomplete and unenforceable until the price is fixed or agreed upon." 98 Cal.App.2d at page 179, 219 P.2d at page 486. Also: "Although a greater degree of certainty is required in a contract which is sought to be specifically enforced, the general rule is that a provision in a contract which leaves open the terms of payment for future negotiation renders the contract incomplete and uncertain in one of its material features and for that reason unenforceable in equity. *Morris v. Ballard*, 56 App.D.C. 383, 16 F.2d 175, 49 A.L.R. 1464 and cases cited. In California the rule is the same and no action will lie to enforce the performance of a contract or to recover damages for its breach unless it is complete and certain." 98 Cal.App.2d at page 180, 219 P.2d at page 486.

Vangel involved a partnership agreement which provided that the parties would agree from time to time upon a fixed amount to be drawn by each partner. The court said, 116 Cal.App.2d at page 631, 254 P.2d at page 929: "An examination of the quoted part of the partnership agreement clearly indicates that although the fixing of compensation for *each* of the partners was in the contemplation of the parties, it was cast in the form of an agreement reserving this matter for future determination. However, the parties were unable to reach an agreement on this deferred subject. Under such circumstances, 'neither law nor equity provides a remedy for breach of an agreement to agree in the future.'"

In accord with the foregoing decisions are: *Mills v. Skaggs*, 64 Cal.App.2d 656, 658, 149 P.2d 204; *Mariposa Commercial & Mining Co. v. Peters*, 215 Cal. 134, 140,

8 P.2d 849; *Buckmaster v. Bertram*, 186 Cal. 673, 676, 200 P. 610; *Gould v. Callan*, 127 Cal.App.2d 1, 273 P.2d 93; *Bean v. Holmes*, Tex.Civ.App., 236 S.W. 120, 121; *Monahan v. Allen*, 47 Mont. 75, 130 P. 768, 769. See, also, annotation in 49 A.L.R. 1464; 51 C.J.S. Landlord and Tenant § 56b(2), p. 597; 12 Cal.Jur.2d § 107, p. 309.

Appellant relies principally upon *Chaney v. Schneider*, 92 Cal.App.2d 88, 206 P.2d 669, which was a declaratory relief action. A lease contained this provision: "At the expiration of this lease, Lessor agrees to give Lessee first refusal for an additional term of lease, at rentals and terms to be mutually agreed upon at that time, provided, the said lessee shall faithfully comply with and perform all of the covenants conditions of this lease." 92 Cal.App.2d at page 89, 206 P.2d at page 669. The lessor refused to negotiate when the time came. The trial court held that the lessee was entitled to an additional five years upon the same terms and conditions as the original lease but at an increased rental. In affirming the judgment the court said:

"Leases which left anything for future agreement of the parties were for a long time generally held to be void for uncertainty. The modern trend of decisions would seem to be in relaxation of the strictness of the rule, particularly when the amount of rental is left to future agreement. If there is in the writing a sufficient definite standard or method for the determination of the rental, and if the amount thereof is the only thing to be determined, courts of equity will hold that the parties agreed upon a reasonable rental for the extension, and will declare it if they do not agree. [Citations.]

"The difficulty in enforcing the clause here under consideration lies in the fact that it provides for mutual agreement as to the terms as well as to the rental for the extended period



of the lease." 92 Cal.App.2d at page 89, 206 P.2d at page 669.

Also: "Like all other branches of the law, the rules as to uncertainty in interpreting contracts are developing along with changing conditions in business and human affairs." 92 Cal.App.2d at page 90, 206 P.2d at page 670. "California has adopted the rule of practical business utility in *Streicher v. Heimburge*, supra, 205 Cal. 675, 272 P. 290. In that case a lease provided for a renewal upon rental to be determined by arbitration. It was held that when arbitrators failed to agree the court would fix a reasonable rental." 92 Cal. App.2d at page 91, 206 P.2d at page 670. "So in this case here before us, the right of renewal constituted a substantial element in the agreement of the lessor and lessee, and inasmuch as the lessor failed and refused to agree upon the terms of the renewal or the rental, these terms were properly declared by the trial court." 92 Cal.App.2d at page 92, 206 P.2d at page 671. There was no petition for hearing in the Supreme Court, but the case was discussed in *Ablett v. Clauson*, supra, 43 Cal. 2d 280, 286, 272 P.2d 753, 756, as follows:

"The trial court adjudged that the option entitled the lessee to an additional term of five years, upon the same terms and conditions as the original lease, but at an increased rental. Upon appeal, the judgment was affirmed, the court ruling that the renewal of the lease was the 'essence of the contract' with the other terms and conditions merely incidental details.

"Although there is an intimation in other decisions that a court of equity is empowered to fix a reasonable rental under an option provision reserving that matter to the future agreement of the parties [citations], the extensions of the rule suggested by the Chaney decision seem seriously questionable. The basis for upholding option provisions which leave the amount of rent

to future agreement is that the implied agreement of a reasonable rent if the parties are unable to agree, provides a sufficient standard for enforcing the option without requiring the court to write a new contract for them. But certainly the *Streicher* case is not authority for the proposition, relied upon in the Chaney decision, that the court may fix all of the provisions of a new lease without ascertainable standards in the option agreement. [Citation.]"

This leaves the Chaney decision in such status that it cannot be accepted as controlling at bar.

*California Lettuce Growers v. Union Sugar Co.*, supra, 45 Cal.2d 474, 289 P.2d 785, 49 A.L.R.2d 496, is also relied upon by appellant. In that instance there was a contract for the sale of beets which was claimed to be void because no provision for price, or time and place of delivery was contained therein and no duty of Union Sugar to accept and pay therefor expressly stated. 45 Cal.2d at page 481, 289 P.2d at page 789. At page 481 of 45 Cal. 2d, at page 789 of 289 P.2d the opinion uses language above quoted herein. The holding is that the pattern of prior dealings between the parties was sufficient "to support the conclusion that the parties intended the 1949 crop to be governed by the procedure previously followed." 45 Cal.2d at page 483, 289 P.2d at page 791. This conclusion in no way detracts from the primary proposition stated at page 481 of 45 Cal.2d at page 790 of 289 P.2d: "Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. [Citations.] If the price of a commodity in a sales contract is intended to be left to the subsequent agreement of the parties, the purported contract is merely an agreement to agree and therefore *nudum pactum* until the price is fixed or agreed upon. [Citations.] Unless the court has ascertainable provisions of agreement be-

fore it, there is no contract on which the court may act." We do not regard this decision as contrary to the Ablett and other cases above discussed.

[6] Appellant's counsel earnestly argues that he was prepared and offered to pay cash upon the exercise of the option, and that this fact cured any uncertainty about terms of payment that inhered in the option clause of the lease. The point has been ruled adversely in several cases.

Klein v. Markarian, *supra*, 175 Cal. 37, 41, 165 P. 3, 4, says that appellant "claims, however, that all uncertainty was removed by his act of tendering four notes, together with a mortgage to secure them. The defendant having then failed to specify any objections to the terms of the instruments tendered, he was, it is argued, precluded from objecting thereafter. \* \* \* No matter what the defendant might have said in response to the offer, the plaintiff could not, of course, have remedied the defects in the written option. The writing was so indefinite that the plaintiff could not, within its terms, lay the foundation for a decree of specific performance. To hold the defendant bound by a tender outside of the provisions of the option would be to make a new contract for him."

In Burgess v. Rodom, *supra*, 121 Cal. App.2d 71, 262 P.2d 335, the balance of the purchase price was \$5,000. The court said, at page 74 of 121 Cal.App.2d, at page 337 of 262 P.2d: "Plaintiff offers to supply the absent elements of an enforceable agree-

ment by proving that respondent arranged for a loan at the bank for \$2,200; that she had more than \$2,800 in her account (but not in the escrow) at the bank; and that she moved into the property, remaining for about three weeks and moving out because of alleged misrepresentations relative to its construction. Such proof would be *aliunde* the writing and is not admissible for the purpose of establishing an essential and material feature of the abortive agreement."

Westphal v. Buenger, 324 Ill. 77, 154 N.E. 426, 427: "An agreement in writing, which does not purport to give an absolute right, without further negotiations thereon, cannot be specifically enforced. Appellant contends that he is now ready and willing to pay the entire \$16,000, but such is not of the terms of the contract. There were to be mortgages, and, while it might be generally considered more acceptable to have the actual cash than mortgages, the court will not make a new contract for the parties, because it appears that conditions claimed by one party, but not in the contract, might prove more beneficial to the other party."

[7] We are persuaded that the ruling of the trial judge is correct. In view of this conclusion arguments presented by counsel upon other points (e. g. whether Harry J. Grella is properly named as an appellant) require no discussion.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

164 Cal.App.2d 502

**The PEOPLE of the State of California,**  
**Plaintiff and Respondent,**

**v.**

**Helen Galvin HOE, Defendant and Appellant.**  
**Cr. 2838.**

District Court of Appeal, Third District,  
 California.

Oct. 23, 1958.

As Modified on Denial of Rehearing

Nov. 21, 1958.

Defendant was convicted of offense of manslaughter in the driving of a vehicle, with a finding of gross negligence. The Superior Court, Napa County, Wright L. Callender, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence that defendant was operating automobile while under influence of intoxicating liquor and that, while in the commission of such unlawful act, she negligently failed to see and take reasonable precautions to avoid hitting driver of automobile parked alongside paved portion of highway was sufficient to support conviction with finding of gross negligence.

Judgment and order affirmed.

#### **1. Criminal Law** Ⓒ1144(13)

In passing on contention that evidence was insufficient to sustain judgment of conviction and order denying a new trial, reviewing court must consider the evidence in light most favorable to the people.

#### **2. Automobiles** Ⓒ355(13)

In prosecution for manslaughter allegedly resulting from commission of an unlawful act while engaged in driving an automobile, evidence was sufficient to support implied finding that defendant was driving automobile while under the influence of intoxicating liquor. West's Ann. Pen.Code, § 192; West's Ann.Vehicle Code, § 502.

#### **3. Criminal Law** Ⓒ696(6), 698(1)

In prosecution for manslaughter allegedly committed by driving automobile against victim, any objection to testimony

of officers that they found what appeared to be flesh and hair stuck to right headlight frame of automobile was waived by failure to raise such objection at time testimony was given, and motion to strike such testimony made at close of prosecution's case came too late and was properly denied, particularly where part of such testimony was given in direct response to question by defense counsel. West's Ann. Pen.Code, § 192.

#### **4. Criminal Law** Ⓒ1166½(12), 1171(1)

Record on appeal from conviction for manslaughter did not show that anything was said by either trial judge or district attorney during colloquy, involving disagreement as to the testimony of a witness, that could have resulted in any prejudice to defendant. West's Ann.Pen.Code, § 192.

#### **5. Criminal Law** Ⓒ761(11), 778(5)

In prosecution for manslaughter allegedly committed by driving automobile against victim, instruction, defining proximate cause in terms of the efficient cause that necessarily sets in operation factors that accomplish injury or death, was not objectionable as relieving prosecution of burden of proof and assuming a homicide because a death occurred without regard to the cause, particularly in view of instruction requiring jury to find as a prerequisite to conviction that defendant's misconduct was the cause of death. West's Ann.Pen. Code, § 192.

#### **6. Criminal Law** Ⓒ822(1)

Instructions in a criminal case must be read as a whole.

#### **7. Automobiles** Ⓒ344

Misconduct in operation of vehicle, whether it constitutes ordinary or gross negligence, must be the proximate cause of death in order to constitute manslaughter in the driving of a vehicle. West's Ann.Pen.Code, § 192.

#### **8. Automobiles** Ⓒ360

In determining whether evidence in prosecution for manslaughter in the driving of a vehicle was sufficient to prove that misconduct of defendant was a proximate cause of death, reviewing court was not



concerned with defendant's conduct preceding her approach to place where automobile driven by defendant allegedly struck victim. West's Ann.Pen.Code, § 192.

#### 9. Automobiles ⇨344

In prosecution for manslaughter allegedly committed in the driving of a vehicle, defendant was chargeable with what was visible to her had she exercised care and looked. West's Ann.Pen.Code, § 192.

#### 10. Automobiles ⇨356

In prosecution for manslaughter in the driving of a vehicle, evidence was sufficient to take case to jury on questions of whether driver of overtaking automobile was negligent in failing to see automobile parked alongside paved portion of highway and driver thereof passing behind parked automobile in such manner that driver of overtaking automobile could reasonably anticipate he might move into path of overtaking automobile and in failing to take reasonable precautions to avoid striking him and whether such negligence was a proximate cause of death of driver of parked automobile when struck by overtaking automobile. West's Ann.Pen.Code, § 192.

#### 11. Automobiles ⇨355(13)

Evidence that driver of overtaking automobile, in exercise of due care, should have seen automobile parked alongside paved portion of highway and driver thereof passing behind parked automobile in such a manner that driver of overtaking automobile could reasonably anticipate that he might move into path of overtaking automobile and that driver did not reduce speed of overtaking automobile or turn it to the left sufficiently to avoid hitting driver of parked automobile was sufficient to support conviction for manslaughter in the driving of a vehicle, regardless of whether conduct of driver of parked automobile was grossly negligent and a proximate cause of his death. West's Ann.Pen. Code, § 192.

#### 12. Automobiles ⇨355(13)

In prosecution for manslaughter in the driving of a vehicle, evidence that de-

fendant was operating automobile while under influence of intoxicating liquor and that, while engaged in commission of such unlawful act, she failed to see and take reasonable precautions to avoid hitting driver of automobile parked alongside paved portion of highway was sufficient to support finding of gross negligence. West's Ann.Pen.Code, § 192; West's Ann. Vehicle Code, § 502.

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Lewis H. DeCastle, Santa Rosa, for appellant.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., Sacramento, for respondent.

SCHOTTKY, Justice.

Defendant was charged with the crime of manslaughter as defined in section 192 of the Penal Code, it being alleged in the information that on the 18th day of March, 1957, in the county of Napa, said defendant "did willfully and unlawfully, feloniously and without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence and while in the commission of a lawful act which might produce death, in an unlawful manner, with gross negligence, kill Huealton Wiley." She was found guilty by a jury of the offense charged with gross negligence. The jury recommended that punishment be in the county jail. A motion for a new trial was denied. Probation was granted. Defendant filed a notice of appeal which stated that she appealed from the judgment of conviction and from the order denying her motion for a new trial.

[1] Appellant makes a number of contentions but her principal contention is that the evidence is insufficient to support the judgment and order. Before discussing the specific contentions of appellant we shall summarize the evidence, as shown by the record, stating it, as must be done, in the light most favorable to respondent.

Huealton Wiley died at the Parks Victory Hospital in Napa on March 23, 1957. The cause of death was extensive brain injury and hemorrhage resulting from a blow to the skull. Five days prior to the death he suffered the fatal injuries upon being struck on the head by a car being driven by appellant. The incident occurred on Highway 29 in Napa County, approximately two and one-half miles from its intersection with Highway 12.

Mr. Kenneth MacLoud, the only eye witness to the incident, testified that on March 18, 1957, while traveling on Highway 12 in Napa County he observed a 1956 DeSoto automobile, which he subsequently learned was being driven by Mrs. Hoe, traveling on this highway ahead of him. He observed that the automobile being driven by Mrs. Hoe was weaving back and forth across the road, slipping over the white line and coming close to the right-hand edge of the highway. He observed this erratic driving for approximately two and one-half miles until Mrs. Hoe pulled off on the right side of the road near a spot referred to as "Lillian's Club." She appeared to be dazed and threw her head back. Mr. MacLoud, after passing her, stopped his automobile and started to back up and see if Mrs. Hoe was in need of help. As Mr. MacLoud was backing up, Mrs. Hoe started up again and passed him. Mr. MacLoud again proceeded to follow her and stayed behind her about four car lengths. The appellant continued on Highway 12 to its intersection with Highway 29 where she came to a stop and then proceeded north on Highway 29. About a mile and one-half beyond the point where Mrs. Hoe had stopped off the highway the decedent, Huealton Wiley, had parked his automobile for the purpose of changing a flat tire. The highway at this point was a four-lane divided highway with two lanes in each direction. Each lane was approximately 12 feet wide and there was a macadamized or improved shoulder three feet in width and a dirt shoulder another three feet in width. Mr. Wiley's car was parked off the main-traveled por-

tion of the highway with the left wheel about 8 inches from the pavement. The left side of the car body was just off the pavement. It was approximately 5:00 p. m., the weather was clear and the sun was shining.

Mr. MacLoud testified that after Mrs. Hoe turned onto Highway 29 she was driving straighter than she had been and was driving about a foot from the shoulder on the right of the pavement, at a speed of from 35 to 40 miles per hour. MacLoud observed the decedent's car which was clearly visible and saw Mr. Wiley walk from the right-hand side of his car to the rear of his car. Mr. Wiley looked to the rear toward MacLoud's car and the appellant's car. When Mr. Wiley got to the left rear of his car he bent over. Just as Mr. Wiley bent or stooped over, Mrs. Hoe's car struck him. She did not strike the parked car. She passed about one foot within the pavement. Without stopping, Mrs. Hoe proceeded on down the road. Mr. MacLoud, after first stopping beside Mr. Wiley's car and signaling to a woman occupant in the back seat, proceeded down the highway in pursuit of the appellant.

After traveling approximately a mile or a mile and one-half Mr. MacLoud succeeded in overtaking Mrs. Hoe after trying to attract her attention by sounding his horn. Upon being informed by Mr. MacLoud that she had struck someone Mrs. Hoe appeared to be surprised. Mr. MacLoud then got into Mrs. Hoe's car and drove it back to the scene of the accident. Upon their arrival spectators had gathered and shortly thereafter a highway patrolman arrived on the scene.

Appellant contends that the evidence fails to establish that appellant committed an unlawful act. Respondent does not contend that appellant was guilty of a violation of Vehicle Code, section 510, the basic speed law, section 525, driving on the wrong side of the road, or section 480, commonly referred to as hit and run, but respondent does contend that the death of Wiley resulted from the act of appel-

lant committed in violation of Vehicle Code, section 502, commonly referred to as drunk driving.

Appellant argues that the evidence is insufficient to prove that she was driving a vehicle while under the influence of intoxicating liquor. She points to her own testimony that she was suffering from an arthritic condition and that her inability to walk properly or maintain her balance at the scene of the accident was due to this physical condition, rather than the fact that she was intoxicated. She points also to the testimony of her chiropractor who corroborated her testimony as to her physical condition, and to her testimony that she had only one beer and was not intoxicated. She points to other testimony and states: "It is respectfully submitted that defendant's conduct all during the day of the accident up to and after its occurrence would not justify reaching a conclusion that she was affected by the consumption of intoxicating liquor to such a degree that she could not, and, more important, did not, operate her car in a cautious, safe and prudent manner."

However, there was the testimony of two highway patrolmen that in their opinion she was under the influence of intoxicating liquor. There was also expert testimony showing that she had a concentration of alcohol in her blood of .16 per cent one hour after the accident, and the testimony of Mr. MacLoud that she was driving erratically while he was following her. Mr. MacLoud testified that the decedent, Mr. Wiley, was clearly visible; that the day was clear and the sun was shining, and there was no other traffic in the immediate vicinity at the time of the accident.

[2] The evidence pointed to by appellant merely created a conflict upon the point of whether or not appellant was under the influence of intoxicating liquor at the time of the accident. There was sufficient evidence to support the implied finding of the jury that she was.

Appellant also contends that the evidence of the highway patrol officers that there appeared to be flesh and hair stuck to the right front headlamp frame should have been stricken. No objection was made at the time the testimony was received. A motion to strike was made at the conclusion of the prosecution's case. The testimony which appellant contends should have been stricken were answers to questions asked of Officer Evensen, as follows:

"Q. What did you find that was out of the ordinary? A. Well, on the right front headlight frame in the adjacent fender was appeared to be flesh and hair stuck around the frame and on the fender.

\* \* \* \* \*

"A. Well, from the hair and flesh on the front of her car; I had reason to believe that she had hit this person."

The second answer which appellant argues should have been stricken was given in response to a question by appellant's counsel and was directly in response to the question asked by counsel. The witness was being questioned concerning the basis upon which he arrived at the conclusion that Mrs. Hoe had been involved in an accident and had struck the decedent. He was asked by counsel as follows:

"Q. Well, by what other means did you know it?"

The witness answered the question, stating as follows:

"A. Well, from the hair and the flesh on the front of her car; I had reason to believe that she had hit this person."

[3] The said evidence having been received without objection, and part of it in response to a question by appellant's counsel, we believe that appellant waived any objection to its reception. As was stated in *People v. Caritativo*, 46 Cal.2d 68, at page 73, 292 P.2d 513, 516:



"The rule is settled that where a defendant deliberately permits evidence to be given without objection in the first instance and then moves to strike it out on grounds readily available at the time the evidence was offered, he waives such objections to the reception of the evidence. (*People v. Long*, 43 Cal. 444, 446; *People v. Rolfe*, 61 Cal. 540, 542.)"

So even if such evidence was inadmissible, which we do not hold, the motion to strike came too late and was properly denied.

[4] There is no merit in the contention of appellant that the trial judge and the district attorney were guilty of misconduct. During the examination of Mr. MacLoud appellant's counsel objected to a question concerning a statement of the appellant made to the witness. Appellant's counsel contended that the corpus delicti had not been established. During a colloquy between counsel and the judge the parties disagreed as to the testimony of the witness. We have read this portion of the record carefully and are convinced that nothing was said by either the trial judge or the district attorney that could have resulted in any prejudice to appellant.

[5,6] Appellant argues that the court erred in instructing the jury that "The proximate cause of an injury or death is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury or death and without which the results would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury or death." Appellant contends that "This instruction relieves the prosecution of that burden of proof and assumes a homicide because a death occurred without regard to the cause." There was no error in giving this instruction. A similar instruction was approved by this court in *People v. Mead*, 126 Cal.App.2d 164, 177, 271 P.2d 619, as containing the standard definition of proximate cause. The instruc-

tions in a case must be read as a whole, and in the instant case the court also instructed the jury that before they could find appellant guilty they "must find that the defendant's misconduct was the cause of death for there must be a causal connection between commission of the unlawful acts and death."

Finally, appellant contends that there was not sufficient evidence to prove the death of decedent to have been the proximate result of the commission of an unlawful act by appellant. Section 192 of the Penal Code prescribes the offense of manslaughter in the driving of a vehicle, as follows:

"3. In the driving of a vehicle—

"(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

"(b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."

The statute then provides:

"This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner."

[7-11] Whether the misconduct proven constitutes gross negligence or ordinary negligence it must appear that it was the proximate cause of the death. In testing the record for the presence of proximate cause we are not concerned with appellant's conduct preceding her approach to the place where the death occurred. At the time and just before her automobile struck decedent she was driving

straight and about one foot within the limit of the right-hand travel lane. Although she testified she did not see decedent's car parked at the side of the road and did not see decedent, she is chargeable with what was then visible to her had she exercised care and looked. She is chargeable, then, with seeing the position in which decedent's car had been parked with respect to its proximity to her path of progress and with seeing decedent pass toward the rear of his car from the right-hand side of it and then behind the car in a manner indicating his approach to her proposed path. The jury could find that she could reasonably anticipate he might go into the area to the left of his car and that if he did there was a reasonable probability that unless she took evasive action open to her, injury to decedent might result. Under these circumstances the jury could find that a reasonably prudent person would have either slowed down or pulled enough to the left to create a margin of safety or have done both of these things, that her failure to do so was negligence and that this negligence was a proximate cause of decedent's death. It matters not that decedent's conduct was grossly negligent and a proximate cause of his death. It cannot, however, be said that decedent's conduct was the sole proximate cause of his death. It results, therefore, that appellant was guilty of manslaughter in the driving of a vehicle. The record supports the jury's verdict in that respect.

[12] It is argued further that the evidence will not support the jury's finding of gross negligence and in support of that argument it is insisted that the proximate cause of death, that is, appellant's failure to exercise care to avoid injuring decedent, will not in itself support a finding of gross negligence. Conceding that to be true, that is, that the only conduct of appellant material here was that immediately preceding the instant her car struck decedent, yet under the statute that negligence occurred in the commission of

an unlawful act with gross negligence. The jury could find that her conduct in driving while intoxicated and in failing to see either decedent or his car as she approached was grossly negligent conduct.

The judgment and the order appealed from are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



164 Cal.App.2d 450

**Robert W. PHILLIPS, Plaintiff and Appellant,**  
v.

**Harry L. BEILSTEN and Helen L. Beilsten,**  
his wife, Defendants and Respondents.

**Harry L. BEILSTEN and Helen L. Beilsten,**  
his wife, Plaintiffs and Respondents,  
v.

**Robert W. PHILLIPS, also known as R. W. Phillips, Defendant and Appellant.**  
Civ. 22962.

District Court of Appeal, Second District,  
Division 2, California.  
Oct. 21, 1958.

Rehearing Denied Nov. 18, 1958.

Hearing Denied Dec. 17, 1958.

Action for specific performance of a contract to exchange properties wherein the respondents subsequently filed an action seeking rescission of the same contract upon the ground of fraud. The actions were consolidated. From a judgment of the Superior Court of Los Angeles County, Phillip H. Richards, J., the plaintiff appealed. The District Court of Appeal, Herndon, J., held that the respondents were not precluded from seeking rescission because of their answer or failure to file a timely cross-complaint in the specific performance action in view of the stipula-

tion of the parties; that the transfer of the actions to Los Angeles County was proper and that the judgment was not inequitable.

Judgment affirmed.

#### 1. Pleading ⚡127(2)

In broker's action for specific performance of a contract for exchange of properties, defendants were not precluded from seeking a rescission of the transaction because they admitted execution of the agreement, where they neither alleged nor admitted any fact which was inconsistent with any fact which they had alleged in their complaint for rescission.

#### 2. Stipulations ⚡14(11)

In broker's action for specific performance of an agreement for exchange of properties wherein defendants subsequently filed action for rescission, broker waived contentions that defendants were barred from seeking rescission by failure to timely file cross complaint in specific performance action, where broker stipulated to the transfer of the rescission action and to consolidation of the two actions for the purposes of trial since any matter with respect to procedural matters antecedent to the stipulation was waived.

#### 3. Appeal and Error ⚡181

Where appellant interposed no objections in the trial court on basis of contentions raised on appeal but sought an adjudication on the merits, any right to urge error in respect to such contentions was waived.

#### 4. Exchange of Property ⚡3(1)

In broker's action for specific performance of an agreement for exchange of properties, defendants who filed action for rescission for alleged fraud before they filed their answer in the specific performance action did not by failure to plead fraud or seek rescission by cross complaint in the specific performance action affirm the contract or admit its validity, where broker at the time he stipulated to a consolidation of the actions knew that the

defendants were seeking a judicial confirmation of the rescission.

#### 5. Stipulations ⚡14(11)

Plaintiff's stipulation for transfer of rescission action of defendants and to consolidation of that action with an action for specific performance was not construable as intending to foreclose the granting of any relief as sought by the respondents' complaint in the rescission action.

#### 6. Courts ⚡23

Parties to an action over which the court has general jurisdiction cannot claim lack of power to try a particular issue after they have consented to a trial thereof and have participated therein.

#### 7. Courts ⚡484

Where broker filed in Los Angeles county, action for specific performance of an agreement for exchange of properties and subsequently the defendants filed in Lake county action for rescission and damages and by stipulation the actions were consolidated for trial in Los Angeles county and broker claimed that the Lake county superior court lacked jurisdiction of the rescission action, transfer of the action to Los Angeles county was proper.

#### 8. Appeal and Error ⚡197(2)

In broker's action for specific performance of an agreement for exchange of properties where defendants sought rescission, broker was not entitled to complain that the finding as to value of the resort property was unsupported by the evidence where the pleadings raised no issue with respect to such matter.

#### 9. Appeal and Error ⚡671(4)

Appellant was not entitled to complain on appeal that the judgment failed to charge the respondent with reasonable value of resort property during the time they were in possession where the appellant did not refer to any evidence in the record which would have afforded a basis for such a charge.



## 10. Cancellation of Instruments Ⓒ55

## Specific Performance Ⓒ125

In an action for specific performance wherein the defendants sought rescission of the transaction, the trial court had power to grant such monetary relief as might be necessary to do complete equity between the parties.

## 11. Exchange of Property Ⓒ8(1)

In suit for specific performance of an agreement for exchange of properties where defendants sought rescission for alleged fraud and the rescission action was tried as an action upon a rescission in pais in which defendants sought recovery of the equivalent of the consideration given pursuant to a contract with consequential damages, award of a money judgment which sought to accomplish as nearly as possible the restoration of the status quo was not inequitable.

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Chas. I. Rosin, Los Angeles, for appellant.

Rodney F. Williams, North Hollywood, Ralph V. DeVoto, and Philip C. Crump, Lakeport, for respondents.

HERNDON, Justice.

The judgment at bar adjudicates the issues tendered in two actions which were consolidated for trial pursuant to stipulation: (1) an action brought by Robert W. Phillips (appellant) against Mr. and Mrs. Harry L. Beilsten (respondents) seeking *specific performance* of a certain contract whereby the parties agreed to an exchange of their respective interests in certain parcels of real property, and (2) an action brought by respondents Beilstens seeking *rescission* of the same contract upon the ground of fraud in the inducement. The trial court decreed a rescission and granted Beilstens a money judgment in the sum of \$28,476.91.

In February, 1955, Phillips, a real estate broker, owned certain real property located

near Kelseyville, Lake County, California, consisting of a resort hotel and cabins, generally known as The Lakewood Resort, which was encumbered in the amount of approximately \$75,000. The Beilstens owned a residential property located in Los Angeles County referred to in the briefs as the Lemona property which was subject to an encumbrance in the amount of \$6,925.67.

By written contract dated February 12, 1955, the parties agreed to an exchange of the above mentioned properties. It was provided that Beilstens were to receive the Lakewood Resort with all its furniture, furnishings and equipment, subject to the encumbrance thereon. According to the original agreement Phillips was to receive the Lemona property free and clear, but it was subsequently agreed orally that he would take it subject to the encumbrance and that Beilstens would pay him an equivalent amount in cash from the proceeds of a loan to be obtained upon the security of other property.

The parties promptly executed their respective deeds and deposited them in escrow. Beilstens' deed conveying the Lemona property to Phillips was recorded. It appears, however, that Phillips withdrew from the escrow the deed to the resort property and that this deed was never delivered. Nevertheless, Beilstens went into possession of the resort property in the latter part of March, 1955. In April, 1955, Phillips sold the Lemona property to one John M. Morehart.

Shortly after taking possession of the Lakewood Resort, Beilstens discovered the falsity of numerous representations made by Phillips and upon which they had relied in agreeing to the exchange of properties. On May 24, 1955, Beilstens gave Phillips written notice of rescission offering to restore to him the ownership and possession of Lakewood Resort and demanding that he return to them all monies and things of value which he had received and that he pay all damages suffered by them. By reason of these circumstances, Beilstens refused to take any further steps to clear

the Lemona property and declined to pay Phillips the amount of the encumbrance thereon.

On July 18, 1955, Phillips filed in the Los Angeles County superior court his action for specific performance. From the allegations of the complaint, it appeared that the only promise of Beilstens then unfulfilled was their promise to pay Phillips the amount of the encumbrance on the Lemona property.

On August 24, 1955, Beilstens filed in the Lake County superior court their complaint for rescission and damages. This complaint charged Phillips with numerous false representations material to the quality, condition and value of the resort property and set forth all the essential elements of a conventional action for rescission on the ground of fraud. It alleged the giving of the notice of rescission and the offer of restoration in May of 1955; it repeated the offer to restore to Phillips all that the complaining parties had received under the agreement and offered "to do equity in the premises as the Court may require." The rescission complaint further alleged: that Phillips had deeded the Lemona property to a third party; that the reasonable and agreed value of the Lemona property was \$27,000; that Beilstens had made numerous outlays in the form of payments to Phillips, payment of taxes on the resort property, payments on the encumbrances and for improvements and other expenses incident to the transaction. The total of these outlays added to the alleged value of the Lemona property amounted to the sum of \$35,866.69. The prayer of the complaint sought cancellation and rescission of the agreement and recovery of the indicated sum.

On December 7, 1955, (a little over three months after filing their rescission action in Lake County) Beilstens filed an answer to the complaint in the specific performance action in Los Angeles. This answer admitted the execution of the agreement and the taking of possession of the resort property but denied the other material allegations of the complaint. It affirm-

atively alleged that Phillips had failed and refused to perform various conditions of the agreement and that he had removed from the premises furniture, furnishings and equipment which were to have been delivered with the resort property.

On May 1, 1956, Beilstens filed in the Los Angeles specific performance action their notice of motion for leave to file a cross-complaint and an amendment to their answer. This proposed cross-complaint was essentially a duplicate of the complaint in the Lake County action. The motion for leave to file the cross-complaint was denied. Shortly thereafter, and pursuant to stipulation, the rescission action was ordered transferred from Lake County to Los Angeles County.

On May 16, 1956, the parties, through their counsel, presented to the presiding judge of the Los Angeles County superior court a written stipulation which, after reciting the pendency of the specific performance action and the transfer of the rescission action from Lake County, provided: that said court might make its order consolidating said causes for the purposes of trial; that in lieu of Phillips filing an amended answer and cross-complaint, each and all of the allegations of the complaint in the rescission action would be deemed denied, and that Phillips might be granted such affirmative relief by way of accounting and otherwise as might be "equitable in the premises."

An order for consolidation was made in conformity with the terms of the foregoing stipulation and the consolidated actions were set for trial. On June 15, 1956, Phillips filed an amended answer which amounted to a general and specific denial of most of the material allegations of Beilstens' complaint.

The consolidated actions came on for trial on July 13, 1956, and after a lengthy trial, the court rendered its decision finding Phillips guilty of fraud substantially as charged in the Beilsten complaint. The judgment decreed a rescission of the contract and awarded the Beilstens a money

judgment in the sum of \$28,476.91. The computation of the monetary award was set forth in the trial judge's memorandum of decision as follows:

|                                                                                                                                                           |             |             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-------------|
| (1) Reasonable value Lemona property                                                                                                                      | \$27,000.00 |             |
| Less unpaid lien                                                                                                                                          | 6,925.00    |             |
|                                                                                                                                                           | <hr/>       |             |
| Net value Lemona property-----                                                                                                                            |             | \$20,075.00 |
| (2) Moneys expended for improvements and<br>reasonable value of equipment<br>necessarily purchased -----                                                  |             | \$ 3,957.80 |
| (3) Escrow expenses, moving expenses,<br>commission, fixture tax, liquor<br>inventory on hand upon abandonment,<br>and cash down payment -----            |             | \$ 2,989.53 |
| (The Court has disallowed the item<br>of \$1203.87 for inventory and<br>supplies as they were used by<br>plaintiffs in their operation of<br>the resort.) |             |             |
| (4) Taxes paid -----                                                                                                                                      | \$          | 462.58      |
| (5) Trust deed payment -----                                                                                                                              | \$          | 992.00      |
|                                                                                                                                                           | <hr/>       |             |
|                                                                                                                                                           |             | \$28,476.91 |

On this appeal from the judgment Phillips expressly concedes the sufficiency of the evidence to sustain all of the findings of the trial court with respect to his fraudulent misrepresentations and respondents' reliance thereon. Appellant also concedes the sufficiency of the evidence to support all of the findings as to the value of the Lemona property. A review of the record readily discloses that appellant's concessions are not only proper but clearly necessary.

[1] Appellant first argues that respondents were precluded from seeking rescission because their verified answer to the complaint in the specific performance action admitted the validity and enforceability of the agreement. Appellant cites a number of decisions in support of the rule stated in *Beatty v. Pacific States Savings & Loan Co.*, 4 Cal.App.2d 692, 696-697, 41 P.2d 378, to the effect that where a fact is directly alleged in a verified pleading the pleader will not be permitted later to contradict the fact so alleged without a satisfactory ex-

planation. The rule which appellant seeks to invoke has no application here. It is true that by their answer in the specific performance action respondents admitted the *execution* of the agreement, but they neither alleged nor admitted any fact which was in the slightest degree inconsistent with any fact which they had alleged in their complaint for rescission which they previously had filed in Lake County.

[2] Appellant advances the concomitant contentions that respondents were barred from seeking rescission (1) by their failure to seek it by way of a timely cross-complaint or counter claim in the specific performance action and (2) by the order denying their motion for leave to file the cross-complaint which they tendered in the specific performance action. Without conceding that these contentions might otherwise have had merit, we hold that appellant *waived* them by stipulating to the transfer of the rescission action from Lake County to Los Angeles and to the consolidation of the two actions for purposes of trial.



[3] These stipulations were plainly designed to avoid a multiplicity of actions in a situation where suits involving the same general subject matter were pending in different courts. The procedure followed was obviously advantageous both to appellant and respondents. (See 2 Witkin, California Procedure, 1132 et seq.) Appellant suggests no reason why he should be permitted to repudiate his stipulations. Manifestly, any right to urge error with respect to procedural matters antecedent to the stipulations has been waived. (Cf. McClure v. Donovan, 33 Cal.2d 717, 722, 723, 205 P.2d 17; Moore v. Hubbard & Johnson Lumber Co., 149 Cal.App.2d 236, 242, 308 P.2d 794.) Appellant interposed no objections in the trial court on the basis of these contentions but rather sought an adjudication on the merits. For this additional reason, therefore, any right to urge error in respect to these procedural matters has been waived. *Huntoon v. Hurley*, 137 Cal.App.2d 33, 38, 290 P.2d 14.

[4, 5] Since respondents had filed their pending action for rescission on the ground of alleged fraud several months before they filed their answer in the specific performance action, it cannot be maintained with reason that their failure to plead fraud or to seek rescission by cross-complaint in the latter action should have been construed as an affirmance of the contract or an admission of its validity. At the time appellant stipulated to a consolidation of the two actions, he well knew that respondents were seeking a judicial confirmation of the rescission which they had declared by their notice of May 24, 1955. (Cf. *Montgomery v. McLaury*, 143 Cal. 83, 88, 76 P. 964; and see *Walsh v. Majors*, 4 Cal.2d 384, 398, 49 P.2d 598.) We must reject as strained and wholly unreasonable appellant's construction of the stipulation upon which the two actions were consolidated for trial. We find nothing either in the stipulation or in the record to support the contention that the stipulation was intended to foreclose the granting of any part of the relief sought by the prayer of respondents' complaint in the rescission action. We hold that the trial

court's construction of the stipulation was reasonable and proper.

[6, 7] Appellant next urges that the Lake County superior court was without jurisdiction of the subject matter of the rescission action for the asserted reason that exclusive jurisdiction of all litigation arising from the transaction involved had vested in the Los Angeles superior court upon the filing of the specific performance action. Upon this premise it is argued that the Los Angeles court "was equally without jurisdiction to grant Beilsten any affirmative relief on his complaint in the rescission action. Hence, the judgment in the rescission action was void and it should be vacated." We find no merit in this contention. For the purposes of discussion we may accept appellant's premise that the Lake County superior court lacked jurisdiction of the subject matter of the rescission action. On this premise the transfer of the action to Los Angeles County was clearly proper.

In *Schlyen v. Schlyen*, 43 Cal.2d 361, 376, 273 P.2d 897, 905, referring to legislation adopted in 1957 and citing § 396 of the Code of Civil Procedure as amended in that year, the court declared: "One of the results of that legislation is to authorize a court having no jurisdiction of the subject matter of an action commenced therein to transfer it to the court having jurisdiction, if there be one." Again it is to be borne in mind that appellant *stipulated* to the transfer of the rescission action to Los Angeles County and to its consolidation with the specific performance action and that thereafter he participated in the trial on the merits without interposing any objection on any of the procedural or jurisdictional grounds which he now advances. As this court stated in *Munns v. Stenman*, 152 Cal.App.2d 543, 557, 314 P.2d 67, 76: "Applicable here is the rule that parties to an action over which the court has general jurisdiction cannot be heard to claim lack of power to try a particular issue after they have consented to a trial thereof and have participated in the same." In *Schlyen*, supra, (43 Cal.2d at page 377, 273 P.2d at

page 905,) the rule is stated: "Where the superior court has jurisdiction over the particular class of cases in question it is the established rule that if no objection on the ground of another action pending or other appropriate objection be timely made it is deemed to be waived. In re Estate of Dombrowski, 163 Cal. 290, 297, 125 P. 233; In re Estate of Latour, 140 Cal. 414, 425-426, 73 P. 1070, 74 P. 441. The latter rule has been applied to proceedings in a court exercising general jurisdiction where a party has failed to interpose a timely objection on the ground that the issues should not be determined in the pending action. Simons v. Bedell, 1898, 122 Cal. 341, 55 P. 3 [68 Am.St.Rep. 35]; Miller v. Forster, 1933, 131 Cal.App. 509, 21 P.2d 678."

[8,9] Appellant asserts that the trial court's finding as to the value of the Lemona property is unsupported by the evidence. However, the record reveals that the pleadings tendered no issue with respect to this matter. In his answer to the rescission complaint appellant made no denial of respondents' allegation that \$27,000 was the reasonable value of said property. Furthermore, it appears to be undisputed that at the time the agreement was made the parties mutually set the value of the property at that figure. Appellant also complains that the judgment erroneously fails to charge respondents with the reasonable rental value of the resort property during the time they were in possession. This argument is futile because appellant does not refer to any evidence in the record which would have afforded a basis for such a charge.

[10,11] Although the briefs of the parties contain no discussion of the matter, it clearly appears that the rescission action was tried in the trial court as an action upon a rescission *in pais* in which the respondents sought recovery of the equivalent of the consideration which they had given pursuant to the contract, together with consequential damages. (See 9 Cal. Jur.2d 517, § 3.) It is clear also that the theory and intent of the trial court's award

of the money judgment was to accomplish as nearly as possible a restoration of the status quo. It is elementary, of course, that the trial court was empowered to grant such monetary relief as might be found necessary to do complete equity between the parties. (See 9 Cal.Jur.2d 633, § 48.) Appellant has failed to show that the judgment is inequitable in any respect.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



164 Cal.App.2d 298

Robert N. HOUGHTON, Plaintiff and  
Appellant,

v.

CITY OF LONG BEACH, a municipal corporation; George W. Vermillion, Lewis D. Reese, Gerald Desmond, Raymond C. Kealer, Toby Wick, Charles M. Garrison, D. Patrick Aheran, John F. Baker, and Virgil H. Spongberg, as members of the City Council of said City; John Mansell, City Auditor; F. W. Brejcha, City Treasurer; and H. P. Beckman, City Accountant of said City of Long Beach, Defendants and Respondents.

Civ. 23117.

District Court of Appeal, Second District,  
Division 2, California.

Oct. 17, 1958.

As Modified on Denial of Rehearing

Nov. 14, 1958.

Hearing Denied Dec. 10, 1958.

Declaratory judgment action. The Superior Court of Los Angeles County, George Francis, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that municipal employee's right to future pension vests upon his entering employment and rendering substantial services therein, and that such right cannot be destroyed by charter amendment even before time for retirement has arrived; but

held that potential pension may be modified in a reasonable manner and to a reasonable extent.

Affirmed.

### 1. Appeal and Error Ⓒ768

Where appellant had not denied statement, in respondents' brief, that insufficient funds had been provided to establish fund on an actuarially sound basis and that resultant pension demands had exceeded amount provided, court reviewing declaratory judgment adverse to plaintiff, who claimed to be entitled to have amount of his pension fixed by pre-amendment charter subdivision, deemed such fact established "sufficiently for present purposes."

### 2. Municipal Corporations Ⓒ187(1), 200(1)

Prior to 1931 amendment of Long Beach City Charter, pension fund for firemen and policemen was limited to 20% of general tax levy. St.1925, p. 1333, § 187 (6).

### 3. Municipal Corporations Ⓒ220(9)

Employee's right to future pension vests upon his entering employment and rendering substantial services therein, and such right cannot be destroyed by charter amendment even before time for retirement has arrived; but potential pension may be modified in a reasonable manner and to a reasonable extent. St.1925, p. 1333, § 187(2); § 187.1 as added by St.1945, p. 2954.

### 4. Municipal Corporations Ⓒ220(9)

1951 Long Beach Charter amendment, which operated to convert pension into general obligation (not limited to any described percentage of general levy) and to impose upon employee contributions to fund equal to 2% of his salary, was valid. St.1925, p. 1333, § 187(2, 6) as amended by St.1931, p. 2785.

### 5. Municipal Corporations Ⓒ220(9)

Municipality has power to withdraw, before employee's right to retirement has accrued, privilege of working beyond permissible retirement age and thereby ac-

quiring larger pension than would be received as result of retiring immediately upon reaching specified permissible retirement age; and, therefore, 1945 Long Beach Charter amendment was valid. St.1925, p. 1333, § 187(2); § 187.1 as added by St. 1945, p. 2954.

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Albert D. White and Kenneth Sperry, Long Beach, for appellant.

Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

ASHBURN, Justice.

Here presented is another problem growing out of the pension provisions of the City Charter of Long Beach. Plaintiff, a Police Sergeant, joined the department in 1921 and at the time of trial had served continuously for more than 30 years. On the effective date of an attempted repeal of pension provisions (by adoption of § 187.1, effective on March 29, 1945, St.1945, p. 2954) he had served some 24 years. Plaintiff claims to be entitled when he retires to a pension of two-thirds of his pay based on the highest rank or position held by him one year prior to the date of his retirement, this under § 187, subdivision 2, of the Charter as enacted in 1925. He has now served some 37 or 38 years in the department. Defendant asserts that plaintiff is entitled to a pension of 56- $\frac{2}{3}$  per cent of said annual salary by virtue of the said amendment adopting § 187.1 in 1945. The action is one for declaratory relief. The trial judge having ruled with defendant, plaintiff appeals.

The pattern for pensions for members of the Police and Fire Departments starts with § 187 of the Charter which was enacted in 1925 (Stats.1925, p. 1333). Subdivision 2 then provided that any member of either department, after serving for 30 years in the aggregate in any capacity or rank whatever, should upon his own application or order of the Board of Police and Fire Commissioners, be retired and



should thereafter be paid a lifetime yearly pension "equal to two-thirds of the annual salary attached to the rank or position held by him in such department one year prior to the date of his retirement." The said subdivision also provided that after 20 years of aggregate service such member should be retired upon his own application or upon order of the commission, and thereupon should be paid a "limited pension" for 20 years service of 50 per cent of the annual salary of the rank or position held by him one year prior to date of retirement, plus an additional  $1\frac{2}{3}$  per cent of such salary for each year over 20 years and less than 30 years in the aggregate served by the member before retirement.

[1] Subdivision 6 of the same § 187 provided for a Relief and Pension Fund. The commission was directed thereby to employ an actuary to report "the cost of maintaining, on a reservation basis, the pension system as hereinabove provided." The same subdivision further said: "[T]he city manager is hereby authorized to include in his annual budget an amount not exceeding two per cent (2%) of the general tax levy to be paid into said fund, based upon the estimate of cost as established by the actuary's survey, and the city council shall annually appropriate the amount of such estimate to the 'Relief and Pension Fund', and also the amount of any deficit which may remain therein in the event the appropriation of any previous year prove insufficient to pay all demands drawn against such fund, which amount, however, in any one year, shall not exceed two per cent (2%) of the general tax levy." This required no contribution from the employee. It seems clear that it provided a limited fund consisting of not more than two per cent of the general tax levy for the year, and, in case of a deficit in any one year, same was required to be made good in the following year, but the appropriation for any one year was specifically limited to two per cent of the general tax levy for that year. Conceivably a deficit

in any one year would never be made up; this would be true if the annual cost were to amount to more than two per cent of the general levy in each successive year. We are told in *England v. City of Long Beach*, 27 Cal.2d 343, 163 P.2d 865: "The accruing payments, however, have not been made to petitioner because, according to respondents, payments due to pensioners have greatly exceeded the sums paid into the pension fund." 27 Cal.2d at page 344, 163 P.2d at page 866. Also: "The report of the actuary, appointed as directed by this subdivision, stated that the payment of two per cent of the general tax levy would be wholly inadequate and that an amount equal to at least five and one-half per cent would be required each year to place the pension system on a reservation basis. Thereafter, until 1931, the full two per cent authorized was not paid into the fund, but the city manager and the city council paid into the fund only a sufficient amount to pay such pensions as then became due." 27 Cal.2d at page 345, 163 P.2d at page 867. Respondents' brief herein says: "It is true that a fund was to be established on an actuarially sound basis, but the total contribution of the City was not to exceed two per cent (2%) of the general tax levy in any one year. It was subsequently ascertained that insufficient funds were provided to establish a fund on an actuarially sound basis. The result was that pension demands soon exceeded the funds provided." Appellant has not denied the last two sentences of this statement and the fact therefore is established sufficiently for present purposes. See, *Royko v. Griffith Co.*, 147 Cal.App.2d 770, 774, 306 P.2d 36.

Section 187 was amended in 1931 (Stats. 1931, p. 2785). The provisions of subdivision 2 above mentioned were not materially altered and hence no change was made in the amount of pension to which plaintiff would become entitled. But subdivision 6 was amended to provide: "The city manager shall include in his annual budget an amount equal to two per cent of the estimated pay of the members of

the police and fire departments, as herein-after provided, and the city council shall appropriate such amount to the 'Relief and Pension Fund.'

"There shall be paid into the said fund, the following monies, to-wit: (a) The City Auditor is hereby authorized, and shall deduct and pay into said fund semi-monthly, two per cent of the salary of each member of the police and fire departments; (b) The amount appropriated by the city council, as hereinbefore provided, to-wit: a sum equal to the amount paid into said fund from the salaries of the members of the police and fire departments; \* \* \*

The England case, *supra*, says in 27 Cal. 2d at page 347, 163 P.2d at page 867: "The only portion of subdivision 6 which might have been held to constitute an express limitation—the reference in the 1925 amendment to an amount not exceeding two percent of the general tax levy—was eliminated by the 1931 amendment." The court specifically held, following the 1931 amendment, "the pension payments directed to be made by the charter constitute general obligations of the city and are not limited in amount to the sums assigned to the pension fund by subdivision 6." 27 Cal.2d at page 347, 163 P.2d at page 867. It was stipulated at the trial of the instant case that "pursuant to the said 1931 Amendment deductions of two percent of plaintiff's monthly salary were thereafter deducted for payment into a pension fund by said City and continued up to March 29, 1945, when the deductions terminated pursuant to the effective date of Section 187.1 of said Charter."

[2] We are unable to accept the view expressed in appellant's reply brief that the England case and *City of Long Beach v. Lentz*, 27 Cal.2d 890, 165 P.2d 677, hold that the pensions prescribed by § 187 of the Charter always had been general obligations of the city. While there is language in the England opinion which is consistent with that view, the actual ruling was not so broad. It dealt with a pension which had been granted in 1944, upon which none

of the accruing payments had been made because of insolvency of the pension fund. This was long after the amendment of 1931 which eliminated the two per cent limitation upon the city's provision for the fund. The question was whether the instalments of this 1944 pension were general obligations of the city. This was answered in the affirmative, but it was not necessary for the court to decide, nor did it hold, that prior to the 1931 amendment pensions had been general obligations of the city. The reply brief insists that the contrary is true and invokes the supposed authority of *City of Long Beach v. Lentz*, *supra*, 27 Cal.2d 890, 165 P.2d 677, which was decided upon the authority of England, *supra*. Resort to the record is had in an effort to establish appellant's contention. It there appears that the case involved pension instalments which had accrued subsequent to January 1, 1944; some of the pensions in question had been granted prior to the effective date of the 1931 amendment, but the instalments remaining unpaid were those accruing after January 1, 1944, —an aggregate of \$149,321.62 according to the amended complaint. The limitation of the fund to a two per cent tax levy having been eliminated in 1931, the question before the court in the *Lentz* case was only that of a general obligation as to the payments becoming due after January 1, 1944. The judgment did not enter into the refinements suggested by appellant herein, but said: "[I]t is the duty of the plaintiff to appropriate and make available sufficient funds to pay all pensions which are now due, or which may become payable in the future, under the provisions of Section 187 or 187.1 of said Charter." And the Supreme Court said: "The problem thus presented has been fully determined by our decision in the England case, where it was held that the pension payments directed to be made by subdivision 2 of section 187 of the charter, as amended in 1925 and 1931, \* \* \* constitute general obligations of the city and are not limited in the manner urged by the city. The declaratory relief



granted in the present case is entirely in accord with that decision." *City of Long Beach v. Lentz*, supra, 27 Cal.2d 890, 165 P.2d 677. It is our conclusion that neither Allen nor Lentz holds that the pension fund or obligation was not a limited one prior to the 1931 amendment; we further hold that it was in fact limited to two per cent of the general tax levy.

[3, 4] The solution of the ultimate question at bar requires a determination at this point of the validity of this 1931 amendment, which operated to convert the pension into a general obligation (not limited to any prescribed percentage of the general levy) and to impose upon the employee contributions to the fund equal to two per cent of his salary.

It had been established previous to *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (Sept. 23, 1955)<sup>1</sup> that the employee's right to a future pension vests upon his entering the employment and rendering substantial services therein, vests in such a sense that it cannot be destroyed by charter amendment even before the time for retirement has arrived (*Kern v. City of Long Beach*, 29 Cal.2d 848, 853, 855, 179 P.2d 799, Apr. 1, 1947); but the vesting is subject to the qualification that the potential pension may be modified in reasonable manner and to a reasonable extent. The Kern case says: "Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but

that the amount, terms and conditions of the benefits may be altered" (29 Cal.2d at page 855, 179 P.2d at page 803); and, "[t]he ruling permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." 29 Cal.2d at page 854, 179 P.2d at page 803. In the later case of *Manning Allen*, supra, the court became more specific as to the extent of permissible modifications in advance of retirement. Certain 1951 amendments to the Long Beach Charter were there under consideration, especially one attempting to substitute a fixed pension for a fluctuating one. At page 131, of 45 Cal.2d, at page 767 of 287 P.2d it is said: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. \* \* \* Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." These criteria were reiterated in *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484 (June 6, 1958). The court says in each of these opinions that each case must turn upon its own facts. It seems quite apparent that a revamping of an existing system so as to eliminate shortages in the available fund, by substituting a general obligation of the city for a mere two per cent of the general levy, has direct relation to the integrity of the system and keeping it flexible "to permit ad-

1. This is the case of *Manning T. Allen*; the one reported in 101 Cal.App.2d 15, 224 P.2d 792, infra, is that of *Albion R.*

*Allen*. For convenience we shall refer to them as the *Manning Allen* and the *Albion Allen* case, respectively.



justments in accord with changing conditions." The imposition of a member's contribution of two per cent of his salary toward a solvent fund, in substitution for an insolvent one, is "a disadvantage" which is "manifestly accompanied by comparable new advantages." We therefore hold that the 1931 amendment to § 187 was valid as applied to plaintiff. The city was therefore entitled to collect from him the two per cent contributions which it did receive until March 29, 1945, the effective date of adoption of § 187.1 which attempted "to withdraw substantially all pension rights granted by section 187 of its charter to employees of the police and fire departments." *Allen v. City of Long Beach*, supra, 45 Cal.2d 128, 130, 287 P.2d 765, 766, but we are told by respondents' brief, with no denial from appellant, that "[b]y 1945, the 'Relief and Pension Fund' was exhausted."

The text of that 1945 amendment is as follows: "Sections 187 and 188 of this Charter are hereby repealed; provided, however, that any member of the Fire or Police Department who shall have served in such department for twenty (20) years or more on the effective date of this amendment shall be entitled to retire at any time within five (5) years from said effective date as provided by subdivision (2) of said Section 187, and beginning with the date of his retirement, shall be paid a pension of such percentage of his salary as he would have been entitled to receive had he been retired on the effective date of this amendment. \* \* \*" This language preserves to members who had served 20 years or more the same pension which was provided for 20-year employees in subdivision 2 of the repealed § 187, a fluctuating one equal to 50 per cent of the salary plus  $1\frac{2}{3}$  per cent thereof for each year of service over 20 and less than 30; but its application is confined to those who had attained the 20-year status upon the effective date of the amendment and who should elect to retire within 5 years from said date, the amount to be fixed at the same percentage as if the employee had retired on the effective date of the amendment.

[5] This § 187.1 was specifically held valid as to the complaining party in each of three decisions of the district court of appeal, namely, *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 208 P.2d 764, July, 1949; *Albion Allen v. City of Long Beach*, supra, 101 Cal.App.2d 15, 224 P.2d 792; Dec., 1950; and *Allstot v. City of Long Beach*, 104 Cal.App.2d 441, 231 P.2d 498, May, 1951. The Supreme Court denied a hearing in each instance.

These decisions are not concerned with statutory changes substituting a pension of fixed amount in place of a fluctuating one, as was the case in *Allen v. City of Long Beach*, supra, 45 Cal.2d 128, 287 P.2d 765; *Abbott v. City of Los Angeles*, supra, 50 Cal.2d 438, 326 P.2d 484; *Cochran v. City of Long Beach*, 139 Cal.App.2d 282, 293 P.2d 839; *Chapin v. City Commission*, 149 Cal.App.2d 40, 307 P.2d 657; *Glaeser v. City of Berkeley*, 148 Cal.App.2d 614, 307 P.2d 61; they pass upon the power to withdraw, before right to retirement has accrued, the privilege of working beyond the permissible retirement age and thereby acquiring a larger pension than would be received as the result of retiring immediately upon reaching the specified permissible age. Relying primarily upon the unanimous Kern decision, supra, the court in each of those cases held that such a change is a lawful one relating to "the amount, terms and conditions of the benefits" to accrue in the future.

In *Palaske*, supra, petitioner, after being credited with time spent in the armed services, had 22 years of service when § 187.1 became effective. The court held that the limitation upon the amount of pension which he could obtain was valid, saying in part: "Applying the principles set forth in *Kern v. City of Long Beach*, supra, it appears that it was within the power of the city to modify its pension plan to provide that on and after the effective date of the amendment an employee who was entitled to retire might do so or not, as he saw fit, but that if he chose to continue as an employee he could not thereby earn any additional pension above that to which he was

entitled on the effective date of the amendment. As stated by the Supreme Court, the employee has a vested right only to a substantial or reasonable pension. His contractual right to such a pension has not been impaired by legislation which, operating prospectively, merely withdraws his right or option to earn a bonus by continuing in employment after he has become eligible for retirement." 93 Cal.App.2d at page 132, 208 P.2d at page 771. Also: "We are in accord with appellants' contention that since the city had the power to modify the pension plan although it could not repeal it altogether, that section 187.1 should be construed as effective to limit respondent's pension right to 50% of his salary. While the attempted repeal of all rights was void, the provision limiting pension rights is separable therefrom. It appears from the amendment that the electors of the city intended to reduce the liability for pensions created under section 187 to the extent of their power constitutionally to do so, and intended to preserve pension rights only to those who were eligible for retirement on the effective date. Although they could not deprive respondent and others similarly situated of all pension rights, they had the power to modify such rights, and it would seem to follow, therefore, that respondent is entitled only to those rights accorded by the amendment—that is, a limited pension. Those who were eligible for retirement on the effective date were entitled to the pension they had earned on the effective date and no more, while those who reached the 20-year mark subsequent to the effective date became eligible for retirement on a 50% pension and no more." 93 Cal.App.2d at page 133, 208 P.2d at page 771.

*Albion Allen v. City of Long Beach*, supra, 101 Cal.App.2d 15, 20, 224 P.2d 792, 794; "After due consideration of the arguments advanced by respondents, we adhere to the conclusion reached in the *Palaske* case, wherein this court held that the proviso in the repealing amendment saving pension rights to those who had completed the minimum term of service was separable

from the invalid portion of the amendment which attempted to repeal all pension rights as to others; that such proviso constituted a reasonable modification under the rule laid down in the *Kern* case, and operated to limit the pension rights of those who had not served the minimum term to a pension of fifty per cent."

*Allstot v. City of Long Beach*, supra, 104 Cal.App.2d 441, 443, 231 P.2d 498, 500: "In the *Allen* case the District Court of Appeal was asked to reverse its holding in the *Palaske* case and declined to do so, adopting as a part of its opinion the following from the former decision (101 Cal.App.2d at page 28, 224 P.2d [792] at page 795): 'Those who were eligible for retirement on the effective date were entitled to the pension they had earned on the effective date and no more, while those who reached the 20-year mark subsequent to the effective date became eligible for retirement on a 50% pension and no more.' Plaintiffs now ask us to disregard the quoted holding in the *Kern* case and also to disapprove of the holdings in the *Palaske* and *Allen* cases to the same effect. It is said that the point did not require decision in the *Kern* case and received practically no consideration by the court in the *Allen* case. We are not sympathetic to the criticism of either decision." At page 444 of 104 Cal.App.2d, at page 501 of 231 P.2d: "Not only are we well satisfied that the former decisions reflect the mature judgment of the court on the points decided, but after giving the problems independent consideration we are fully in accord with the reasoning and the conclusions of the District Court of Appeal in both the *Palaske* and *Allen* cases."

In the *Allstot* case, supra, Mr. Presiding Justice Shinn also said, 104 Cal.App.2d at page 445, 231 P.2d at page 501, referring to the *Albion Allen* case, supra: "Moreover, we may not overlook the fact that the same argument was advanced in the petition for hearing in the *Allen* case and that a hearing was denied. So far as we are concerned, the denial of a hearing in a case which decides questions of such widespread interest and importance means that

they were fully considered by the Supreme Court and were not deemed to have been decided incorrectly." Again the Supreme Court unanimously denied a hearing. This is "most persuasive" (People v. Rowland, 19 Cal.App.2d 540, 542, 65 P.2d 1333).

In *Housing Authority of City of Los Angeles v. Peters*, 120 Cal.App.2d 615, 616, 261 P.2d 561, it is said: "Therefore we are bound by the foregoing decisions, the correct rule being that when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case. [Citations.]"

With respect to the Manning Allen case, supra, the trial judge at bar found: "[T]hat it is true that the Supreme Court established a new criterion for determining the reasonableness of permissive changes in pension systems where the changes occur prior to the time the employee becomes eligible for retirement, but did not alter the law with respect to a change in pension systems if the change altered the benefit to be earned subsequent to the employee being eligible for a retirement pension." Also: "The court further finds that the Supreme Court in said case held that the decisions culminating in *Allstot v. City of Long Beach*, 104 Cal.App.2d 441, 231 P.2d 498, which upheld a Charter Amendment depriving employees of the opportunity to earn an increase in their pensions by remaining in service after reaching retirement age, were distinguishable from the Allen case." This is a reference to the following passage of the Manning Allen case, supra: "Cases relied on by the city which were decided prior to *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799, are not controlling here, and the series of decisions culminating in *Allstot v. City of Long Beach*, 104 Cal.App.2d 441, 231 P.2d 498, which upheld a charter amendment depriving employees of the opportunity to earn an increase in their pensions by remaining in service after reach-

ing retirement age, are distinguishable from the present case." *Allen v. City of Long Beach*, supra, 45 Cal.2d 128, 133, 287 P.2d 765, 768. Certainly the *Palaske*, *Albion Allen* and *Allstot* cases, supra, were not overruled by the Manning Allen decision. Nor did the later *Abbott* case, supra, 50 Cal.2d 438, 326 P.2d 484, do so. The claim that the court in the *Abbott* case "expressly disapproved 'any implications in the former' decisions of the District Courts of Appeal which were inconsistent with the 'commensurate advantage' criteria \* \* \*" is misplaced. The quoted phrase "any implications in the former" is found in this context in *Abbott*, 50 Cal.2d at page 453, 326 P.2d at page 492. "*Carey v. Retirement Board* (1955), 131 Cal.App.2d 739, 281 P.2d 25, is relied upon by defendants. \* \* \* That case was decided before the Allen case and any implications in the former which are inconsistent with our decision in the latter must be deemed disapproved." The *Palaske*, *Albion Allen* and *Allstot* rulings stand as persuasive if not controlling authority.

There is no merit in the contention that the city is estopped to make any changes in the pension system after one has entered its service in reliance thereon. It is thus expressed in appellant's brief: "Since the obvious purpose of the offer contained in the first sentence of Section 187, subdivision 2, was to induce the employee to render an aggregate period of service of at least 30 years, the City would be estopped from withdrawing or substantially altering its offer after the acceptance thereof by partial performance on the part of the employee, under well-settled principles of contract law." The fact is that plaintiff entered the police department in 1921 and the city's pension plan was first put into effect in 1925 (see *England*, supra, 27 Cal.2d at pages 344-345, 163 P.2d 865). So far as plaintiff is individually concerned it was merely a method of increase in salary through adding deferred payments. There is no basis for estoppel so far as he is concerned. *Kern v. City of Long Beach*, supra, 29 Cal.2d 848, 851-853, 179 P.2d 799. It is



the effect upon the individual employee that controls in this field of amendments to a pension system. *Abbott v. City of Los Angeles*, supra, 50 Cal.2d 438, 326 P.2d 484.

It seems to us that the "Rule of Property Theory" discussed in *Abbott*, supra, 50 Cal.2d at page 455, 326 P.2d at page 494 et seq. (but there held inapplicable) is pertinent here. If § 187.1 was not valid with respect to plaintiff the city had a lawful right to continue to deduct two per cent of his salary from March 29, 1945, to the present date. (See quotation from *Palaske*, supra, as to severability.) The same is true of others standing in the same position as plaintiff. After the city's reliance upon the *Palaske* line of cases, beginning in July, 1949, it would seem not sound to now reverse those decisions with a retroactive effect, for rights and duties have accrued upon the basis of decisions which have represented the law since 1949; if they are to be reversed the effect of that action doubtless will be limited to future events. That is what was done with reference to the *Cahan* rule ([*People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513] *People v. Kitchens*, 46 Cal.2d 260, 262, 294 P.2d 17). *County of Los Angeles v. Faus*, 48 Cal.2d 672, 680, 312 P.2d 680, 685, discusses the matter thus: "It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former decision was bad law but that it never was the law.

"A well-recognized exception to this general rule is that, where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in a subsequent decision. Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision. (7 R.C.L.(1915), Courts, § 36, p. 1010.)"

We consider the *Palaske*, *Albion Allen* and *Allstot* cases not to be in conflict with *Manning Allen* or *Abbott*, and we accept them as good law.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.



164 Cal.App.2d 566

**Marcla RACKOV, Plaintiff and Respondent,**

**v.**

**Herman RACKOV, Defendant and Appellant.**

**Civ. 5743.**

District Court of Appeal, Fourth District,  
California.

Oct. 27, 1958.

Action for divorce. From an order of the Superior Court, Riverside County, *Hilton H. McCabe, J.*, denying a motion to vacate the default judgment and from an order denying the motion to set aside provisions of an interlocutory decree relative to disposition of community property, the defendant appealed. The District Court of Appeal, *Mussell, J.*, held, inter alia, that the question whether personal service of summons and complaint was made on husband in wife's action for divorce as shown by return attached to the summons was one of fact for trial court, and since there was substantial evidence to support trial court's refusal to set aside default judgment, no clear abuse of discretion was shown.

Affirmed.

#### **I. Appeal and Error ☞957(1)**

##### **Judgment ☞139**

Motions for relief from default are addressed to trial court's sound discretion, and exercise thereof will not be interfered with by an appellate tribunal in absence of a

clear showing of abuse thereof. West's Ann.Code Civ.Proc. § 473.

### 2. Divorce ☞161, 184(6)

The question whether personal service of summons and complaint was made on husband in wife's action for divorce as shown by return attached to the summons was one of fact for trial court, and since there was substantial evidence to support trial court's refusal to set aside default judgment, no clear abuse of discretion was shown. West's Ann.Code Civ.Proc. § 473.

### 3. Divorce ☞160

Where complaint in wife's divorce action stated that there was community property belonging to the parties and that such property stood in the names of both parties, husband by his default admitted all the allegations of complaint and was estopped from thereafter challenging them.

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Harold M. Fagin, Riverside, for appellant.

Jerome Lyman Richardson and Benjamin W. Henderson, Palm Springs, for respondent.

MUSSELL, Justice.

The complaint in this action for divorce on the ground of extreme cruelty was filed in Riverside County on December 6, 1956, and the affidavit of service of summons shows that personal service thereof was made on the defendant in the County of Los Angeles on December 18, 1956. Defendant failed to appear in said action and his default was entered on January 21, 1957. On January 30, 1957, the cause was heard by the court and an interlocutory judgment entered granting plaintiff a divorce and the property described in the complaint as the family home and rental property belonging to the parties and located at 529 West Arenas Road in Palm Springs was declared to be community property and was awarded and assigned to plaintiff as her sole and separate property. No appeal was taken from this judgment. On March 19, 1957, the defendant filed a mo-

tion in said action to set aside the default and default judgment. In his affidavit in support of the motion defendant states that "neither the summons nor the complaint in said action nor any order to show cause, nor any copies thereof, were served personally upon affiant or received by him at any time or in any manner, either through the mail or otherwise; that there has been no order for service of summons by publication upon the said defendant".

On March 26, 1957, defendant filed a motion to quash the service of summons in said action on the same grounds stated in his previous motion to set aside his default. In opposition to these motions plaintiff filed the affidavit of Louis Lane, who signed the affidavit of service endorsed on the summons. In additional affidavits Lane stated that he received the original summons and a copy of the summons and complaint on or about December 15, 1956, with instructions to serve the said papers on the defendant, who could be located as residing at the Alexandria Hotel in Los Angeles; that he checked with the room clerk at said hotel and was informed that the defendant occupied room 843 at said hotel; that he called this room and a man's voice answered the telephone and stated that his name was Herman Rackov; that the party to whom he talked refused to make an appointment; that on another occasion he called the same room number and talked to the same man's voice but was again unable to make an appointment; that on the evening of December 18, 1956, he again went to the hotel and the same voice answered his telephone call; that he then went to said room 843 in said hotel and rapped on the door "and when the voice answered, I asked 'Mr. Rackov' to which the voice answered 'Yes'. I stated that I had a message for him, the door opened slightly and I dropped a copy of the summons and complaint issued out of the Superior Court of the State of California in and for the County of Riverside, No. Indio No. 1217, through the opening of the door and through the room and stated in substance, these are copies of a complaint and summons for you to appear in court, be sure

and read them. The door closed and I left. I was not able to see the person who was inside the room, but the voice was that of a man and was the same voice that I had heard in my prior conversations with the person occupying the said room No. 843."

The affidavits of one of the attorneys for plaintiff and of the plaintiff, filed in opposition to the motion, indicated that the plaintiff and defendant met in the attorney's office on December 27, 1956, and a lengthy conference was held at which defendant did not claim that he was not served with the summons in said action. Plaintiff, in her affidavit in opposition to the said motions, states that during the first week of December, 1956, she ascertained that the defendant was living at the Alexandria Hotel in Los Angeles; that on December 18, 1956, said defendant ordered his mail forwarded to him at said hotel; that on December 26, at a conference in which the matter of a divorce was discussed, nothing was said by either party relative to the service of summons.

On April 17, 1957, the court denied defendant's motion to quash the service of summons and on May 15, 1957, denied defendant's motion to set aside the default judgment. On May 31, 1957, the defendant filed notice of motion for an order of court setting aside the granting and awarding of the real property owned by the parties to the plaintiff on the ground that the property involved was held by the parties in joint tenancy and was not community property. On June 11, 1957, the trial court denied this motion to set aside the default judgment. Defendant appeals from the orders of May 15, 1957 and June 11, 1957.

[1] Defendant states in his opening brief that his appeal is prosecuted pursuant to the provisions of sections 963 and 473 of the Code of Civil Procedure. It is a settled principle of law that motions for relief from default under the remedial provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court, and the exercise of that discretion, in the absence of a clear showing

of abuse, will not be interfered with by an appellate tribunal. *Hendrix v. Hendrix*, 130 Cal.App.2d 379, 382, 279 P.2d 58; *Colvin v. Sibley*, 117 Cal.App.2d 144, 146, 255 P.2d 16.

In *Kapple v. Kapple*, 140 Cal.App.2d 787, 788, 295 P.2d 932, on appeal from an order denying a motion to vacate a default and an interlocutory decree, the court said:

"It is of course presumed that the trial court resolved any conflicts in favor of the prevailing party, *Warren v. Warren*, 120 Cal.App.2d 396, 400, 261 P.2d 309; *Baratti v. Baratti*, 109 Cal. App.2d 917, 922, 242 P.2d 22, and the order will not be set aside in the face of such conflict and the ruling thereon. *Warren v. Warren*, *supra*; *Elms v. Elms*, 72 Cal.App.2d 508, 513, 164 P. 2d 936."

In *Smith v. Jones*, 174 Cal. 513, 515-516, 163 P. 890, 891, the court, in discussing section 473 of the Code of Civil Procedure in a default case, said:

"That section provides for relief upon motion when the judgment is taken against a party through 'mistake, inadvertence, surprise or excusable neglect.' Not having been served with process, and hence having no knowledge that he was required to appear, the failure of respondent to do so cannot be said to arise from any mistake, inadvertence, surprise, or neglect on his part. If respondent, as defendant in the action, had not been served with summons, he had an absolute right on motion, if timely made, to have the judgment set aside independent of section 473, or any other statute, as violative of the fundamental principle that one may not be deprived of his property without due process of law. The only condition to his right to invoke this aid of the court by a motion in the action itself is that his motion be made within a reasonable time."

In *Suttman v. Superior Court*, 174 Cal. 243, 244, 162 P. 1032, it is said that



"In view of our statutory provisions, the interlocutory judgment provided for by section 131, Civil Code, is, when regularly entered, subject to be modified or vacated only in some way provided by law for the modification or vacating of final judgments. The character of such an interlocutory judgment in this regard is fully shown by what is said in *Claudius v. Melvin*, 146 Cal. 257, 79 P. 897. It is final except against such attack as is expressly authorized by statute. It is subject to be vacated on appeal, or on motion for new trial, or by proceedings under section 473, Code of Civil Procedure (*Claudius v. Melvin*, supra, [146 Cal. 257, 79 P. 897]), or in any other way that may be expressly authorized for the review of final judgments."

[2] In the instant case the question of whether personal service of the summons and complaint was made on the defendant as shown by the return attached to the summons was one of fact for the trial court. The matter was heard on conflicting affidavits and since there is substantial evidence to support the trial court's refusal to set aside the default judgment, no clear abuse of discretion was shown. The trial court impliedly found that the defendant was personally served with process and that finding is supported by the record.

[3] It is alleged in the complaint that "there is community property belonging to the parties hereto consisting of the multiple unit apartments known as 'Sulas Lodge', located at 529 West Arenas Road, Palm Springs, California, together with the furniture and furnishings therein contained, and one (1) 1954 Skyliner Ford automobile. That the said community property stands in the names of both parties hereto." It therefore follows that by his default the defendant admitted all the allegations of the complaint and is estopped from thereafter challenging them. *Christiana v. Rose*, 100 Cal. App.2d 46, 50, 222 P.2d 891.

The motion of the defendant made on May 31, 1957, was an attack on the suffi-

ciency of the evidence to support the interlocutory decree and was properly denied.

The orders appealed from are affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



164 Cal.App.2d 722

PEOPLE of the State of California,  
Plaintiff and Respondent,

v.

William Otis CONKLIN, Defendant and  
Appellant.

Cr. 1381.

District Court of Appeal, Fourth District,  
California.

Oct. 30, 1958.

Defendant was convicted in the Superior Court of San Diego County, Clarence Harden, J., for aiding and abetting in commission of a robbery (first degree), robbery (second degree), burglary (second degree), conspiracy to commit robbery and conspiracy to commit burglary, and he appealed. The District Court of Appeal, Griffin, P. J., held that convictions were sustained by evidence.

Affirmed.

Burglary ⇨41(1)

Conspiracy ⇨47

Robbery ⇨24(1)

Convictions for aiding and abetting in commission of a robbery (first degree), robbery (second degree), burglary (second degree), conspiracy to commit robbery and conspiracy to commit burglary were sustained by evidence. West's Ann.Pen.Code, § 1111.

T. T. Crittenden, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Appellant William Otis Conklin was charged in count one of an amended information and was convicted by a jury of aiding and abetting one Womack and one Shields in the commission of a robbery (first degree) on November 24, 1957; in count two of robbery (second degree) on November 22; in count three with burglary (second degree) on November 23rd; in count four, of conspiracy to commit robbery, on November 24th; in count five, of conspiracy to commit robbery on November 22nd; and in count six, of conspiracy to commit burglary on November 23rd. Several separate and distinct overt acts are alleged under the conspiracy counts. Appellant was sentenced to State's prison, sentences to run consecutively on counts one and two, and the remaining counts to run concurrently with counts one and two.

Counsel for appellant sets forth in his brief an elongated and all-inclusive statement of the many reasons why he claims the judgment should be reversed. As we construe it, he claims that appellant's co-defendants, Shields and Womack, pleaded guilty to the robberies under some alleged "deal" with the district attorney; that in truth and in fact these co-defendants "used" appellant to assist them in the robberies and burglaries alleged; that there was no evidence showing appellant received any of the loot or benefit from the robberies; that one of the co-defendants and principal witness at the trial had "vengeance against him" and "framed" this appellant by implicating him in these alleged offenses; that appellant's acts in connection with these crimes were only incidental to and were innocent acts; that there was no sufficient corroboration of the testimony of

the two named conspirators; that these alleged conspirators had been on a "robbery spree" for over six weeks and appellant was but a tool in their hands; that although he furnished transportation to them it was the same as any public utility, and that the evidence was not sufficient to support the verdicts on any of the counts alleged. No authorities are cited and no reference to the record is made supporting these claims. We have read the entire transcript. The testimony of the two co-conspirators, if believed by the jury, fully supports the charges made. The only possible point indicating any merit would involve the question of corroboration of their testimony.

Generally speaking, it was on November 22nd that appellant Conklin, Womack and Shields were together at Imperial Beach and had a conversation relating to robbery. They discussed robbing a cab driver in San Ysidro. Shields and Womack were to enter a cab and appellant was to follow it in his car. They planned that Shields would hit the cab driver and Womack would take his money; that the loot would be divided three ways; that Shields and Womack entered the cab of one Kilcrease, and directed him to drive to a certain location. Appellant was parked in his automobile at the San Ysidro Hotel awaiting a pre-arranged signal to follow as the cab went by. One of the cab passengers acted as if he were sick and drunk, so the driver stopped and opened the door. Womack then grabbed the driver and after a scuffle the driver slumped down on the seat. His money and his watch were taken. The appellant did not appear but met Shields and Womack the following day. They told appellant they had gotten some money but they were not going to share it with him because he did not fulfill his part of the plan. However, on the night of November 23rd the appellant Conklin, Shields and Womack were riding together in the Logan Heights area in appellant's car. They had a conversation about burglarizing a TV store. Appellant took them to the store and

gave them a key to it. Shields and Womack were to burglarize it while the appellant waited for them. They entered the store and took some "Hi-Fi" equipment. As they came out they saw the spotlight of a patrol car, dropped the articles taken, and ran down an alley. Appellant did not appear immediately, but in a little while he drove through the same alley. Shields and Womack got in appellant's car and he told them there were patrolmen all around the place.

On November 24th Shields, Womack and the appellant again met at a drive-in in the Pacific Beach area and discussed robbing a cab driver. They predetermined an address where Shields and Womack were to be driven by the cab driver. They agreed that appellant would then call a cab and follow it in Shields' car, after Shields and Womack entered the cab, in order to pick them up after they robbed the driver; and that if connections were not made they were to meet at a certain bar not far from the address agreed upon. Shields picked out an address and the three went there to view the area. They proceeded to the Aztec Bar and appellant called a cab from a near-by public booth. A cab arrived and Shields and Womack entered it, giving the driver the address agreed upon. When they arrived there they struck the driver, Van Stelle, with a flashlight and took his billfold, money, wrist watch and gloves. The appellant did not appear at the scene of the robbery at this time, so Shields and Womack proceeded to the bar where they had agreed to meet following the commission of the crime. A short time later the appellant arrived there. When Shields and Womack left the cab the driver called the cab company from a radio in the vehicle. In about a minute a police car arrived at the scene as well as a 1954 Chevrolet automobile driven by the appellant. The police officers brought the appellant from his car to the cab driver who failed to identify him as one of the assailants and he was released.

An officer who answered the robbery call was at the scene of the crime when ap-

pellant was observed backing west on Thomas Street in the 1954 Chevrolet. He talked to him and then appellant left. The officer remained there and was talking to the victim when again he noticed appellant driving up in a 1957 Chevrolet. Later appellant arrived at the bar where he and his companions had arranged to meet, driving his own automobile, a 1957 Chevrolet, and told Shields and Womack they had better leave because there were police in the area. They drove towards La Jolla and appellant, upon seeing a patrol car, told Shields and Womack to say they were on Mount Soledad transmitting on a ham radio set. Officers then stopped appellant's car.

At about midnight on November 24, 1957, an officer stopped a 1957 Chevrolet on La Jolla Boulevard. Appellant got out of the car and spoke to the officer and said he was going to Ocean Beach and had been on Mount Soledad with his "ham" radio. Shields and Womack were seated in appellant's automobile. On his way to the station the officer observed that the 1957 Chevrolet in which he had seen the appellant earlier that evening had been stopped by another police officer, and he recognized the driver as the appellant. He observed that two other men, Shields and Womack, were also in the car. Another officer was also present when appellant was stopped and out of the presence of Shields and Womack appellant told him that there were some things he could tell him. Appellant then stated, in the presence of another officer, that Womack and Shields had committed the robbery in Pacific Beach; that they were at the Aztec Bar and they, Womack and Shields, had planned the robbery, planned to call the cab, had a pre-arranged place, and they agreed to rob the cab driver at that place. He stated that he had been in the area of Thomas Street looking for Womack and Shields. He then asked if the officer had heard of the cab driver who was robbed in San Ysidro and then related that Womack and Shields had committed that robbery and told him about it the following day. At the police station appellant related the details of the



robbery of Van Stelle at Pacific Beach. When asked about the things taken in the robbery he stated that the gloves were left on a barrel near a service station or used-car lot near the bar where he had picked up Womack and Shields. An officer recovered the wrist watch of Van Stelle from a grey jacket lying on the rear seat of appellant's automobile.

About December 4th the officer had a conversation with appellant as he was brought to court for arraignment on the charge of burglary. Appellant stated to him that he had been employed by Dependable TV & Appliance Company; that at one time he was sent to have a duplicate key made, and he had two duplicate keys made and kept one for himself; that on the night of the burglary he, Shields and Womack were driving by this store and he mentioned that he had a key to it and Shields and Womack then stated they would like to burglarize it; that he gave them the key, dropped them off, and later on he picked them up.

Appellant, in defense, testified generally that on November 22nd he went to the Drive-In at Imperial Beach with Shields and Womack and there met their friends; that they later went to a party, and then drove away; that they stopped at San Ysidro for a short time and then drove on to the border; that he remained in his automobile while Shields and Womack left the car and said they would come back in 10 or 15 minutes; that he waited that time but his companions failed to return and he went home; that on November 23rd he, Shields and Womack were together at the Drive-In until late in the evening; that they drove through Logan Heights, passing the Dependable TV store; that he mentioned he used to work there and remembered he still had a key to the place; that when he mentioned it his companions said they wanted to enter the store; that he said "If you're stupid enough to go in you are on your own"; that he gave them the key, let them out of the car, and drove around the corner; that he waited there

quite a while and then drove through an alley observing a police car there, and proceeded downtown; that he returned to the alley in 10 or 15 minutes, heard his companions calling to him, and picked them up. He then testified that on November 24th he again went to the Drive-In and met Shields and Womack, and he and Womack planned to meet Shields later in Pacific Beach; that he and Womack drove to Mount Soledad and did some "hamming" there and then went to the Drive-In where they again met Shields; that they entered Shields' car and drove to the Aztec Bar; that Shields and Womack went into the bar and appellant drove around in Shields' car; and that he started towards a girlfriend's house when he had trouble with the car and had to back around the corner; that there he saw a police car and a cab; that he was then taken to the cab driver and was permitted to leave; and that he drove away thinking of why he was stopped.

It appears that on testing the radio in the car it was tuned in for the police calls. A mere recitation of the testimony produced sufficiently establishes the commission of the crime, and there is sufficient corroborating evidence to satisfy the requirements of section 1111 of the Penal Code. *People v. Henderson*, 34 Cal.2d 340, 343, 209 P.2d 785; *People v. Trujillo*, 32 Cal.2d 105, 110, 194 P.2d 681; *People v. McLean*, 84 Cal. 480, 481, 24 P. 32; *People v. Negra*, 208 Cal. 64, 69, 280 P. 354.

An examination of the record on appeal illustrates that the appellant received a fair trial; that there is sufficient evidence to support the judgment of conviction; and there is additional evidence, independent of the claimed co-conspirators, enabling the jury to accept as true the accomplices' testimony.

Judgment affirmed.

MUSSELL, J., and COUGHLIN, J. pro tem., concur.

164 Cal.App.2d 400

Jeanne PRICE, Plaintiff and Appellant,

v.

ATCHISON, TOPEKA &amp; SANTA FE RAILWAY CO., a corporation, Defendant and Respondent.

Civ. 22674.

District Court of Appeal, Second District,  
Division 3, California.

Oct. 20, 1958.

Rehearing Denied Nov. 5, 1958.

Hearing Denied Dec. 17, 1958.

Action against railroad by passenger for injuries resulting from derailment of train. The Superior Court, Los Angeles County, David Coleman, J., rendered judgment for railroad, and passenger appealed. The District Court of Appeal, Patrosso, J. pro tem., held that final judgments in actions by other passengers against railroad for personal injuries resulting from same accident were not res judicata upon issue of railroad's negligence and records of previous actions were properly excluded in subsequent action.

Affirmed.

Vallée, J., dissented.

### 1. Judgment ⇨665

Final judgments in actions by passengers against railroad for personal injuries resulting from derailment of train were not res judicata upon issue of railroad's negligence in subsequent action instituted by another passenger against railroad for injuries sustained in same accident and records of previous actions were properly excluded in subsequent action.

### 2. Evidence ⇨219(3)

Fact that railroad passenger effected settlement of passenger's claim for injuries resulting from derailment of train during trial of action against railroad did not constitute an admission in subsequent action instituted by another passenger for injuries resulting from same accident that accident was caused by railroad's negligence.

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### 3. Negligence ⇨121(2)

Doctrine of res ipsa loquitur does not operate to place upon defendant the burden of overcoming inference of negligence arising thereunder by a preponderance of evidence.

### 4. Carriers ⇨316(5), 318(6)

Doctrine of res ipsa loquitur was applicable to action by passenger who was injured in train derailment against railroad but it was not necessary for railroad to overcome by preponderance of evidence the inference of negligence arising from application of doctrine.

### 5. Negligence ⇨134(1, 11)

Plaintiff's burden of proving negligence and proximate cause by preponderance of evidence is not changed by inference arising from application of doctrine of res ipsa loquitur and, in order to hold defendant liable, inference of negligence and proximate cause, either alone or with such other evidence, if any, as favors it, must have greater weight and more convincing force in mind of jury than opposing explanation offered by defendant and any evidence supporting it.

### 6. Carriers ⇨280(1)

"Negligence" as applied to common carrier with respect to passengers means any breach of duty towards passenger.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

### 7. Carriers ⇨318(6), 320(22)

In action against railroad by passenger for injuries resulting from derailment of train, questions whether accident occurred as result of breaking of equalizer, a steel bar resting on axle and journal box, and whether defect that may have existed in equalizer was not discoverable despite careful inspection thereof immediately prior to time that accident occurred were for jury and jury was warranted in determining that inference of negligence arising from application of doctrine of res ipsa loquitur was met or at least balanced.

**8. Carriers** ⇨234

In action against railroad by passenger who boarded train in Illinois for injuries sustained when train was derailed in Illinois, law governing degree of care required and liability of railroad for its negligence was law of Illinois.

**9. Evidence** ⇨35, 43(4), 80(1)

California courts take judicial notice of laws of sister states as well as interpretation thereof by highest courts of appellate jurisdiction of such states and law of sister state, in absence of proof to the contrary, is not presumed to be the same as law of California. West's Ann.Code Civ.Proc. § 1875, subd. 3.

**10. Carriers** ⇨280(1)

Under Illinois law, railroad was not insurer of safety of passenger or of her transportation free from injury but care required was highest degree that reasonably could have been exercised consistently with mode of transportation used and practical operation of railroad's business as a carrier and such requirement would be measured in light of best precautions which, at time of accident, were in common, practical use in same business and proved to be efficacious.

**11. Appeal and Error** ⇨1048(6)**Witnesses** ⇨282½

In action against railroad by passenger for injuries sustained as result of derailment of train, wherein witness testified on direct examination that he saw train at point 28 miles from scene of accident and observed nothing defective in its appearance, sustaining of objection to question put to witness on cross-examination as to whether he could observe if equalizer, a steel bar resting on axle and journal box, on train going 80 miles an hour was defective by simply standing on platform and watching train go by was not improper, and, even if erroneous, was not prejudicial.

**12. Trial** ⇨252(10)

In action against railroad by passenger for injuries resulting from derailment of

train, wherein railroad produced evidence through its employees that prior to accident they carefully inspected train and found nothing defective, refusal of instruction that where there is evidence to effect that one did look, but did not see that which was in plain sight it follows that either some part of evidence is untrue or that person was negligently inattentive was not improper in absence of evidence that there was any defect which was clearly visible.

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Robertson, Harney, Drummond & Dorsey, Los Angeles, for appellant.

Robert W. Walker and Richard K. Knowlton, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted this action to recover damages for personal injuries alleged to have been sustained as a result of the derailment of defendant's train upon which she was riding as a passenger. The accident occurred on August 22, 1954, near the town of Lomax in the State of Illinois, some 219 miles west of the city of Chicago, where plaintiff had boarded the train for a journey to Los Angeles. Trial was had before a jury which returned a verdict in favor of the defendant and plaintiff appeals from the judgment entered thereon.

At the opening of the trial, plaintiff sought to secure a ruling by the trial court restricting the trial to the issue of damages. In support of this motion appellant offered in evidence the files of two previous actions instituted in the Superior Court of Los Angeles County by other passengers who sustained injuries in the same accident, and in each of which actions judgment was rendered in favor of the plaintiffs therein and against the defendant, and which judgments had become final. Objections to appellant's motion and the offer in evidence of the record of the prior proceedings, were sustained by the trial court and these rulings are the principal ground of appellant's claim of error upon this appeal.



[1] Appellant contends that the judgments in the two prior actions previously mentioned, are res judicata upon the issue of defendant's negligence within the doctrine announced in *Bernhard v. Bank of America*, 1942, 19 Cal.2d 807, 122 P.2d 892, and that the trial court erred in refusing to permit proof of such prior judgments. This identical contention was advanced by the plaintiff in *Nevarov v. Caldwell*, 161 Cal.App.2d 762, 327 P.2d 111 (hearing by Supreme Court denied), and after careful consideration was decided adversely to the appellant by Division Two of this court, in an opinion authored by Mr. Justice Ashburn. As we are in accord with both the conclusion there reached and the reasons assigned in support thereof, we see no need to elaborate thereon. The rulings here complained of were therefore proper.

Appellant also complains that she was precluded from proving that in one of the prior cases above adverted to (*Meredith v. The Atchison, Topeka & Santa Fe Railway Company*) the defendant herein stipulated to judgment in favor of the plaintiff and in the other (*Longworth v. The Atchison, Topeka and Santa Fe Railway Company*), defendant admitted liability. The argument is that the proffered proof would have established an admission by the defendant that the derailment was occasioned by defendant's negligence. With respect to the *Longworth* case, the file thereof which was offered in evidence failed to disclose that defendant admitted liability, and counsel for the defendant herein denied that any such admission had been made. In response, counsel for the appellant stated that he had been informed by Mr. Murphy, counsel for the plaintiff in the *Longworth* case, that such an admission had been made and indicated that he intended to call Mr. Murphy as a witness to establish this fact. Counsel for the respondent thereupon stated that appellant's attorney was of course at liberty to do so, but Mr. Murphy was not called as a witness and no further proof was offered in this connection. With reference

to the *Meredith* case, however, the judgment entered therein discloses that after the case had been on trial for 11 successive court days on both the issues of liability and damages, "defendant The Atchison, Topeka and Santa Fe Railway Company denying liability," and while the jury was deliberating upon the verdict the parties entered into a stipulation for a settlement of the cause and for entry of judgment in favor of the plaintiff, Mrs. Meredith, and against the defendant in the sum of \$110,000 subject to the approval of the Probate Court<sup>1</sup> and in favor of the plaintiff, Mr. Meredith, in the sum of \$15,000.

[2] Thus the question presented is whether the fact that the defendant in an action by a third party who was also injured in the same accident as that which constituted the basis of the plaintiff's claim made a settlement thereof, may be given in evidence as constituting an admission that the accident in question was caused by the defendant's negligence. The answer to this question is to be found in *Brown v. Pacific Electric Ry. Co.*, 1947, 79 Cal.App.2d 613, 180 P.2d 424, in which a hearing by the Supreme Court was denied. There plaintiff was permitted, over objection, to introduce evidence to the effect that the defendant railway company had made a settlement with another party who had sustained damage as a result of the same accident in which plaintiff was injured, upon the theory that this constituted an admission against interest. In holding the trial court's ruling to be error and in reversing a judgment for plaintiff, the court after an elaborate review of the authorities said (79 Cal.App.2d at page 615, 180 P.2d at page 425):

"While it is the policy of the law to discourage litigation and to encourage compromise of doubtful rights and controversies (*Hamilton v. Oakland School Dist.*, 219 Cal. 322, 329, 26 P.2d 296), appellee contends in effect that proof of a settlement of the controversy made by

1. Approval of the Probate Court was required due to the fact that Mrs. Meredith

appeared in the action by a guardian ad litem.

the defendant in an action with a third party who was injured in the same accident as that which constitutes the basis of plaintiff's claim is not inhibited by section 2078, Code of Civil Procedure. That statute declares that 'an offer of compromise is not an admission that anything is due.' While it refers to offers only, yet the doctrine that a plaintiff may prove that the defendant has satisfied the demands of a third party who was a victim of the same tort as that alleged by plaintiff is so tenuous and rests upon such precarious support that it should not be extended without legislative enactment. The general rule is to reject such evidence as irrelevant and incompetent.

"Evidence of a compromise settlement by the defendant of a claim which originated in the very tort alleged by the plaintiff is inherently harmful in the trial of an action for personal injuries. It invades the province of reason in the exercise of its function to ascertain the truth as to whether the alleged tortfeasor has committed actionable negligence or has failed to perform an act which in the exercise of reasonable care he should have performed, to the detriment of the claimant. Where the culpability of a defendant in an action based upon his alleged negligence is in issue it should be the aim of the court to endeavor to derive a determination of factual liability by competent proof of the circumstances and occurrences constituting the transaction alleged, and it should not be guided by compromise settlements which the defendant has made of other claims arising out of the same facts. In such a trial there is no proper alternative to the art of presenting only competent evidence and of making sound deductions and drawing reasonable inferences therefrom. When the fact finders enter upon their task poisoned with the recital of some irrelevant event that transpired subsequent to the alleged negligent act they are under

a handicap which is not only difficult to disregard but which cannot be eliminated because it has the obvious approval of the judge whose views juries are prone to follow in determining facts if an opportunity is presented for them to ascertain the judicial trend. Moreover, the extrajudicial admission of a party not learned in the law that he is liable amounts to no more than a legal opinion at its best. A fully blown legal opinion asserted by an agent of the alleged tortfeasor outside of court would not be admissible as competent evidence.

"Proof of the settlement made by the corporation with Champion contains no evidence of the admission of the corporation's negligence. It shows no more than the diligence of appellant to buy its peace with the party whose claim was modest and whose automobile had actually been struck by the train. The bare statement that Champion had been compensated for his losses falls far short of an admission of a fact showing the motorman's actionable negligence. It appears to be the prevalent rule in California and in the other states of the Union that in actions for personal injuries arising out of negligence evidence of a settlement with another claimant for injuries caused by the same tort alleged by plaintiff, not connected up with any act admitted by the defendant and which shows his liability for the accident, is clearly irrelevant and therefore inadmissible. *Citti v. Bava*, 204 Cal. 136, 138, 266 P. 954; *Curtis v. McAuliffe*, 106 Cal.App. 1, 288 P. 675; *Georgia Ry. & Electric Co. v. Wallace & Co.*, 122 Ga. 547, 50 S.E. 478, 480; *Smith v. Sanders*, 293 Ky. 6, 168 S.W.2d 359; *Moore v. Stetson Machine Works*, 110 Wash. 649, 188 P. 769; *Quiel v. Wilson*, Ohio App., 34 N.E.2d 590. It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subse-

quent lawsuit by another person asserting a cause of action arising out of the same transaction. To receive such evidence would inevitably tend to discourage settlements out of court if one's purchase of his peace with one person were to be thereafter taken as an admission of his liability for an occurrence which brought injury to another. Reasonable and compelling circumstances might very well influence the defendant to make settlement with the third person while denying all liability to the plaintiff. No party to a justiciable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away. (Citations)."

While in the cited case the settlement relied upon as constituting an admission was seemingly made before suit was filed, we see no difference in principle between such a situation and that where the settlement is effected after suit and during the trial thereof.

[3, 4] Appellant next contends that the trial court erred in denying her motion for a directed verdict upon the ground that the defendant failed as a matter of law to overcome the inference arising from the application of the doctrine of *res ipsa loquitur*. There is no doubt that the doctrine was applicable and the trial court instructed the jury with respect thereto. Appellant's argument in this regard, however, seemingly proceeds upon the assumption that the doctrine of *res ipsa loquitur* operates to place upon the defendant the burden of overcoming the inference of negligence arising thereunder by a preponderance of the evidence. This, of course, is not true. The trial court, at the request of the appellant, gave the jury BAJI instructions 206 and 206D. By the latter they were told:

[5] "In making such a showing, it is not necessary for a defendant to overcome the inference by preponderance of the evidence. Plaintiff's burden of proving negligence and proximate cause by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence and proximate cause, either alone or with such other evidence, if any, as favors it, must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant and any evidence, if any, supporting it.

"If such preponderance in plaintiff's favor exists, then you must find that some negligent conduct on the part of defendant was the proximate cause of the injury; but if the evidence preponderates in defendant's favor, or if in the jury's mind an even balance exists as between the weight of the inference and such evidence, if any, as favors it, on the one side, and the weight of the contrary explanation and such evidence, if any, as favors it, on the other side, neither having the more convincing force, then the verdict must be for the defendant.

[6] "As applied to a common carrier such as the defendant, the word 'negligence' wherever used in the instructions just given, means any breach of duty toward the passenger, evidence of which has been received in this trial. That duty is defined elsewhere in my instructions to you."

This is a correct statement of the rule, both generally and specifically as applied to an action against a carrier for injuries sustained by a passenger. *Armstrong v. Pacific Greyhound Lines*, 1946, 74 Cal.App. 2d 367, 371-373, 168 P.2d 457.

In *Bourguignon v. Peninsular Ry. Co.*, 1919, 40 Cal.App. 689, at page 694, 181 P. 669, at page 671, the Supreme Court, in denying a petition for hearing said:



"The petition for rehearing is denied. Such denial, however, is not to be taken as a complete approval of the instruction that the defendant must show 'that the overturning of the car was the result of inevitable casualty, which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs.'

"The true rule is that, where the accident is of such a character that it speaks for itself, as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless, except upon a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

"In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be most satisfactory, in the sense that the carrier is held to a very high degree of care.

"But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case

of any other presumption which a defendant must meet; that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation, or of his contention that he exercised due care in all particulars, as to offset the presumption in the minds of the jury, and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. See *Haun v. Tally*, [*ante*, 40 Cal.App. 585] 181 P. 81."

And in *James v. American Buslines*, 111 Cal.App.2d 273, 276, 244 P.2d 503, 505, it is said:

"In an action for personal injuries sustained by plaintiff while a passenger in defendant's bus, it is the sole province of the jury to determine from all the evidence whether plaintiff's prima facie case arising from the application of the doctrine of *res ipsa loquitur* is adequately met or balanced by defendant's showing of the conduct of the driver and the circumstances of the accident. (*Armstrong v. Pacific Greyhound Lines*, 74 Cal.App.2d 367, 375 [8], 168 P.2d 457.)"

As said in *Walters v. Bank of America Nat. Trust & Savings Ass'n*, 9 Cal.2d 46, 49, 69 P.2d 839, 840, 110 A.L.R. 1259:

"Substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants. *Bias v. Reed*, 169 Cal. 33, 145 P. 516; 24 Cal.Jur. p. 913, § 163. A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict has been rendered."

Viewed in accordance with the rule last above stated, evidence was adduced by the defendant from which the jury could reasonably conclude that the derailment of defendant's train occurred as a result of the breaking of an equalizer on the south side of the rear truck of the car in which plaintiff was riding and which was the second car of the train. After the accident it was discovered that the equalizer, a curved steel bar resting at each end on the axle and journal box, Exhibit "C", had broken near the foot resting on the journal box and had dropped until the bottom thereof reached a point lower than the surface of the south rail of the westbound track. The point at which the break occurred, because of the truck pedestal, was not visible to inspection. Evidence was adduced to the effect that this car had been completely overhauled in January and February of 1954, some six months prior to the derailment. Included in this overhaul was a complete tearing down and inspection of the truck assemblies including an electrical magnifluxing of the parts thereof and as a result of which no defects were found in the equalizers on the trucks of the car in question. Magnifluxing is described as a process designed to determine the presence of a fracture in metal. The object being inspected is passed through an electrical current which magnetizes the object and thereupon a powder flux is sprinkled upon the surface. If a crack or break of any kind is present, the powder follows the crack and fixes it, thus indicating its presence. It further appears that the car in question arrived in Chicago on August 20th, two days prior to the run on which the derailment occurred. It was then taken to the defendant's coach yard where it was entirely inspected and the inspection revealed no defects. The car then remained in the coach yard until the morning of August 22nd, when it was taken to the Dearborn Street station and again inspected. En route west of Chicago running inspections of the train's running gear were made by the train crew and nothing out of the ordinary was noted by the train

crew up to the time of the derailment. The first indication to the train crew of the derailment came when the emergency braking apparatus of the train went into effect automatically and the train came to a stop some three-quarters of a mile west of the Lomax station.

[7] In the light of this evidence, we are unable to say that, as a matter of law, the jury was not warranted in determining that the inference of negligence arising from the application of the doctrine of *res ipsa loquitur* was not met or at least balanced. In its factual aspect, the case at bar is somewhat similar to that of *Allbritton v. Interstate Transit Lines*, 1939, 31 Cal.App.2d 149, 87 P.2d 704, 706, in which a hearing by the Supreme Court was denied. There, the plaintiff, a passenger upon defendant's bus, was injured when it overturned. To meet the *prima facie* case of negligence made by the showing of the accident, the defendant introduced evidence to the effect that the bus involved in the accident was regularly inspected and repaired, including daily inspection of its under parts, and that one or two days before the accident the defendant's mechanic had made a front-end inspection of the bus consisting of cleaning the front wheels, spindles, front wheel bearings and front steering mechanism as well as the tie rod and springs. After such cleaning process, a solution of chalk and alcohol was applied to these parts in order to show up cracks or flaws, if any. In this operation the mechanic looked at the left front spring but did not discern any defect in the metal of which the spring was composed. On the day following the accident this mechanic made another inspection of the wrecked bus, particularly with reference to the left front spring and he found the spring broken and the front brake cable torn loose from the wheel housing. He further testified that "the break showed approximately fifty per cent old break and fifty per cent new break." The trial court there instructed the jury upon the doctrine of *res ipsa loquitur*, stating that in order to overcome the inference of negligence,

the defendant carrier was required to prove, by a preponderance of the evidence, that the injury was occasioned by an unavoidable casualty or some other cause which human care and foresight could not prevent. Upon appeal, it was held that this instruction was erroneous insofar as it stated that the burden rested upon the defendant to overcome the inference by a preponderance of evidence. The respondent claimed, however, "that the appellant was not prejudiced by the court's failure to instruct the jury that the burden of proof as to the main issue of negligence remained with the plaintiff throughout the trial, for the reason that under the evidence the jury was bound to find against defendant." The court, however, held (31 Cal.App.2d at page 156, 87 P.2d at page 706) that this claim could not be upheld "because there was in the record a substantial conflict in the evidence upon the issue of whether the accident was caused by, or resulted from, such inevitable casualty or unavoidable accident, or cause beyond human care or foresight to prevent. We cannot say as a matter of law that the instructions here under attack were not prejudicial to the defendant."

What has been said answers the last part of appellant's contention that respondent failed to explain how the derailment occurred or that the derailment occurred without negligence upon its part. While it is true, as appellant states, that no expert testimony was adduced as to the cause of the derailment, as heretofore stated, facts were established from which the jury was entitled to infer that it occurred as a result of the breaking of the equalizer and that any defect that may have existed in the equalizer was not discoverable despite a careful inspection thereof immediately prior to the time that the accident occurred.

Appellant further contends that the trial court erred in denying her motion to strike respondent's evidence as to the care exercised by it in the inspection and mainte-

nance of its cars and equipment. This contention is based upon Civil Code, section 2101, which reads as follows: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

The argument is that, inasmuch as the evidence was such that it would have justified a finding "that the derailment was the result of respondent's failure to provide vehicles safe and fit for the purposes to which they are put" defendant was not excused for default in that respect by any degree of care. In effect the claim is that this section operates to make a carrier an absolute insurer of its passengers, at least for injuries occurring as a result of its failure to provide vehicles safe and fit for the purposes to which they are put. While respondent disputes that such is the effect of the statutory provision in question, we find it unnecessary to consider the question thus posed.

[8] As previously noted, appellant became a passenger of the respondent in Illinois and the accident in question occurred in that state. In such situation "the law which governs the degree of care required and the liability of a carrier for its negligence in injuring a passenger is the law of the place where the injury occurred". 13 C.J.S. Carriers § 679, p. 1263. Appellant has not referred us to any statute of Illinois similar or of like import to section 2101, and our own research has failed to reveal any such. Neither do we find that such a rule has been adopted by the courts of that jurisdiction. The degree of care required by a carrier for the safety of its passengers as declared by the Supreme Court of Illinois is as follows: "Carriers are not insurers of the safety of their passengers. The degree of care to be exercised under circumstances of this character is well defined in the case of *North Chicago Street Railroad Co. v. Cook*, 145 Ill. 551, 33 N.E. 958. In that case this



court said: 'Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill and diligence for the safety of the passenger that is consistent with the mode of conveyance employed.'" *Lundquist v. Chicago Rys. Co.*, 1922, 305 Ill. 106, 137 N.E. 92, 93.

[9] It is to be noted that appellant's argument in this regard seemingly proceeds upon the assumption that in the absence of proof to the contrary, the law of Illinois is presumed to be the same as the law of this state. While this was the former rule, it no longer obtains. Our courts now take judicial notice of the laws of the sister states as well as the interpretation thereof by the highest courts of appellate jurisdiction of such states. Code Civ.Proc. § 1875 (3); 18 Cal.Jur.2d p. 450, § 27.

[10] The preceding discussion also disposes of appellant's further contention that the trial court erred in refusing to give an instruction in the language of section 2101. The court fully and correctly instructed the jury as to the degree of care which a carrier owes to its passengers. A copy of this instruction is set forth in the margin.<sup>2</sup>

[11] Plaintiff further complains that the trial court erred in sustaining an objection to a question propounded upon cross-examination to the respondent's witness R. M. Smith. This witness had testified on direct examination that he saw the train when

it passed Nemo, a point some 28 miles from the scene of the accident, and then observed nothing defective in its appearance. Upon cross-examination the witness was questioned at considerable length by counsel for the appellant with respect to what he observed with respect to the train. When asked if he looked at the equalizers he answered in the affirmative and in answer to the question as to what they looked like, he stated they appeared normal; that there was nothing wrong with them insofar as he could see; that he did not see any equalizer "either dragging, making a noise or throwing sparks." He was then asked: "Now, in order to determine if an equalizer on a train that is going 80 miles an hour is defective, you believe that you could observe it by simply standing on the platform and watching the train go by?" To this question defendant interposed an objection which was sustained. The ruling was correct. In answer to previous questions as noted, the witness had stated that insofar as he could see the equalizers appeared normal and did not appear to be dragging, making a noise or throwing sparks. In any event, if it were to be conceded that the ruling was erroneous, it could not have operated to the prejudice of appellant.

[12] Finally appellant complains of the refusal of the trial court to give an instruction, a copy of which appears in the margin.<sup>3</sup> The argument is that the in-

2. "As a common carrier the defendant was required by law to use the utmost care and diligence for the safe carriage of plaintiff, to provide everything necessary for that purpose, including vehicles safe and fit for the purposes to which they are put, and to exercise a reasonable degree of skill.

"The defendant, however, was not a guarantor of the safety of the plaintiff or of her transportation free from injury.

"Its responsibility was not to use the most effective methods for safety that the human mind can imagine, nor that the best scientific skill might suggest. The care required of it, however, was the highest that reasonably could have been exercised consistently with the mode

of transportation used, and the practical operation of its business as a carrier. This requirement must be measured in the light of the best precautions which, at the time of the accident in question, were in common, practical use in the same business and had been proved to be efficacious."

3. "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could

struction should have been given because of the fact that respondent produced evidence through various of its employees, that prior to the accident they carefully inspected the train and found nothing defective. We see no merit in the claim. There was no evidence that there was any defect which was "clearly visible" and consequently the requested instruction was inapplicable. Moreover, the refusal to give it could in no way have prejudiced the appellant.

The judgment is affirmed.

SHINN, P. J., concurs.

VALLÉE, Justice.

I dissent. I am of the opinion the court erred in excluding the record in the Meredith case insofar as it shows that after the cause was fully tried and while the jury was deliberating, defendant in open court stipulated that judgment be entered in favor of the plaintiffs in that action and that judgment was entered pursuant to the stipulation. The stipulation constituted an admission of negligence. *McClure v. Steele*, 326 Mich. 286, 40 N.W.2d 153, 13 A.L.R.2d 160. Cf. *Gonzales v. Pacific Greyhound Lines*, 34 Cal.2d 749, 754, 214 P.2d 809. Certainly such conduct circumstantially implied a consciousness of liability entirely different from an extrajudicial compromise. Of course, it was evidentiary only. That the error was prejudicial goes without saying.

*Brown v. Pacific Electric Ry. Co.*, 79 Cal.App.2d 613, 180 P.2d 424, quoted by the majority, is not at all analogous. That case involved an extrajudicial, out-of-court compromise settlement of a modest claim. Here we have a solemn, formal, judicial stipulation of liability which necessarily included an admission of negligence. The Santa Fe did not agree to a judgment against it for \$125,000 merely to buy its peace.

Rehearing denied; VALLÉE, J., dissenting.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

have heard in the exercise of ordinary care, it follows that either some part of

**The PEOPLE of the State of California,  
Plaintiff and Respondent,**

**v.**

**John C. WILLIAMS, Defendant and  
Appellant.**

**Cr. 6107.**

District Court of Appeal, Second District,  
Division 2, California.

Oct. 16, 1958.

Prosecution for robbery. The Superior Court, Los Angeles County, Walter H. Odemar, J., denied defendant's motion for a new trial and entered judgment of conviction and defendant appealed. The District Court of Appeal, Ashburn, J., held that prosecutor would not be deemed to have been accorded undue latitude in cross-examination by mere fact that court permitted the defendant to be interrogated about a conversation he had with the police, although the conversation was not mentioned by defendant in his direct testimony.

Judgment and order denying new trial affirmed.

#### **1. Criminal Law** ⇨1144(13), 1159(6)

Where the sufficiency of the evidence to sustain a conviction is attacked on appeal, duty of District Court of Appeal begins and ends with ascertainment of whether there was a substantial conflict in the evidence, and District Court of Appeal must assume in favor of the verdict existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict, and if circumstances easily justify verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with the determination of the jury.

#### **2. Robbery** ⇨24(1)

Evidence sustained conviction for robbery.

such evidence is untrue or the person was negligently inattentive."

**3. Witnesses** ⇨277(4)

Prosecutor would not be deemed to have been accorded undue latitude in cross-examination by mere fact that court permitted the defendant to be interrogated about a conversation he had with the police, although the conversation was not mentioned by defendant in his direct testimony. West's Ann.Pen.Code, § 1323.

**4. Criminal Law** ⇨683(4)

In criminal prosecution, trial court did not err in permitting an officer to testify in rebuttal to certain alibi testimony of defendant on theory that testimony of officer was a part of the state's case in chief, in view of fact that the state made a clear case before resting, and in view of fact the testimony was also proper as a basis for impeachment. West's Ann.Code Civ. Proc. § 2052.

**5. Criminal Law** ⇨641(1)

In criminal prosecution, record did not establish defendant was deprived of a fair trial on theory that deputy public defender who conducted defendant's case was incompetent, indifferent or oblivious to his duty to protect rights of defendant.

**6. Criminal Law** ⇨1166½(12)

In criminal prosecution, misstatement of judge to defendant as to time for appeal would not be deemed prejudicial where defendant filed a timely notice of appeal.

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John C. Williams, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., William E. James, N. B. Peek, Deputies Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of robbery of Howard Lee Johnson while armed with a deadly weapon (Pen.Code, §§ 211 and 211a), defendant, appearing in propria persona, appeals from the judgment and an order denying his motion for new trial. At the trial he was represented by the Public Defender of Los Angeles County.

[1, 2] First, appellant claims insufficiency of the evidence to sustain the verdict, asserting "numerous instances of perjurous inconsistency" in the testimony of the complaining witness. The argument centers upon the matter of identification of the robber. Appellant says: "That factor (darkness) makes it impossible, according to Mr. Johnson's testimony, for him to have identified the robber." As our duty begins and ends with ascertainment of a substantial conflict in the evidence, we "'must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." *People v. Daugherty*, 40 Cal.2d 876, 885, 256 P.2d 911, 916. To the same effect see *People v. Walker*, 154 Cal.App.2d 143, 147, 315 P.2d 740. That the evidence is sufficient to sustain the verdict is clearly apparent from the record.

Howard Lee Johnson, on his way home from work, stopped at McDonald's Cafe in the early morning of May 24, 1957; there he remained with friends for an hour or an hour and a half, one of the friends being Bill Dennis. Seated behind Johnson during that time was defendant Williams, whom he saw on that occasion and had seen frequently in that place. Johnson during that time was defendant shirt pocket. It was arranged that Dennis would follow him to his home. At about 4:00 a. m., after Johnson had reached his residence, there was a knock on the door. "Who is it?" "Bill." This inquiry and answer were repeated and Johnson opened the door thinking the caller was Dennis. When he did so he was confronted by defendant, whom he then recognized. Defendant had an automatic pistol in his hand and said, "Give it to me." "What?" "The money." Defendant reached for



Johnson's shirt pocket, Johnson got hold of him, there was a tussle, the pistol, then pointed at the floor, was fired and defendant snatched Johnson's money and ran. Johnson summoned the police and Officer Houston soon arrived. He found and preserved a lead slug from the gun which had buried itself in the porch between the wall and the doorstep.

Three or four weeks later Dennis (who had arrived at Johnson's house before the police on the morning of the robbery) telephoned Johnson from McDonald's Cafe and told him that defendant was there. Johnson took police to the place and defendant was there arrested. Later Johnson went to a police line-up and there identified defendant as the robber. He did so again at the trial. Officer Houston corroborated Johnson's testimony to the extent of saying that he found the slug from the gun buried in the porch; he preserved and presented it in court.

Defense counsel sought to weaken Johnson's testimony as to the foregoing facts by cross-examination concerning defendant's clothing, whether his hair was long or short, whether he had a mustache or a goatee or neither one. At best this created a conflict in the evidence which was resolved against defendant by the jury and again by the trial judge.

Defendant testified that he was not a party to any robbery of Johnson, was not at his house with a gun on the 24th, never saw Johnson at McDonald's or elsewhere prior to his own arrest on June 17th, although he had been at that cafe some 20 times. To this he added the defense of alibi. He and Marie A. Chanel had lived together, at least intermittently, without the sanction of a marriage ceremony, for some years, begetting four children. His testimony was that he won some money in shooting dice on the 24th and so he took his "girl friend" that evening to the

Celebrity Club where they stayed from about 11:00 p. m. to 2:00 or 2:15 a. m.; while there they saw and talked with Doris Concepcion and Eliza Hayward and other acquaintances; from the club they went to Marie's home, had some sandwiches and went to bed together; there he remained until about 8:30 or 9:00 the next morning. Thus it was impossible for him to have committed the robbery. Marie corroborated this testimony, adding the fact that she was awakened by one of the children at about 4:30 a. m. and then saw that defendant was still in her bed. In all he spent seven nights with her in that month of May and there was nothing unusual about this night of the 24th which would cause it to stand out in memory. Defendant himself disclosed the further fact that about three days after his arrest, "I asked her what day was it that we went to the club, and we talked about what day I went to the club, and everything, so we got our heads together and I said, 'It's not possible for me to have held up this man this particular time,' I said, 'because we was at the club.' Q. And when you and Miss Chanel got going over these things in your own minds, it was just by a happenstance that was the night you went to the Celebrity Club? A. Yes, sir." Obviously the jury was not required to accept this alibi testimony (People v. Baserto, 162 Cal.App.2d 123, 327 P.2d 558). The testimony of Johnson and of Officer Houston, accepted by the jury, made a complete case against defendant.

[3] Next appellant argues that the prosecutor was accorded undue latitude in cross-examination in that he himself was interrogated about a conversation he had with the police, one which is claimed to be outside the scope of proper cross-examination because he had not mentioned it in his direct testimony. Of course there is no merit in this contention. After quoting § 1323, Penal Code<sup>1</sup> the Supreme Court said,

1. Section 1323 of the Penal Code provides: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he of-

fers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. \* \* \*

in *People v. Zerillo*, 36 Cal.2d 222, 228, 223, P.2d 223, 227: "This does not mean that the cross-examination must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination. [Citations.] It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. \* \* \* If a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide. [Citations.] Moreover, as stated in *People v. Teshara*, 141 Cal. 633, 638, 75 P. 338, 340, 'A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony-in-chief, as well as with respect to facts which he expressly states.'"

[4] Closely related to the foregoing contention is that of permitting improper rebuttal evidence. On cross-examination defendant was asked: "In other words, once you knew that the offense here alleged was alleged to have been committed on the 24th of May, you immediately remembered you had been to the Celebrity Club that evening and had been shooting dice? A. No. No, not right then. No." In further response he volunteered information as to a conversation with the police: "[W]hen I was at 77th Street Police Station \* \* \* they told me, asked me did I know this man and I said no, I never seen him before. They called his name. I didn't remember his name. They called four more names and had the address, and I do remember he said this man worked at some kind of aircraft place, and three of the other guys' names on there worked at the aircraft place, but the other guy, he worked somewhere else; and he said, 'Williams, you could be getting around but,' he said, 'if you did

not do the robbing, it was somebody probably who looked like you. You went out to this man's house. They were playing poker. You held them up.' I denied. I didn't know the man or any of the fellows who were supposed to have been there. When he gets to the preliminary hearing, he says he was home by himself and the whole thing is a mystery to me. That's why I am confused."

Asked if he did not tell the investigating officer he had been to McDonald's on the 24th of May he said he did not. To the inquiry whether the officers talked to him at the 77th Street Police Station about the night of May 23-24, his counsel objected and the court sustained the objection. Defense counsel at the bench then objected to any conversation between defendant and any officer as outside the scope of the direct examination; also: "That it will be, maybe, evidence in the nature of an admission and, if such, it should have been placed by the People in the case in chief. Not having done so, they would waive at this time the right to proceed on such evidence if it is tantamount to an admission." The prosecutor avowed that he expected to show inconsistent statements by way of impeachment and the objection was overruled. Thereupon defendant testified that he had had no conversation with Officer Griffin at all; that he did not tell him he was at McDonald's on the 24th in the early morning hours; that he had a conversation with Griffin's partner; he did not tell Griffin he did not know whom he saw that night or did not know where else he went that night. In rebuttal Officer Griffin testified that on June 20 defendant told him he had been at McDonald's drive-in on May 24th in the early morning hours. Counsel again objected on the ground that this evidence was part of the prosecution's case in chief. The officer also said that the defendant told him, "'I don't know who I saw that night. I see a lot of people'" and "'I don't know where else I went that night'".

Appellant's claim is that this was a violation of the rule that the prosecution cannot hold back part of its case in chief until

after defendant has rested and then surprise and embarrass him by producing it in rebuttal. "In criminal cases, as in civil, the order of proof lies in the discretion of the trial judge. [Citations.] But the practice of permitting the prosecution to withhold a part of its case for use on rebuttal has been severely condemned." *People v. Newton*, 139 Cal.App.2d 289, 291, 293 P.2d 476, 477. "The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." *People v. Carter*, 48 Cal.2d 737, 753, 312 P.2d 665, 675.

Fricke on California Criminal Evidence, 3d Ed., p. 325: "While a party should not be allowed to introduce part of his testimony at one stage of the trial and withhold other testimony to be introduced as rebuttal when it may be more effective the trend of a trial is often changed when the adversary puts on his case and raises a relatively minor issue to a position of such importance that the developments should, in the interests of justice, permit the introduction of evidence to meet the enlarged issue even though such evidence belongs in the case in chief and not on rebuttal. While it is improper for the prosecutor to withhold evidence which is properly a part of his case in chief and offer it after the defense has closed its case, such procedure does not call for a reversal where the defense is thereafter permitted to introduce

evidence in rebuttal of that so introduced by the prosecution and the defense has not been put to a substantial disadvantage (*People v. Avery*, 35 Cal.2d 487, 218 P.2d 527). Such evidence may, however, properly be used by the prosecutor where it comes within the rules of Impeachment (q. v.) and may be properly admissible on rebuttal to meet evidence upon a point put into dispute by the testimony for the defense."

It cannot be said at bar that there was any impropriety in the prosecutor's procedure. He had made a clear case before resting. It was not necessary for him to anticipate and disprove every possible defense or alibi of the defendant. The evidence under discussion was directed toward defendant's alibi. He himself had given a portion of his conversation with the police and the prosecutor was entitled to develop the rest of it. Cf. *People v. Sutton*, 73 Cal. 243, 245, 15 P. 86; 98 C.J.S. Witnesses § 392, p. 164.

Likewise these questions were proper as the basis for impeachment under Code of Civil Procedure, § 2052. *People v. Scalapio*, 143 Cal. 343, 350, 351, 76 P. 1098; *People v. Durrant*, 116 Cal. 179, 220, 48 P. 75; *People v. Kimball*, 23 Cal.App.2d 32, 34, 72 P.2d 157. "In the present case, the People did not withhold a material part of the case until rebuttal, but offered rebuttal testimony to support their case in chief after it had been controverted by the defendant. The evidence was properly admitted." *People v. Nye*, 38 Cal.2d 34, 39, 237 P.2d 1, 4.

[5] Appellant claims that the Deputy Public Defender who conducted his case "proved himself to be incompetent, indifferent and oblivious to his duty to protect the rights of his client" and therefore appellant should have a reversal. On this subject *People v. Wein*, 50 Cal.2d 383, 326 P.2d 457, 473 says: "The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or



a sham.' [Citations.] The record in this case does not even remotely approach such a situation. Defendant's sole defense lay in his claim that his identification by the victims was incorrect. His counsel vigorously cross-examined the prosecution's witnesses to test their memories, and assiduously attempted to establish an alibi and to show defendant's good character. He at most committed what in retrospect may be claimed to be mistakes in judgment by following certain strategy employed. Such mistakes, if any, do not constitute a denial of due process." The trial judge considered that defendant had been adequately represented in this case: "The Court: Wait a moment, Mr. Williams. I have told you before and I am telling you again, just answer the question. Mr. Breckenridge is a good attorney. He will ask you everything that he wants." Upon the argument of the motion for new trial the court told the defendant, who was speaking in his own behalf, "I think you had a good, fair trial." Again, "As I say, Mr. Williams, I feel that you had a fair trial. I do not feel that the jury made a mistake." Our own examination of the transcript discloses that defendant had a fair trial and was adequately represented by the Deputy Public Defender in charge of the case.

[6] Finally appellant says that when he asked the judge what procedure to follow in order to "appeal for a new trial" the judge "did so distort, garble, misquote and equivocate the necessary process, which the defendant was bound to follow by the rules adjudicated by the California Judicial Council, that had the defendant been lulled into a temporary sense of legal security and followed the '30 day', dubious, evasive and fraudulent course as directed by the Court (Judge Odemar) then he would have been most decidedly duped and defrauded by the Court to the extent of forfeiture of his right to a direct appeal." The reference is to the following colloquy: "Defendant Williams: Your Honor, Judge, I would like to make a motion for an appeal. The Court: Well, all right. You are

making an oral notice of appeal at this time. It will be necessary for you to take the regular steps that are necessary in an appeal, which will have to be done within 30 days." But appellant was not misled by this "30 days" misstatement, for he was sentenced on September 27, 1957, and filed his notice of appeal three days later, on September 30th, well within the time prescribed by the rule.

No prejudicial error appearing, the judgment and the order denying the new trial are affirmed.

FOX, P. J., and HERNDON, J., concur.



164 Cal.App.2d 577

George K. WHITNEY, Jr., Plaintiff, Cross-Defendant and Respondent,

v.

Emily WHITNEY, Defendant, Cross-Complainant and Appellant.

Civ. 17633.

District Court of Appeal, First District,  
Division 1, California.

Oct. 28, 1958.

Hearing Denied Dec. 23, 1958.

Action for divorce. From a decree of the Superior Court, City and County of San Francisco, Twain Michelsen, J., which awarded to the wife property and money for support of a child and support of herself, the wife appeals. The District Court of Appeal, Fred B. Wood, J., held that it was not an abuse of discretion to place a four year limit upon the husband's duty to pay alimony; that closing of hearing to the public was not an abuse of discretion; that the community property was properly disposed of, and that testimony was either properly excluded or its admission was not prejudicial.

Judgment affirmed.

**1. Divorce** ⚭312

Wife abandoned her appeal from award of support for a child by not discussing it on appeal.

**2. Divorce** ⚭231, 243

In theory, "alimony" is considered to be compensation to the injured spouse for loss resulting from the other's breach of obligations of the marital relationship and a spouse may acquire no right to permanent alimony in the absence of a provision for it, in the decree. West's Ann.Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Alimony".

**3. Divorce** ⚭235, 286

A suitable allowance for alimony to the injured spouse is measured by the circumstances, and in making a determination the trial court exercises a sound legal discretion, and in determining whether that discretion has been abused, the reviewing court can only interfere if it finds under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did. West's Ann.Civ.Code, § 139.

**4. Divorce** ⚭237

Alimony to the wife where the husband is without property may not be based on husband's hope of gratuities in the form of inheritances or the court's surmise that he will receive them.

**5. Divorce** ⚭309

If circumstances change, modification of an award for child's support at any time prior to its maturity could be sought by the wife until husband's obligation therefor had terminated. West's Ann.Civ.Code, § 139.

**6. Divorce** ⚭239

In divorce action, in determining whether the trial court abused its discretion in placing a four year limit upon the husband's duty to pay alimony, evidence did not establish that the wife was lulled into a false sense of security in the conduct of her case and the production of evidence on that issue by the remarks of the court,

nor did the evidence indicate that the court had foreclosed its mind on any issue. West's Ann.Civ.Code, § 139.

**7. Trial** ⚭393(1)

It is the formal findings which a court makes that constitutes judicial action, not mere informal remarks made during the course of a trial.

**8. Divorce** ⚭235

In divorce action, evidence did not establish an abuse of discretion by the trial court in placing a four year limit on the husband's duty to pay alimony on theory that alimony is a "penalty" and that the penalty was not in due proportion to the degree of cruelty which the husband allegedly committed. West's Ann.Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Penalty".

**9. Divorce** ⚭146

In divorce action, closing of the hearing to the public was not an abuse of discretion where it was done for the good of the child of the parties. West's Ann.Civ.Code, § 125.

**10. Divorce** ⚭146, 184(12)

In divorce action, striking evidence indicative of a certain personality trait which the wife claimed the husband possessed was not error, where the trial court viewed such as a noncausative factor in relation to the charge of cruelty and no prejudice resulted to the wife where other evidence not stricken supported the findings in the wife's favor.

**11. Divorce** ⚭253

In divorce action, evidence did not establish an abuse of discretion in disposition of the community property on the ground that the court failed to require the husband to account for an automobile and other property.

**12. Divorce** ⚭249(1)

In divorce action, wife was not entitled to an automobile which was community property but only to one half of the community property.

13. Divorce ⇨111

In divorce action, evidence concerning the standard of living of the parties was properly excluded.

14. Divorce ⇨243

In divorce action, directing that alimony payments begin soon after the date of the minute order which directed judgment and specified that the alimony payments begin on a certain date, instead of the date interlocutory decree was filed, was not error. West's Ann.Civ.Code, § 137.2.

15. Divorce ⇨243

In divorce action, the trial court does not lack authority to direct payment of permanent alimony commencing at a date earlier than the effective date of the decree.

16. Divorce ⇨221

In divorce action, denying wife psychiatric fees and fees of an investigator was not an abuse of discretion where the charges did not appear to be necessary disbursements.

17. Divorce ⇨192

In divorce action, the determination of the items allowable as costs is largely within the trial court's discretion.

18. Divorce ⇨206

In divorce action, dissolving an injunction restraining the husband from disposing of certain shares of corporate stock was not error, where the order of dissolution was simply a supplement to a prior order made without notice to the wife and the wife did not indicate that she was prejudiced thereby.

19. Divorce ⇨184(12)

In divorce action, failing to allow evidence concerning acts that occurred after the filing of the wife's cross complaint was not prejudicial where the excluded evidence pertained to the cruelty charge, which was supported in wife's favor by evidence not excluded, and that feature of the judgment had become final.

20. Divorce ⇨183, 285

In divorce action, denying wife her costs upon appeal and attorney fees was not reviewable where there was nothing in

the record before the appellate court concerning such action.

21. Divorce ⇨184(1)

In divorce action, where denial of wife of her costs upon appeal was, if it occurred, in the form of a special order after final judgment, such order was not reviewable upon appeal from the judgment.

James Martin MacInnis, Nicholas Alaga, Harry P. Glassman, San Francisco, for appellant.

Lewis, Field, De Goff & Stein, San Francisco, for respondent.

FRED B. WOOD, Justice.

[1] The interlocutory decree granted Emily a divorce from George Whitney, Jr., upon the ground of extreme cruelty, and awarded her \$300 a month alimony for four years, the custody of their minor child, \$100 per month for the child's support, certain property characterized as community property, and \$1,250 for attorney fees. She appealed from those portions which awarded her the property, and money for her support and for support of the child, but has abandoned her appeal from the award of support for the child by not discussing it.

[2] (1) *Was it an abuse of discretion to place a four-year limit upon respondent's duty to pay alimony?* No.

Appellant's argument starts with the premise that "one aspect of alimony is that it is a penalty." She contends that here the penalty is not in due proportion to the degree of cruelty which, she asserts, respondent committed.

A mere reading of the applicable statute demonstrates the fallacy of her premise. "In any interlocutory \* \* \* decree \* \* \* the court may compel the party against whom the decree \* \* \* is granted to make such suitable allowance for support and maintenance of the other party for his or her life, or for such shorter period as the court may deem just, having regard for the circumstances of the re-



spective parties \* \* \*. Civil Code, § 139. This does not speak of punishment of the guilty party measured by the degree of guilt. It speaks only of legal consequences which flow from conduct which causes dissolution of the marriage. In such a case the law imposes a duty to compensate the opposite party. This compensation does not take the form of exemplary or punitive damages. Instead, the trial court in its exercise of sound discretion is to grant a "suitable allowance for the support" of the other party for life or a shorter period "as the court may deem just, having regard for the circumstances of the respective parties."

Appellant cites cases in which the word "penalty" was used when referring to the duty imposed by this statute. But it does not appear that the courts in those cases measured the duty in terms of the degree of the so-called offense. We think, therefore, that they used the word "penalty" as if it meant no more than the expression "legal consequence." It is more accurate to say, as the Supreme Court said in *Hall v. Superior Court*, 45 Cal.2d 377, 384, 289 P.2d 431, 435: "In theory, alimony is considered to be compensation to the injured spouse for the loss resulting from the other's breach of the obligations of the marital relationship. *Arnold v. Arnold*, 76 Cal. App.2d 877, 885-886, 174 P.2d 674. But the right to receive it depends not alone upon the granting of a divorce for the fault of the opposing party, but also upon a showing that the circumstances of the parties justify the award made. Civ.Code, § 139; *Bowman v. Bowman*, 29 Cal.2d 808, 811, 178 P.2d 751, 170 A.L.R. 246. Despite his prevalence in the divorce action, a spouse may acquire no right to permanent alimony in the absence of a provision for it in the decree. *Puckett v. Puckett*, 21 Cal. 2d 833, 841, 136 P.2d 1; *Howell v. Howell*, 104 Cal. 45, 47, 37 P. 770, [43 Am.St.Rep. 70]."

[3] It seems too clear to require further elaboration that the "suitable allowance" is measured by the "circumstances of the

respective parties" and in making a determination the trial court exercises a sound legal discretion. In ascertaining whether that discretion has been abused in a given case, a reviewing court uses this test: "The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." *Newbauer v. Newbauer*, 95 Cal.App.2d 36, 40, 212 P.2d 240, 243. See also *Simpson v. Simpson*, 134 Cal.App.2d 219, 224, 285 P.2d 313; *Winn v. Winn*, 143 Cal.App.2d 184, 188, 299 P.2d 721.

[4] Appellant has cited no evidence that would furnish a basis for a reviewing court to conclude that "no judge could reasonably have made the order that" this trial judge did, nor have we found any such evidence in the record. The parties married in March, 1952, and separated in January, 1954. She is in her early thirties. There is nothing to indicate that she is not in good health nor that she suffers any physical impairment that might hamper her availability for gainful employment. The child will be of school age when the four years have elapsed. Respondent testified that he was earning \$125 per week gross. He held stock in a family corporation that had never paid dividends and had borrowed \$11,000 upon the security of that stock. He had an expectancy of a substantial inheritance some time but it has been said that alimony "where the husband is without property may not be based on the husband's hope of gratuities or the court's surmise that he will receive them." *Merritt v. Merritt*, 220 Cal. 85, 88, 29 P.2d 190, 191.

[5] Should circumstances change, modification of the award could be sought for the child's support at any time prior to its maturity; for appellant's support, until respondent's obligation therefor has terminated. *Simpson v. Simpson*, 134 Cal.App. 2d 219, 221-222, 285 P.2d 313.

[6-8] Appellant makes the additional argument that the trial "court had openly represented to" her that "no limitation would be placed upon her right to receive alimony." Early in the trial and before any witness had taken the stand the trial judge made this observation: "Without prejudice, \* \* \* I would be disinclined to place any limitation on the period of time during which alimony payments should run \* \* \*." Respondent's counsel said: "Well, if you say that without prejudice— The Court: I do say that without prejudice." A little later the court repeated this remark, adding "and I say this entirely without prejudice to either side." That furnishes appellant no basis for claiming that she was lulled into a false sense of security in the conduct of her case and the production of evidence on that issue; nor any indication that the court had foreclosed its mind on any issue. Moreover, it is the formal findings which a court makes that constitute judicial action, not mere informal remarks made during the course of a trial. *Slavich v. Slavich*, 108 Cal.App.2d 451, 455, 239 P.2d 100; *Pecarovich v. Becker*, 113 Cal.App.2d 309, 315, 248 P.2d 123.

[9] (2) *Was the closing of the hearing to the public an abuse of discretion?* No.

"In an action for divorce \* \* \* the court may direct the trial of any issue of fact joined therein to be private \* \* \*". Code Civ.Proc. § 125. The court's exclusion of the public in this case was well within the purview of that section. It was done for the good of the child, a purpose that would not be best subserved by further discussion.

[10] (3) *It was not error to strike evidence indicative of a certain personality trait which appellant claimed respondent possessed.* Appellant sympathetically regarded the alleged personality trait as a sickness in him, if indeed he possessed such a trait. Accordingly, the trial court viewed that as a noncausative factor in relation to the charge of cruelty. Also, there was no

possible prejudice to appellant's case. Other evidence, not stricken, supported the finding in appellant's favor, a finding which has become final.

[11] (4) *Did the court err in the disposition of the community property?* No.

The court found "[t]here is and has been community property of the parties to this action and the Court awards all of the same to" appellant, and listed the items thereof. (Emphasis added.)

Appellant contends that the court erred in failing to require respondent to account for a 1953 Mercury automobile, a Simca automobile, a bunny bank, the child's bank account, and the proceeds of a check representing a federal income tax refund. No mention of these items was made in the decree.

The testimony at the preliminary hearing on temporary alimony was made a part of the record at the trial. At that time, respondent testified that the Mercury automobile had been sold for \$495 and the proceeds used to pay a bill to a Dr. Lindner. The proceeds of the bunny bank were eventually used to purchase a gift for the child. The child's bank account, which was a present from respondent's parents to the child, with respondent as trustee, was disbursed for "medical expenses, living expenses for myself and my wife." Except for \$500, which was used "for other expenses incurred," the proceeds of the income tax refund check were used to pay off the balance on the Simca automobile which respondent still had at the time of the preliminary hearing. Respondent paid \$3,250 for the car. An interim order for alimony and support granted respondent the right to sell the Simca automobile, the proceeds to be used for payment of the community debts of the parties. However, it was agreed at the trial that the Simca was then in respondent's possession.

[12] There was no evidence at the trial as to the value of the property awarded to the wife; the market value of the Simca at the time of the separation or trial; or

the amount of respondent's separate property that was used to pay outstanding community debts. At the time the motion for temporary support was noticed, \$2,013.86 in community debts allegedly were outstanding, which respondent was ordered to pay in part. Respondent testified that he borrowed approximately \$11,000 against his separate property to pay certain obligations pursuant to court order. Defendant could have sold the Simca, paid the obligations, and borrowed against his separate property to buy a car. In that situation, appellant would not be entitled to the car. That he borrowed against his separate property and kept the car should not change the situation. Moreover, appellant was not entitled to the car, but only to more than half the community property. *Gaeta v. Gaeta*, 102 Cal.App.2d 87, 88, 226 P.2d 619. Without testimony concerning the value of the various items of community property, appellant has failed to show error in this regard. *Barry v. Barry*, 124 Cal.App.2d 107, 112-113, 268 P.2d 147.

[13] (5) *Were objections erroneously sustained to appellant's testimony concerning the standard of living of the parties?* No.

An objection that a certain question was compound was properly sustained. Appellant's other references to the record are simply passages where the trial judge remarked that he thought the matter was covered by the evidence given at the hearing of the motion for support *pendente lite*, the transcript of which was made a part of the record upon the trial. We derive from those remarks no intent to curtail appellant in the presentation of her case. To the contrary, the court upon more than one occasion indicated there should be additional evidence concerning appellant's financial needs.

[14] (6) *Was it error to direct that the alimony payments begin soon after the date of the minute order (November 28, 1955) which directed judgment and specified that the alimony payments begin on December 1, 1955, instead of the date (February 14,*

*1956) the interlocutory decree was filed?* No.

This had the effect of terminating the order for temporary alimony (\$350 a month) and for payment of certain medical expenses. Appellant cites no authorities in support of this assignment of error.

We perceive no element of error here. An order *pendente lite* is always subject to modification, as to the future. Civ.Code, § 137.2. The minute order of November 28 in effect modified the *pendente lite* order, commencing December 1, 1955.

[15] Nor does the trial court lack authority to direct payment of permanent alimony commencing at a date earlier than the effective date of the decree: "Generally, periodic payments commence with the effective date of the decree; but it is not an abuse of discretion to direct payment of permanent alimony 'from the appearance of the defendant in the action, or from its commencement', *Sharon v. Sharon*, 75 Cal. 1, 46, 16 P. 345, 365, or to reserve jurisdiction to consider it at some time after entry of the judgment of divorce. See *McCaleb v. McCaleb*, 177 Cal. 147, 149, 169 P. 1023." *Hall v. Superior Court*, 45 Cal.2d 377, 385, 289 P.2d 431, 436.

[16] (7) *Was it error not to award appellant psychiatric fees and the fees of an investigator?* No.

Appellant included these items in her cost bill. Upon respondent's motion the court disallowed all items including these two. It appears that the court deemed these two items not proper taxable costs.

[17, 18] The determination of the items allowable as costs is largely within the trial court's discretion. *Von Goerlitz v. Turner*, 65 Cal.App.2d 425, 432, 150 P.2d 278; *Puppo v. Larosa*, 194 Cal. 721, 723, 230 P. 440. We perceive no abuse of discretion in this case. The charges do not appear on their face to be necessary disbursements. Appellant had the burden of proving the element of necessity. *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536 (cost of map disallowed).



[19] (8) *Was it error to dissolve the injunction which restrained respondent from disposing of certain shares of corporate stock?* No.

On December 30, 1955, a written order was filed dissolving the injunction *pendente lite* which had restrained respondent from disposing of his stock in Whitney's at the Beach, a California corporation. This was apparently done without notice to appellant.

It appears to us that this was simply a matter that was before the court upon submission of the cause for decision. The minute order of November 28, 1955, failed to dispose of it. Accordingly, the order of December 30, was for all practical purposes, a supplement of the order of November 28. We find in such action no error and no abuse of discretion; nor has appellant indicated to us that she was prejudiced thereby.

[20] (9) *Did the court err in failing to allow evidence concerning acts that occurred after the filing of appellant's cross-complaint?* No.

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Appellant was asked if surveillance of her, by detectives, occurred at a time which in fact was after the date her cross-complaint was filed. The court sustained an objection that it was not material. No supplemental complaint had been filed.

Moreover, the excluded evidence pertained to the cruelty charge, which was supported in appellant's favor by evidence not excluded, and that feature of the judgment has become final. No conceivable prejudice has been shown.

[21] (10) *Was it error to refuse to grant appellant her costs upon this appeal?*

Appellant contends it was error to deny her attorney fees and court costs upon appeal. There is nothing in the record before us concerning such action. Moreover, such denial was, if it did occur, in the form of a special order after final judgment, not reviewable upon appeal from the judgment. *Fulton v. Fulton*, 220 Cal. 726, 729, 32 P.2d 634.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.









































